BRB No. 98-0260 BLA

FRED KENNEDY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PIONEER COAL COMPANY, INC.	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC 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 of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (95-BLA-2347) of Administrative Law Judge J. Michael O'Neill 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] The administrative law judge credited

[1] Claimant is the miner, Fred Kennedy, who filed his initial application for benefits on May 9, 1978, which claim was denied on March 19, 1979. Director's Exhibit 29. Claimant filed the present duplicate claim on February 29, 1992. Director's Exhibit

claimant with seven years of coal mine employment, and determined that the evidence of record established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and total respiratory disability pursuant to 20 C.F.R. §718.204(c)(4), which provided the basis for his finding that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309. The administrative law judge further found however, that the evidence of record was insufficient to establish that claimant's pneumoconiosis or his total disability arose out of his coal mine employment pursuant to 20 C.F.R. §§718.203, 718.204(b). Accordingly, benefits were denied. On appeal, claimant argues that the administrative law judge erred in finding less than ten years of coal mine employment established, and that the administrative law judge erroneously determined that claimant had not established that his pneumoconiosis and his total disability resulted from his coal mine employment. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, as party-in-interest, has not participated in this appeal.

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 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 Part 718, claimant must establish total respiratory disability due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any of these elements precludes entitlement. *Trent, supra; Perry, supra*.

1.

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. Claimant asserts that the administrative law judge erred by failing to credit him with eleven to thirteen years of coal mine employment, including seven years of full-time employment in his father's mine from 1956 through 1962. Claimant's further asserts that the administrative law judge's finding of three and one-half years of qualifying coal mine employment from 1956 to 1962 was unexplained. We disagree. The administrative law judge's Decision and Order clearly reflects that the administrative law judge relied on claimant's hearing testimony that he worked full-time only during the summers, and worked only evenings and weekends during the winter months. Accordingly, the administrative law judge rationally credited claimant with half of this seven year period, and his finding of seven years of total qualifying coal mine employment is supported by substantial evidence, and is affirmed.[2] *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988), *aff'd sub nom. Director, OWCP v. Cargo Mining Co.*, Nos. 88-3531 and 3578 (6th Cir., May 11, 1989)(unpub.); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Trusty v. Director, OWCP*, 4 BLR 1-263 (1981), *aff'd* 709 F.2d 1509 (6th Cir. 1983).

We further reject claimant's argument that the administrative law judge erroneously determined that claimant's pneumoconiosis did not arise out of his coal mine employment by selectively analyzing the record, and by rejecting the medical reports of Drs. Williams, Wicker and Baker. The administrative law judge fully considered these opinions, in addition to the opinions of the other physicians of record who either failed to diagnose the presence of coal workers' pneumoconiosis, or failed to address this issue. The administrative law judge rationally found that the opinions of Drs. Williams, Wicker and Baker did not establish the element of causality since all of these physicians based their opinions on a coal mine employment history of eleven to twelve years, nearly twice that found by the administrative law judge, and the record contains evidence of exposure to other industrial irritants. The discrepancy between the coal mine employment history found by the administrative law judge, and that relied upon by the physicians of record, and the possible effects of other industrial exposure, are factors affecting the weight given to a medical report, and the administrative law judge may rationally accord less weight to a medical report on this basis. *Barnes v. Director, OWCP*, 18

[2] Claimant does not allege any error in the administrative law judge's finding that claimant established three and one-quarter years of post-1962 coal mine employment.

BLR 1-71 (1995)(*en banc*); *Smith v. Director, OWCP*, 12 BLR 1-156 (1989); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Long v. Director, OWCP*, 7 BLR 1-254 (1988). As the administrative law judge has provided a rational basis for his Section 718.203 finding, we hold that it is supported by substantial evidence.[3]

[3] We affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge is empowered to weigh the medical evidence and 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 inferences on appeal. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's findings pursuant to Section 718.203, as they are supported by substantial evidence and are in accordance with law. Moreover, since claimant has failed to establish a required element of proof under Part 718, we affirm the denial of benefits.[4] *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

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[4] Since claimant has failed to establish his pneumoconiosis arose of coal mine employment, which precludes an award of benefits, we need not address claimant's arguments regarding whether his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Similarly, as we have affirmed the denial of benefits on the merits, we decline to address employer's arguments regarding 20 C.F.R. §§725.309 and 718.204(c).