BRB No. 98-1496 BLA

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<tr><td>GEORGE BROWN, JR.

Claimant-Petitioner

v.

WEBSTER COUNTY COAL CORPORATION

Employer-Respondent

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest</td><td>)
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DECISION and ORDER</td></tr>
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Appeal of the Decision and Order of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

Joseph H. Kelly (Monhollon & Kelly P.S.C.), Madisonville, Kentucky, for claimant.

Laura Metcoff Klaus and Gregory S. Fedder (Arter & Hadden, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-0071) of Administrative Law Judge J. Michael O'Neill denying benefits on a duplicate 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 thirty-two years of coal mine employment based on a stipulation by the parties and adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that claimant, based on the newly submitted evidence, established total respiratory disability pursuant to 20 C.F.R. §718.204(c) and, in light of the decision of the United States Court of Appeals for the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th

Cir. 1994), concluded that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309. The administrative law judge further found that the evidence of record was insufficient to establish that claimant suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied. On appeal, claimant challenges the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1) and (4). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[1]

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 under Part 718 in a living miner's claim, claimant must establish the existence of 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 prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

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 that there is no reversible error contained therein. The administrative law judge, in the instant case, permissibly determined that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge considered the x-ray evidence of record pursuant to Section 718.202(a)(1) and permissibly accorded greater weight to the x-ray interpretations of the readers with superior qualifications and to the preponderance of negative x-ray readings. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)

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[1] The administrative law judge's findings that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2)-(3) are unchallenged on appeal and are therefore affirmed. *Skrack v. Island Coal Creek Co.*, 6 BLR 1-710 (1983).

(*en banc*); *Trent*, *supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 13-17; Director's Exhibits 11-15, 18-19, 21-23, 41-42, 45; Claimant's Exhibit 2; Employer's Exhibits 4-7. We, therefore, affirm the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

The administrative law judge also considered the entirety of the medical opinion evidence of record and acted within his discretion in concluding that claimant failed to establish the existence of pneumoconiosis by a preponderance of the evidence pursuant to Section 718.202(a)(4). *Piccin*, *supra*. In so finding, the administrative law judge rationally relied on the opinions of Drs. Anderson, Vuskovich, Fino and Branscomb, that claimant did not suffer from pneumoconiosis and that his disabling respiratory impairment was due to chronic obstructive pulmonary disease and a lobectomy for lung cancer due to smoking, since the administrative law judge determined that their conclusions were supported by specific objective evidence. *Clark*, *supra*; *King v. Consolidation Coal Co.*, BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-146 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); Decision and Order at 17-25; Director's Exhibits 41, 43, 45; Employer's Exhibits 2-3. Contrary to claimant's contention, the administrative law judge considered the entirety of the medical opinion evidence and permissibly determined that the reports of Drs. Penman, Wright, Simpao and Bentsen, that the miner suffered from pneumoconiosis, were not supported by any specific objective evidence other than discredited x-rays and a lengthy coal mine employment history and were outweighed by the contrary opinions. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark*, *supra*; *Perry*, *supra*; *King*, *supra*; *Wetzel*, *supra*; *Lucostic*, *supra*; *Piccin*, *supra*; Decision and Order at 22; Director's Exhibits 12-13, 16; Claimant's Exhibits 1-2. Moreover, the administrative law judge acknowledged that Dr. Bentsen was claimant's treating physician, but also provided valid reasons for finding his opinion entitled to less weight. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Wetzel*, *supra*; Decision and Order at 24 n.13. 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 Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Clark*, *supra*. Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) as it is supported by substantial evidence and is in accordance with law. Inasmuch as claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement under 20 C.F.R. Part 718, entitlement thereunder is precluded. *See Trent*, *supra*; *Perry*, *supra*.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge