BRB No. 98-1462 BLA

EARL E. ASHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SANDY FORK MINING COMPANY, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 8/11/99
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
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 on Modification - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Tommie L. Weatherly (Weatherly Law Offices), London, Kentucky, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Modification - Denial of Benefits (98-BLA-0033) of Administrative Law Judge Robert L. Hillyard with respect to 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 relevant procedural history of this case is as follows: Claimant filed an application for benefits on March 13, 1992. Director's Exhibit 23. In a letter dated August 19, 1992, the district director denied benefits on the ground that claimant failed to establish any of the elements of entitlement. *Id*.. Claimant filed a second claim for benefits on April 29, 1994. Director's Exhibit 1. In a Decision and Order issued on February 6, 1996, Administrative Law Judge Thomas M. Burke determined that the newly submitted evidence did not support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Judge Burke denied benefits, therefore, on the ground that claimant did not establish a material change in conditions under 20 C.F.R. §725.309. Director's Exhibit 31. The Board affirmed the denial of benefits in a Decision and Order dated January 23, 1997. *Asher v. Sandy Fork Mining Co.*, BRB No. 96-0753 BLA (Jan. 23, 1997)(unpub.); Director's Exhibit 42.

Claimant filed a timely request for modification on May 20, 1997. Director's Exhibit 43; *see* 20 C.F.R. §725.310(a). Following the district director's issuance of a Proposed Decision and Order Denying Request for Modification, the case was transferred to the Office of Administrative Law Judges for a hearing at claimant's request. Administrative Law Judge Robert L. Hillyard (the administrative law judge) issued an Order to Show Cause why a hearing was necessary. Counsel for claimant and for employer responded, in writing, that they waived their right to a hearing. Counsel for the Director, Office of Workers' Compensation Programs (the Director), informed the administrative law judge that he would not be attending any hearing held with respect to the present claim.

In his Decision and Order, the administrative law judge determined that inasmuch as the newly submitted evidence, if fully credited, was sufficient to establish that claimant has pneumoconiosis and is totally disabled by it, claimant had demonstrated a change in conditions pursuant to Section 725.310. The administrative law judge further found, however, that the evidence of record as a whole did not demonstrate the existence of pneumoconiosis under Section 718.202(a)(1)-(4) or that claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204(b) and (c)(1)-(4). Accordingly, benefits were denied. Claimant argues on appeal that the administrative law judge did not properly weigh the evidence of record under Sections 718.202(a)(1), (a)(4), and

718.204(b) and (c)(4). Employer has responded and urges affirmance of the denial of benefits. The Director has not filed a brief in this appeal.[1]

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 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 under 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. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

With respect to the administrative law judge's consideration of the x-ray evidence under Section 718.202(a)(1), claimant asserts that the administrative law judge placed an inappropriate degree of reliance upon the respective qualifications of the x-ray readers and upon the numerical superiority of the negative x-ray interpretations. Claimant also maintains, without further elaboration, that the administrative law judge "may have selectively analyzed the x-ray evidence." Claimant's Brief at 5. These contentions are without merit. In resolving the conflict in the x-ray evidence of record, the administrative law judge acted within his discretion in according greatest weight to the interpretations submitted by physicians who are both Board-certified radiologists and B readers. Decision and Order at 15-16. The administrative law judge also rationally determined that inasmuch as the preponderance of these readings is negative for pneumoconiosis, the existence of the disease was not established under Section 718.202(a)(1). *Id.*; *see Director, OWCP v. Greenwich Collieries [Ondecko],* 114 S.Ct. 2251, 18 BLR 2A-1 (1994); *Woodward v. Director, OWCP,* 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985).

Concerning Section 718.202(a)(4), claimant argues that the administrative law judge erred in discrediting the opinions in which Drs. Baker and Wright diagnosed pneumoconiosis. We reject claimant's contention. The administrative law judge

[1]We affirm the administrative law judge's findings with respect to modification under 20 C.F.R. §725.310 and his findings on the merits under 20 C.F.R. §§718.202(a)(2), (a)(3), and 718.204(c)(1)-(3), as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

permissibly determined that Dr. Baker's and Dr. Wright's diagnoses of coal workers' pneumoconiosis were based solely upon their respective positive x-ray readings, inasmuch as each physicians' reference to coal workers' pneumoconiosis was accompanied by the ILO classification of the x-ray taken in conjunction with the physicians' examination of claimant. Director's Exhibits 22, 23. The administrative law judge rationally found, therefore, that these reports do not constitute reasoned medical opinions under Section 718.202(a)(4). Decision and Order at 17-18; *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

The administrative law judge also acted within his discretion in declining to credit Dr. Wright's apparent diagnosis of pneumoconiosis, as defined in 20 C.F.R. §718.201, on the ground that Dr. Wright did not adequately identify the basis for his determination that claimant suffers from chronic bronchitis caused by smoking and the inhalation of respirable dust. Decision and Order at 17; Director's Exhibit 22; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(en banc), *aff'd sub nom. Director, OWCP v. Cargo Mining Co.*, Nos. 88-3531, 88-3578 (6th Cir. May 11, 1989)(unpub.). Similarly, the administrative law judge permissibly found that Dr. Baker's attribution of claimant's hypoxemia, chronic obstructive pulmonary disease, and chronic bronchitis to coal dust exposure, in part, was not credible, as Dr. Baker did not explain how he reached this conclusion. Decision and Order at 18; Director's Exhibit 23; *see Clark*, *supra*; *Tackett*, *supra*. Thus, the administrative law judge rationally found, pursuant to Section 718.202(a)(4), that the opinions of Drs. Wright and Baker are insufficient to establish the existence of either clinical pneumoconiosis or pneumoconiosis as defined in Section 718.201.

Inasmuch as we have affirmed the administrative law judge's finding that the evidence of record, considered in its entirety, does not support a finding of pneumoconiosis under Section 718.202(a)(1)-(4), an essential element of entitlement, we must also affirm the denial of benefits under Part 718.[2] *See Trent*, *supra*; *Gee*, *supra*; *Perry*, *supra*.

[2]We need not address claimant's allegations of error regarding the administrative law judge's findings under Section 718.204(c)(4), as error, if any, therein is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order on Modification - Denial of Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge