BRB No. 04-0228 BLA

JOHN H. BOWLING	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 08/12/2004
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
SUN COAL COMPANY, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2003-BLA-5419) of Administrative Law Judge Jeffrey Tureck on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C.

§901 et seq. (the Act). Initially, the administrative law judge found that this case involves the filing of a subsequent claim in June 2001, pursuant to 20 C.F.R. §725.309.[1] Decision and Order at 1, 3. The administrative law judge then credited claimant with twelve years of coal mine employment, as employer did not contest this issue, and he adjudicated the claim under 20 C.F.R. Part 718. Decision and Order at 3. Assuming that a change of conditions had been established pursuant to Section 725.309(d), the administrative law judge weighed all of the relevant evidence, old and newly submitted, and found that claimant failed to prove the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Decision and Order at 3-6. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the x-ray and medical opinion evidence insufficient to establish pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4). In addition, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish a total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). Claimant also contends that the administrative law judge erred in considering evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414. In response, employer urges affirmance of the administrative law judge's denial of benefits, as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the

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[1] The regulations state that a subsequent claim is a claim filed more than one year after the effective date of a final order denying a claim previously filed by the claimant. 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, BLR , BRB No. 03-0367 BLA (Jan. 22, 2004).

In this case, claimant's initial application for benefits, filed on March 4, 1994, was denied by the district director on August 15, 1994, based on the determination that claimant did not establish any of the elements of entitlement under 20 C.F.R. Part 718. Decision and Order at 1; Director's Exhibit 1.

[2] The parties do not challenge the administrative law judge's decision to credit claimant with twelve years of coal mine employment and his findings pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3). These findings, therefore, are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.[3] The administrative law judge rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Initially, we reject claimant's general contention that the administrative law judge erred in considering x-ray evidence in excess of the statutory limitations set forth at Section 725.414 because claimant does not specify which evidence was erroneously considered. *See* Claimant's Brief at 3-4. Moreover, a review of the record indicates that the x-ray evidence submitted in conjunction with the miner's 2001 subsequent claim did not exceed the limitations on evidence set forth at Section 725.414. Additionally, as set forth in Section 725.309(d)(1), the administrative law judge properly admitted into the record all evidence submitted with the miner's prior claim. 20 C.F.R. §725.309(d)(1). As claimant does not allege the errors of law with specificity, we hold that the administrative law judge reasonably weighed all of the relevant evidence of record, old and newly submitted, in his consideration of the claim on the merits of entitlement. *See generally Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Furthermore, contrary to claimant's contention, the administrative law judge reasonably exercised his discretion in finding that a preponderance of the x-ray interpretations by the better qualified physicians was negative for the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1); Decision and Order at 3; *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v.*

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Decision and Order at 2; Director's Exhibit 4.

Director, OWCP, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). While noting the presence of the positive x-ray interpretations by Drs. Baker and Hussain, the administrative law judge, nonetheless, reasonably found that these interpretations were outweighed by the negative interpretations by physicians who are at least B readers.[4] Decision and Order at 3; Director's Exhibits 1, 10-13, 15. Since the administrative law judge permissibly considered both the quality and the quantity of the x-ray evidence in finding it insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), we affirm the administrative law judge's weighing of the x-ray evidence as it is supported by substantial evidence. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Staton*, 65 F.3d 55, 19 BLR 2-271; *Woodward*, 991 F.2d 314, 17 BLR 2-77; *Edmiston*, 14 BLR 1-65. In addition, we reject claimant's contention that the administrative law judge "may have selectively analyzed" the x-ray evidence. Claimant's Brief at 4. Claimant has not provided any support for this assertion, nor does a review of the evidence and the administrative law judge's Decision and Order reveal a selective analysis of the x-ray evidence.

Claimant next contends that it was error for the administrative law judge to discredit the medical opinions of Drs. Baker and Hussain because they were based on a positive x-ray interpretation. Rather, claimant contends these opinions are sufficiently reasoned to establish entitlement to benefits. We disagree.

With regard to Dr. Hussain's opinion diagnosing the existence of pneumoconiosis, the administrative law judge considered both Dr. Hussain's August 8, 2001 medical report and the accompanying answers to supplemental questions, and determined that Dr. Hussain's opinion had little probative value because the physician did not provide an explanation for the inconsistencies between these documents. Decision and Order at 4; Director's Exhibit 10. Specifically, the administrative law judge found that on the examination form, Dr. Hussain stated that claimant had pneumoconiosis and hypertension with no impairment. Director's Exhibit 10. However, on the accompanying form, Dr. Hussain checked the "no" box in response to the question "[b]ased on your examination does the miner have an occupational lung disease which was caused by his coal mine

[4] As the administrative law judge found, the record contains seven relevant readings of four x-ray films, of which the only positive interpretations were by Drs. Baker and Hussain, neither of whom possesses any special radiological qualifications. Decision and Order at 3; Director's Exhibits 10, 12. The remainder of the relevant x-ray interpretations were negative for the existence of pneumoconiosis and were provided by physicians who are either B readers or dually qualified as B readers and Board-certified radiologists. Decision and Order at 3; Director's Exhibits 1, 10-13, 15.

employment." *Id*. The administrative law judge further found that Dr. Hussain did not provide any further explanation for these inconsistent diagnoses. Decision and Order at 4. Thus, the administrative law judge reasonably exercised his discretion as trier-of-fact in according little weight to Dr. Hussain's opinion based on the inconsistent statements he made regarding the existence of pneumoconiosis. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Hopton v. United States Steel Corp.*, 7 BLR 1-12 (1984).

Moreover, the administrative law judge permissibly discredited the diagnoses of coal workers' pneumoconiosis rendered by Drs. Baker and Hussain because he found that they were merely restatements of x-ray opinions, noting that neither physician offered any explanation for his diagnosis of pneumoconiosis other than his own x-ray interpretation and claimant's length of coal dust exposure. Decision and Order at 4; Director's Exhibits 10, 12; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *see also Collins v. J & L Steel*, 21 BLR 1-181 (1999). Further, because claimant does not assert any additional error in the administrative law judge's weighing of the medical opinion evidence, we affirm, as unchallenged on appeal, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983), the administrative law judge's finding that the remaining medical opinions are insufficient to carry claimant's burden of establishing the existence of pneumoconiosis at Section 718.202(a)(4). Decision and Order at 5-6. Therefore, we affirm the administrative law judge's finding that claimant has not carried his burden of proof in establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Ondecko*, 512 U.S. 267, 18 BLR 2A-1; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge permissibly concluded that the evidence of record does not establish the existence of pneumoconiosis, claimant has not met his burden of proof on all the elements of entitlement. *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson*, 12 BLR 1-111; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis as it is supported by substantial evidence and is in accordance with law. *See Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Hill*, 123 F.3d 412, 21 BLR 2-192; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge