BRB No. 98-1459 BLA

DOUGLAS R. FULMER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 8/11/99
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Dorothy L. Page (Henry J. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-0649) of Administrative Law Judge Ainsworth H. Brown denying benefits 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). The administrative law judge credited claimant with twelve years of coal mine employment based on the parties' agreement at the hearing. *See* Hearing Transcript at 10. The administrative law judge adjudicated this claim pursuant to the regulatory criteria set forth in 20 C.F.R. Part 718 as the claim was filed after March 31, 1980. The administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis or to demonstrate the presence of a totally disabling respiratory

impairment at 20 C.F.R. §§718.202(a) and 718.204(c). Accordingly, benefits were denied. On appeal, claimant challenges the administrative law judge's finding that the x-ray evidence was insufficient to establish pneumoconiosis and that the report of Dr. Kraynak was insufficient to establish a totally disabling respiratory impairment.[1] The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated 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 prove 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. Failure to establish any one of these elements precludes entitlement.[2] *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Initially, claimant contends that the administrative law judge erred when he found the weight of the x-ray evidence negative for pneumoconiosis. Specifically, claimant argues that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), because he did not provide an adequate rationale or explanation as to why teaching credentials should be given more weight than the practical, hands on experience of practicing physicians who are Board-certified radiologists and B-readers; that the administrative law judge mischaracterized the evidence of record when, as an alternative, he found the x-ray evidence equally probative; that the administrative law judge failed to consider the progressive nature of pneumoconiosis; and that the

[1]We affirm the findings of the administrative law judge on the length of coal mine employment, and at 20 C.F.R. §718.202(a)(2) and (a)(3) as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2]Since the miner's last coal mine employment took place in Pennsylvania, the Board will apply the law of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

administrative law judge applied an inconsistent standard of review.

We do not find claimant's arguments persuasive. The record contains two x-rays taken on May 13, 1996 and April 23, 1997. Board-certified radiologists, ten of whom are also B readers, interpreted these x-rays eleven times. Their interpretations were both positive and negative for pneumoconiosis . *See* Director's Exhibits 13, 16-18, 30, 32, 34; Claimant's Exhibits 1, 2, 8, 9, 11, 13. The administrative law judge permissibly accorded greatest weight to the interpretations of the dually qualified readers.[3] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Likewise, the administrative law judge acted within his discretion when he found that the x-ray interpretations of Drs. Sargent and Barrett, who found no coal workers' pneumoconiosis, were more persuasive because these physicians have current academic credentials. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). 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, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). We, therefore, affirm the administrative law judge's weighing of the x-ray evidence and his finding that this evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) as it is supported by substantial evidence.

[3]Dually qualified readers of x-rays are physicians who are both Board-certified radiologists and NOISH certified B readers.

Claimant next asserts that the administrative law judge erred when he found the medical opinion of Dr. Kraynak insufficient to demonstrate the presence of pneumoconiosis or a totally disabling respiratory impairment at 20 C.F.R. §§718.202(a)(4) and 718.204(c)(4). Specifically, claimant contends that since Dr. Kraynak relied on two qualifying, valid pulmonary function studies and reviewed all the evidence of record, the administrative law judge should not have discredited his report; that the administrative law judge erred when he found only one valid pulmonary function study as the record contains two valid pulmonary function studies dated November 5, 1997 and November 13, 1997; that the administrative law judge selectively analyzed Dr. Kraynak's report when he rejected the report because the physician's physical findings were different than the earlier findings of Dr. Ahluwalia; and that the administrative law judge improperly rejected Dr. Kraynak's criticism of Dr. Ahluwalia's pulmonary function study.[4] The Director agrees with claimant that the administrative law judge erred when he rejected Dr. Kraynak's report, conceding that claimant has demonstrated the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(c). Based on the Director's concession, we reverse the finding of the administrative law judge at Section 718.204(c) and hold that claimant has met his burden of establishing the presence of a totally disabling respiratory impairment. We also agree with claimant and the Director that the administrative law judge erred in rejecting Dr. Kraynak's opinion under Section 718.202(a)(4) and vacate that finding.[5] If, on remand, the

[4]Dr. Kraynak performed five pulmonary function studies on claimant. *See* Director's Exhibits 28, 36, 38; Claimant's Exhibits 12, 15, 17, 18. Pursuant to the regulatory criteria, the tests performed on April 23, 1997, June 16, 1997 and August 18, 1997 contained qualifying FEV1 values of 1.15, .87, and 1.10 respectively, and qualifying MVV values of 25, 27.28, and 44 respectively, but were invalidated by reviewing physicians for suboptimal effort, inconsistent effort, hesitancies, poor effort on MVV, and/or marked variability of FEV1s or FVCs. *See* 20 C.F.R. §718.204(c)(1), Appendix B; Director's Exhibits 28, 36, 38. Under the regulatory criteria, the tests performed on November 5, 1997 and November 13, 1997 contained qualifying FEV1 values of 1.15 and 1.45 respectively, qualifying FVC values of 1.23 and 2.06 respectively, and qualifying MVV values of 34.09 and 47 respectively. *See* 20 C.F.R. §718.204(c)(1), Appendix B; Claimant's Exhibits 17, 18. Neither test was invalidated.

[5]The administrative law judge concluded that Dr. Kraynak based his opinion diagnosing pneumoconiosis on pulmonary function studies that were not as probative as the pulmonary function results relied upon by Dr. Ahuwalia. Decision and Order at 6. Specifically, the administrative law judge found that Dr. Kraynak relied upon discredited pulmonary function studies dated April 23, June 16, and

administrative law judge finds the evidence of record sufficient to meet claimant's burden of proof at Section 718.202(a)(4), he must weigh all the relevant medical evidence of record to determine if claimant has established the existence of pneumoconiosis at Section 718.202(a). *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Moreover, if the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis under Section 718.202(a), he must determine if claimant's pneumoconiosis is a substantially contributing cause of his totally disabling respiratory impairment. *See* 20 C.F.R. §§718.201, 718.202(a)(4), 718.204(b); *see Bonessa v. United States Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed in part, reversed in part, vacated in part and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

August 18, 1997. *Id.* However, the administrative law judge erred in failing to consider the fact that Dr. Kraynak indicated that he also relied on qualifying pulmonary function studies dated November 5 and 13, 1997, which have not been invalidated. Claimant's Exhibits 17, 18, 20. Moreover, the administrative law judge erred in finding that there was no basis in the record to support Dr. Kraynak's criticism of the pulmonary function study submitted by Dr. Ahuwalia as showing inaccurately high values, as Dr. Ahuwalia indicated on the face of the report that the "low expiratory time of 3.9 seconds may result in an over estimation of FEV1." Director's Exhibit 12.

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge