BRB No. 99-0457 BLA

DANNY JERALD MILLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JUDE ENERGY, INCORPORATED	)	DATE ISSUED:
	)	
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 Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, appeals the Decision and Order - Denying Benefits (98-BLA-0173) of Administrative Law Judge Lawrence P. Donnelly 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*.[1] The parties stipulated that claimant

[1] Claimant is the miner, Danny Jerald Miller, who initially filed a claim for benefits on November 8, 1993. Administrative Law Judge Edward J. Murty, Jr. issued a Decision and Order denying benefits on November 27, 1995. The Board subsequently affirmed the denial of benefits. Director's Exhibits, 1, 37, 45; *Miller v. Jude Energy, Inc.*, BRB No. 96-0566 BLA (Aug. 23, 1996)(unpub.). Claimant filed a petition for modification on November 14, 1996. Director's Exhibit 46.

established twenty-one years of coal mine employment and the administrative law judge considered whether the evidence of record supports a determination of a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R §725.310. The administrative law judge found that the evidence of record was sufficient to establish that claimant is totally disabled from a pulmonary standpoint under 20 C.F.R §718.204(c). The administrative law judge determined, therefore, that claimant established the presence of a mistake of fact in the prior disposition. The administrative law judge also found, however, that the evidence did not support a finding of pneumoconiosis or total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.204(b). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in his consideration of the x-ray readings and medical reports of record relevant to the existence of pneumoconiosis and causation of total disability. Employer, and the Director, Office of Workers' Compensation Programs, have not participated in this appeal.[2]

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 one of these elements precludes entitlement.

After careful consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order denying

[2] The administrative law judge's finding that the record evidence now establishes the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(c) and, therefore, a mistake in fact is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

benefits is supported by substantial evidence and contains no reversible error. In the instant case, the administrative law judge rationally found that claimant was unable to establish the existence of pneumoconiosis pursuant to Section 718.202(a), based upon a consideration of all of the evidence of record. The administrative law judge weighed the conflicting interpretations of each x-ray reading of record pursuant to Section 718.202(a)(1), accorded greater weight to the readings performed by physicians who are B readers or Board-certified radiologists, and rationally found that the record contained four x-rays which were positive for the existence of pneumoconiosis, and four x-rays which were negative for the presence of the disease. Employer's Exhibit 1; Director's Exhibits 5, 11, 16-18, 31, 33, 46-48, 53-55, 60. Thus, the administrative law judge properly determined that as the evidence was in equipoise, claimant had failed to prove the existence of pneumoconiosis by a preponderance of the x-ray evidence. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-61 (4th Cir. 1992); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). We affirm, therefore, the administrative law judge's findings pursuant to Section 718.202(a)(1), as they are rational and are supported by substantial evidence.

We also affirm the administrative law judge's finding that the existence of pneumoconiosis cannot be established pursuant to Section 718.202(a)(2),(3), since the record contains no biopsy evidence, and the presumptions contained at 20 C.F.R. §§718.304, 718.305, 718.306 are inapplicable to this living miner's claim filed after January 1, 1982, with no evidence of complicated pneumoconiosis. *See* Director's Exhibit 1; Decision and Order at 13; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

Claimant contends that the administrative law judge erred in holding that he failed to establish the existence of pneumoconiosis at Section 718.202(a)(4). Claimant argues that the medical opinions diagnosing pneumoconiosis, from the West Virginia Occupational Pneumoconiosis Board (WVOPB) and from Drs. Gaziano, Porterfield, Ranavaya, and Rasmussen are better documented and reasoned than those diagnosing no pneumoconiosis, from Drs. Zaldivar and Fino. We reject claimant's contentions.

Regarding the opinions of the physicians associated with the WVOPB, we have previously held that the administrative law judge did not err in failing to consider this report since state board decisions are not binding on the administrative law judge. *Miller v. Jude Energy, Incorporated*, BRB No. 96-0566 BLA (Aug. 23,

1996)(unpub.). Moreover, the administrative law judge permissibly accorded greatest weight to the superior qualifications and well-reasoned opinion of Dr. Zaldivar. *See discussion infra*; *Clark*, *supra*; *Miles v. Central Appalachian Coal Co.*, 7 BLR 1-744 (1985).

The administrative law judge rationally accorded little weight to Dr. Gaziano's opinion, since it lacked any objective studies, provided contradictory interpretations of claimant's x-ray readings, and the physician was unaware of claimant's history of asthma. Dr. Porterfield's summary report was also rationally accorded less weight since it contained no supporting documentation, assumed that claimant had a positive x-ray reading, and was equivocal in its conclusion that claimant's obstructive airway disease was "probably" due to cigarette smoking and pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibit 1; Decision and Order at 15-16; *Nance v. Benefits Review Board*, 861 F.2d 68, 12 BLR 2-31 (4th Cir.1988); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

In finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(4), the administrative law judge credited as reasoned and documented the opinions of Drs. Zaldivar, Rasmussen, and Ranavaya. Decision and Order at 15-16. The administrative law judge rationally accorded greater weight to Dr. Zaldivar's opinion based upon his status as a Board-certified pulmonologist, and because the administrative law judge found this opinion more persuasive in its rationale. *See Trumbo*, *supra*; *Scott*, *supra*; *Clark*, *supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Contrary to claimant's contention, Dr. Zaldivar did not rely solely upon his determination that there was no x-ray evidence of pneumoconiosis in concluding that claimant does not have the disease, but rather also referred to claimant's medical, smoking, and employment histories, in addition to the results of objective data other than x-rays. Director's Exhibit 31; Employer's Exhibit 2; *Sakach v. Director, OWCP*, 8 BLR 1-237 (1985). Claimant also alleges that the administrative law judge should have discredited Dr. Zaldivar's opinion, as his determination that claimant does not have pneumoconiosis, but has emphysema caused by cigarette smoking, contravenes the holding of the United States Court of Appeals for the Fourth Circuit in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir.1995).[3] The record reflects that the premise of claimant's argument is misplaced: Dr. Zaldivar acknowledged that pneumoconiosis can cause an obstructive impairment and explained why, based upon the data before him, claimant's emphysema is not related to coal dust exposure. Dr. Zaldivar did not preclude the possibility that pneumoconiosis can cause an obstructive impairment. Employer's Exhibit 2; *see Stiltner v. Island Creek Coal Co.*, 86 F.3d 377, 20 BLR 2-

[3] In *Warth v. Southern Ohio Coal Co.,* 60 F.3d 173, 19 BLR 2-265 (4th Cir.1995), the United States Court of Appeals for the Fourth Circuit held that an opinion in which a physician asserts that pneumoconiosis or coal dust exposure does not cause an obstructive impairment is not entitled to any probative weight.

246 (4th Cir. 1996). Contrary to the implication of claimant's argument, the administrative law judge did not rely upon Dr. Fino's opinion, which he found internally inconsistent. Decision and Order at 16. Thus, the administrative law judge acted within his discretion in concluding that claimant failed to meet his burden of proof at Section 718.202(a)(4). Decision and Order at 15-16; *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983).

Accordingly, we affirm the administrative law judge's finding under Section 718.202(a)(4) and, therefore, his determination, based upon a weighing of all of the relevant evidence of record, that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a). Inasmuch as the administrative law judge appropriately determined, on the merits, that claimant did not demonstrate an essential element of entitlement, we must also affirm the denial of benefits. *See Trent*, *supra*; *Perry*, *supra*. Consequently, we decline to address claimant's allegations of error regarding the administrative law judge's findings under Section 718.204(b), 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 Decision and Order - Denying Benefits of the administrative law judge denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge