BRB No. 04-0493 BLA

JOSEPH LOHIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
READING ANTHRACITE COMPANY	)	
	)	DATE ISSUED: 12/28/2004
Employer-Respondent	)	
	)	
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 Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Frank L. Tamulonis, Jr. (Zimmerman, Lieberman, Tamulonis & Crossen), Pottsville, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2003-BLA-00033) of Administrative Law Judge Janice K. Bullard 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] This case involves claimant's request for modification

[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 20 C.F.R. Parts 718, 722, 725, and 726

pursuant to 20 C.F.R. §725.310 (2000).[2] Considering the new evidence submitted by the parties on modification in conjunction with the evidence previously submitted, the administrative law judge found that claimant did not establish the existence of pneumoconiosis or that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b). The administrative law judge therefore concluded that claimant did not establish a change in conditions or mistake in a determination of fact to justify modification of the prior denial of benefits pursuant to 20 C.F.R. §725.310 (2000). *Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-62-63 (3d Cir. 1995). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in her analysis of the chest x-ray evidence and medical opinion evidence when she found that claimant did not establish the existence of pneumoconiosis or that he is totally disabled. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not participate in this appeal.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising

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(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant filed his claim on November 18, 1998. Director's Exhibit 1. The claim was denied by an administrative law judge on May 17, 2000, based on findings that claimant did not establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a) (2000), 718.204(c) (2000). Director's Exhibit 52. On May 31, 2001, the Board affirmed the administrative law judge's denial of benefits. Director's Exhibit 57. Claimant timely requested modification on February 20, 2002. Director's Exhibit 58.

[3] We affirm, as unchallenged on appeal, the findings that claimant did not establish the existence of pneumoconiosis pursuant 20 C.F.R. §718.202(a)(2), (3) or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), and (iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to 20 C.F.R. §718.202(a)(1), claimant contends that the administrative law judge erred in declining to credit the positive readings of claimant's chest x-rays. Contrary to claimant's contention, the administrative law judge properly considered the conflicting readings of the newly submitted July 30, 2001 and August 23, 2002 x-rays in light of the readers' radiological credentials, and permissibly determined that the readings were at best equally probative and did not demonstrate the existence of pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994); *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993). The administrative law judge considered the new x-rays in conjunction with those previously submitted, and rationally determined that the overall x-ray evidence did not establish the existence of pneumoconiosis and thus did not establish either a mistake in a determination of fact or a change in conditions. *See Keating*, 71 F.3d at 1123, 20 BLR at 2-62-63; *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993). Consequently, we reject claimant's allegation of error and affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1).[4]

Pursuant to 20 C.F.R. §718.202(a)(4), claimant contends that the administrative law judge failed to accord proper weight to the opinion of claimant's treating physician, Dr. Tavaria, diagnosing pneumoconiosis. Claimant's contention lacks merit. The administrative law judge considered Dr. Tavaria's status as claimant's treating physician, *see Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004), but permissibly found that Dr. Tavaria's opinion did not merit deference because it was "not persuasive evidence of the presence of pneumoconiosis." Decision and Order at 22. Specifically, the administrative law judge questioned Dr. Tavaria's diagnosis because it was based on pulmonary function testing that the administrative law judge found to be invalid and unreliable. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 639-40, 13 BLR 2-259, 2-267 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1327, 10 BLR 2-220, 2-233 (3d Cir. 1987). The administrative law judge also reasonably took into

[4] Claimant alleges generally that the negative x-ray readings and medical opinions submitted by employer in this case were "cumulative." Claimant's Brief at 2. The record reflects that claimant did not raise this issue with the administrative law judge. Consequently, it is not before the Board on appeal. *Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-6 (1995).

account that Dr. Tavaria based his diagnosis of coal workers' pneumoconiosis on a positive reading of the July 30, 2001 x-ray, which did not support a finding of the existence of pneumoconiosis. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 2-111 (3d Cir. 1997).

By contrast, the administrative law judge permissibly found that the opinions of Drs. Dittman, Rashid, and Fino that claimant does not have pneumoconiosis were "more extensively explained and better detailed," and were "better supported by the clinical documentation of record." Decision and Order at 21; *see Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). Because substantial evidence supports the administrative law judge's discretionary determination that Dr. Tavaria's opinion was outweighed by better reasoned medical opinions, we reject claimant's allegation of error and affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4).[5] Further, substantial evidence supports the administrative law judge's finding that the medical evidence considered as a whole did not establish the existence of either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), which we therefore affirm. *Williams*, 114 F.3d at 25, 21 BLR at 2-111.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), claimant argues that the administrative law judge failed to accord proper weight to Dr. Tavaria's treating opinion that claimant is totally disabled. Contrary to claimant's contention, the administrative law judge permissibly discounted Dr. Tavaria's assessment because it was premised on unreliable objective testing, *Siwiec*, 894 F.2d at 639-40, 13 BLR at 2--267, and was countered by better documented and reasoned opinions rendered by Drs. Dittman, Rashid, and Fino. *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8. Substantial evidence supports the administrative law judge's finding. We thus reject claimant's contention and affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(b)(2)(iv).

Therefore, we affirm the administrative law judge's findings that claimant did not establish either the existence of pneumoconiosis or that he is totally disabled, and thus did not demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). *Keating*, 71 F.3d at 1123, 20 BLR at 2-62-63; *Nataloni*, 17 BLR at 1-84. Consequently, we affirm the denial of benefits.

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[5] The administrative law judge also found that Drs. Dittman, Rashid, and Fino were better qualified than Dr. Tavaria, but did so without discussing Dr. Tavaria's certification in Internal Medicine. Claimant's Exhibit 2. The administrative law judge's oversight was at best harmless error in view of the two valid reasons she gave for according less weight to Dr. Tavaria's opinion. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

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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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge