BRB No. 01-0452 BLA

RUFICE JEWELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
OLGA COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
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 of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Robert Weinberger (West Virginia Coal-Workers' Pneumoconiosis Fund - Employment Programs Litigation Unit), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (00-BLA-675) of Administrative Law Judge Stuart A. Levin 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).[1] Based on the filing date of April 22, 1999, the administrative law judge adjudicated this claim pursuant to 20 C.F.R Part 718. The administrative law judge credited claimant with at least ten years of coal mine employment, based on the parties' stipulation, and found employer to be the responsible operator. The administrative law judge also found the evidence of record insufficient to establish the existence of pneumoconiosis and insufficient to demonstrate the presence of a totally disabling respiratory impairment. Accordingly, benefits were denied.

On appeal, claimant challenges the findings of the administrative law judge regarding the existence of pneumoconiosis and total disability. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), did not respond to the appeal, other than to state that the outcome of this case would not be affected by the amended regulations.

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

Claimant first contends that the administrative law judge erred in relying on negative

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

x-rays to deny this claim. We disagree. Contrary to claimant's contention, the administrative law judge noted that all evidence relevant to the existence of pneumoconiosis must be weighed together to determine whether the existence of pneumoconiosis was established pursuant to the holding of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Thus, the administrative law judge weighed the x-ray evidence along with the medical opinion evidence in determining whether claimant established the existence of pneumoconiosis. In finding that the x-ray evidence did not establish the existence of pneumoconiosis, the administrative law judge accorded greater weight to the readings of the physicians with better qualifications. This was proper. 20 C.F.R. §718.202(a)(1); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988).

Claimant next contends that the administrative law judge erred in finding Dr. Zaldivar's opinion, diagnosing a mild irreversible airway obstruction resulting from smoking, was in equipoise with the opinion of Dr. Rasmussen, diagnosing chronic obstructive pulmonary disease due to both smoking and coal mine employment. In support of this contention, claimant argues that the administrative law judge erred in relying on Dr. Zaldivar's opinion inasmuch as it was based on a negative x-ray reading and because Dr. Zaldivar concluded that objective studies showed no pulmonary impairment, when, in fact, they did. *Id*., Director's Exhibit 8. Contrary to claimant's argument, however, as the administrative law judge noted, Dr. Zaldivar, in addition to taking an x-ray, took work and medical histories of claimant, and conducted a physical examination and pulmonary function and blood gas studies. Further contrary to claimant's argument, Dr. Zaldivar did recognize that the pulmonary function study showed a mild impairment, but attributed it to claimant's smoking habit not coal mine employment. Thus, contrary to claimant's argument, the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis based on medical opinion evidence because it was in equipose. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984). In conclusion, therefore, we affirm the administrative law judge's finding, based on his consideration of the x-ray and medical opinion evidence together, that claimant failed to establish the existence of pneumoconiosis. *See Compton*, *supra*. Further, because we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement, we need not consider claimant's argument regarding total disability. *Trent*, *supra*; *Perry*, *supra*.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge