BRB No. 99-0486 BLA

HERBERT HARRIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
C.S. & S. COAL CORPORATION	)	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 - Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

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

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (97-BLA-1026) of Administrative Law Judge Jeffrey Tureck 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 found that claimant established eighteen years of coal mine employment, and based on the filing date of the claim, applied the regulations found at 20 C.F.R. Part 718. Considering all the newly submitted evidence, the administrative law judge found that claimant established a totally disabling respiratory impairment, an element of entitlement he had previously failed to establish, and therefore established a material change in conditions pursuant to *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); *cert. denied*, 117 S.Ct. 763 (1997); *Cline v. Westmoreland Coal Co.*, 21 BLR 1-69 (1997); 20 C.F.R. §725.309. The administrative law judge therefore considered the claim on the merits, reviewed all the evidence, both old and new, and determined that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a).[1] Accordingly, benefits were denied. Claimant appeals, contending that the administrative law judge erred in failing to find the existence of pneumoconiosis established at Section 718.202(a)(1) and (4).[2] Employer responds, urging affirmance of the

[1] The administrative law judge noted that although Administrative Law Judge Rippey found the existence of pneumoconiosis based on the x-ray evidence at Section 718.202(a)(1) pursuant to *Stapleton v. Westmoreland Coal Co.*, 785 F.2d 424 (4th Cir. 1986)(*en banc*), *rev'd sub nom. Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 108 S.Ct. 427 (1987). However, as the Judge Rippey's reliance upon the *Stapleton* case is no longer valid, the administrative law judge found that Judge Rippey's finding of pneumoconiosis by x-ray evidence has no bearing on the instant case. Decision and Order at 4.

[2] We affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) and (3) as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has not participated in this appeal.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational and 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).

Claimant contends that the administrative law judge erred in failing to recognize that Drs. Deponte and Navani were Board Certified Radiologists, as well as B-readers, in considering the x-ray evidence pursuant to Section 718.202(a)(1), and that the administrative law judge erred in finding the CT scans more probative than the x-ray evidence for establishing the presence or absence of pneumoconiosis. The evidence of record contains twenty four x-ray readings, of which ten are positive for simple or complicated pneumoconiosis. In weighing the x-ray evidence, the administrative law judge permissibly found that the qualifications of the doctors reading x-rays as negative were clearly superior to the qualifications of positive readers. Additionally, the administrative law judge permissibly accorded greatest weight to the negative readings of Drs. Wheeler and Branscomb because of their particular expertise both with coal workers' pneumoconiosis and tuberculosis and because they each testified by deposition and "clearly explained their opinions." Decision and Order at 6. The administrative law judge further found that "[o]f particular importance was their testimony explaining that the large opacities identified by some of the physicians

were calcified masses resulting from tuberculosis, not large opacities of complicated pneumoconiosis." Decision and Order at 6. The administrative law judge therefore permissibly gave greatest weight to the readings of Drs. Wheeler and Branscomb based on their qualifications and fully explained opinions. Employer's Exhibits 1, 7, 8; Director's Exhibits 29, 37; *see Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Woody v. Valley Camp Coal Co.*, 73 F.3d 360, 20 BLR 2-113 (4th Cir. 1995); *Seals v. Glen Coal Co.*, 19 BLR 1-80 (1995)(*en banc*)(Brown, J. concurring.). Accordingly, the administrative law judge permissibly accorded greater weight to the readings of the physicians who read the x-rays negative for pneumoconiosis and particularly to the readings of Drs. Wheeler and Branscomb, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). Accordingly, the administrative law judge's finding that the x-ray evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(1) is affirmed.

Further, the administrative law judge permissibly found after weighing the relevant evidence of record that the CT scans interpreted by Drs. Wheeler, Templeton and Branscomb as consistent with tuberculosis, not pneumoconiosis were entitled to greater weight based on their deposition testimony and superior qualifications. 20 C.F.R. §718.304(a)-(c). *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Seals*, *supra*; *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994). We therefore affirm the administrative law judge's finding that the CT scan evidence does not establish the existence of complicated

pneumoconiosis at Section 718.304(a)-(c).

Claimant next contends that the administrative law judge erred in discrediting the medical opinions of Drs. Modi and Forehand because they relied upon positive x-rays, erred in performing a selective analysis of these opinions, and erred in using negative x-rays to establish the absence of pneumoconiosis at Section 718.202(a)(4). We disagree. The evidence of record contains the opinions of six physicians, of which only the opinions of Drs. Forehand and Modi diagnose the existence of coal workers' pneumoconiosis. The administrative law judge permissibly found Dr. Forehand's opinion, which diagnosed simple pneumoconiosis, not credible and entitled to no weight, as Dr. Forehand predicated his opinion on a completely negative smoking history, when in fact the administrative law judge had found a smoking history of fifty years.[3] Director's Exhibit 14; Decision and Order at 7; *Sellards v. Director, OWCP*, 17 BLR 1-77 (1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Additionally, the administrative law judge permissibly found that Dr. Forehand's opinion was not credible since, even if Dr. Forehand's positive x-ray reading were reliable, he failed to explain the inconsistency between his x-ray reading of complicated pneumoconiosis and his diagnosis of simple pneumoconiosis only. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Stiltner, supra*; *Doss v. Director, OWCP*, 854 F.2d 1316, 19 BLR 2-181 (4th Cir. 1995); *Carson, supra*. Likewise, contrary to

[3] Claimant has not challenged the administrative law judge's finding of a fifty year smoking history. Decision and Order at 3; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

claimant's argument, the administrative law judge could consider the reliability of Dr. Forehand's opinion of pneumoconiosis based in part on a positive x-ray in light of the preponderance of negative x-ray and CT scan evidence. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

The administrative law judge also permissibly accorded no weight to the medical opinion of Dr. Modi, who also diagnosed pneumoconiosis, as he "erroneously interpreted claimant's x-ray as positive for pneumoconiosis," over-estimated claimant's height during the pulmonary function study examination, which affected his evaluation of the pulmonary function study results, and failed to consider whether smoking played any role in causing the mild pulmonary impairment, even though he found emphysema on claimant's x-ray and was aware that claimant had been a cigarette smoker. Additionally, the administrative law judge found that as Dr. Modi's pulmonary function study values were so close to normal, it was "questionable" as to whether they showed any impairment. *See Hicks*, *supra*. Decision and Order at 7; *Clark*, *supra*; *Fields*, *supra*.

The administrative law judge permissibly accorded greater weight to the opinion of Dr. Castle, who found no pneumoconiosis, as it was well-reasoned, consistent with "the more probative evidence in the record," and fully supported by Dr. Branscomb, who reviewed much of the medical evidence of record. Decision and Order at 8. The administrative law judge also permissibly accorded greater weight to Dr. Branscomb's opinion, who also found no pneumoconiosis, as he "clearly explained why the claimant does not have coal workers' pneumoconiosis, and why the moderately severe obstructive pulmonary impairment he

diagnoses is the result of the claimant's smoking history." Decision and Order at 8; *Carson, supra*; *Clark, supra*; *Fields, supra*. We therefore affirm the administrative law judge's finding that the medical opinions fail to establish pneumoconiosis at Section 718.202(a)(4). Because the administrative law judge had valid reasons for according various weight to each of the medical opinions, we reject claimant's contention that he used negative x-rays to establish the absence of pneumoconiosis. *See Clark, supra*; *Fields, supra*.

As the administrative law judge permissibly found that the evidence fails to establish the existence of pneumoconiosis at Section 718.202(a), an essential element of entitlement, we affirm the administrative law judge's denial of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge