BRB No. 03-0554 BLA
and 03-0576 BLA

HARRY LEE COWAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BUCK CREEK COAL, INCORPORATED	)	DATE ISSUED: 02/24/2004
	)	
and	)	
	)	
SECURITY INSURANCE COMPANY OF HARTFORD	)	
	)	
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 - Denial of Benefits and Order of Robert L. Hillyard, Administrative Law Judge United States Department of Labor.

John S. Sowards, Jr. (Wilson, Sowards, Polites & McQueen), Lexington, Kentucky, for claimant.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville Kentucky, for employer.

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Order (03-0576 BLA) denying the parties' request for approval of a settlement agreement and the Decision and Order – Denial of Benefits (01-BLA-1028) of Administrative Law Judge Robert L. Hillyard rendered 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). By Order dated April 17, 2003, the administrative law judge denied the parties' request for approval of a proposed settlement agreement, made between them, stating that he had no authority under the Act or pursuant to the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, to approve proposed settlement agreements between the parties of a black lung claim. Turning to the merits of the claim, the administrative law judge credited claimant with seventeen years and nine months of coal mine employment, but found the evidence of record insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(a)(4).[1] Accordingly, benefits were denied.

On appeal, claimant challenges both the administrative law judge's refusal to accept the parties' proposed settlement agreement, and the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer responds, arguing that the administrative law judge has the authority to accept the proposed settlement agreement, but also urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, (the Director) responds, taking no position on the ultimate question of entitlement, but asserting that the Act prohibits settlement agreements.[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 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).

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

[1] We affirm the administrative law judge's findings on the length of coal mine employment, on the designation of employer as the responsible operator, and at 20 C.F.R. §718.202(a)(1)-(3) as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] Since the miner's last coal mine employment took place in Indiana, the Board will apply the law of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 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*).

Initially, we note, contrary to the arguments of claimant and employer, that the administrative law judge acted properly in denying the parties' proposed settlement agreement. It is well established that settlement agreements are prohibited under the Act. *Ladigan v. Central Penn Industries, Inc.*, 7 BLR 1-192 (1984); *see Ramey v. Triple R Coal Co.*, 22 BLR 1-122, 1-129-30 (2002), *aff'd sub nom. Ramey v. Director, OWCP*, 326 F.3d 474, BLR (4th Cir. 2003).

Turning to the merits of the claim, claimant contends that the administrative law judge erred in his consideration of the medical opinion evidence at Section 718.202(a)(4). Specifically, claimant contends that the administrative law judge: failed to note significant testimony from Dr. Westerfield; failed to note that both Drs. Fino and Branscomb have consistently found that coal dust exposure, in and of itself, is incapable in producing obstructive breathing impairment; failed to note that Dr. Burki found that the pulmonary function study relied on by Dr. Simpao was valid; and failed to consider the treatment records of Dr. James.

Claimant contends that the administrative law judge erred in failing to consider Dr. Westerfield's deposition testimony which clearly establishes that the bases for his opinion were his entire examination findings, not just his positive x-ray interpretation. In according little weight to Dr. Westerfield's opinion, the administrative law judge found that it was not well-reasoned and documented because Dr. Westerfield did not give any reason for his diagnosis of pneumoconiosis other than his positive x-ray interpretation,[3] and he did not explain how claimant's smoking history affected claimant's pulmonary condition or identify how much of the decrease seen in claimant's pulmonary function study was due to coal mine employment. This was rational. *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); *King v. Consolidated Coal Co.*, 8 BLR 1-262, 1-265 (1985); *Brown v. Director, OWCP*, 7 BLR 1-730, 1-733 (1985); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984).

Claimant next contends that the administrative law judge should not have credited the opinions of Drs. Fino and Branscomb because they both opined that coal dust exposure cannot, in and of itself, produce obstructive breathing impairments contrary to

[3] The x-ray read positive by Dr. Westerfield, a B-reader, was subsequently read negative by Dr. Barrett, a Board-certified, B-reader. Decision and Order at 6; Director's Exhibits 22, 31.

the Act. Contrary to claimant's argument, however, a review of the opinions of Drs. Fino and Branscomb reflects that they did not make such a blanket statement, but instead explained why they believed, based on the particular facts in claimant's case, that claimant's respiratory impairment was not due to coal mine employment, but was instead due to smoking and asthma. Director's Exhibits 8, 9. The administrative law judge, in considering these opinions, credited them because he found them based on a thorough review of claimant's numerous medical documentation, *i.e.*, in reaching their opinions they reviewed numerous x-rays, pulmonary function studies, blood gas studies, and examination reports conducted on claimant from 1972 through 2001. Accordingly, contrary to claimant's argument, the administrative law judge's crediting of the opinions of Drs. Fino and Branscomb was rational. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Stark*, 9 BLR 1-36, 1-37; *King*, 8 BLR 1-262, 1-265; *see also Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996).

Claimant also contends that the administrative law judge erred in rejecting Dr. Simpao's opinion because it was based on a pulmonary function study invalidated by Dr. Branscomb, without considering that Dr. Burki found the same study to be valid. Contrary to claimant's argument, the administrative law judge's decision reflects that he was aware that Dr. Burki had validated the study. Decision and Order at 9. In addition, the administrative law judge did not accord Dr. Simpao's opinion less weight solely based on the invalidated pulmonary function study, but also accorded it less weight because it was not as well-supported as the other physicians opinions of record. This was rational. *See King*, 8 BLR 1-262, 1-265; *Winters*, 6 BLR at 1-881 n.4; *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Finally, claimant argues that the administrative law judge erred in discrediting Dr. James's report without considering the treatment records which supported his findings. The administrative law judge, however, noted that even though Dr. James had treated claimant numerous times and found that claimant had pneumoconiosis, Dr. James's progress notes did not mention claimant's smoking history or diagnose or mention pneumoconiosis other than to indicate that claimant reported a history of black lung. Director's Exhibit 30. Thus, contrary to claimant's contention, the administrative law judge did consider Dr. James's treatment records, but found that they did not support a finding of pneumoconiosis or render Dr. James's opinion more reasoned than the other opinions of record. This was rational. 20 C.F.R. §718.204(d)(1)-(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, BLR (6th Cir. 2003); *King*, 8 BLR 1-262, 1-265.

The administrative law judge is empowered to weigh the medical evidence of record and draw his own inferences therefrom, *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal as long as the administrative law judge's inferences are supported by the record. *Anderson*, 12 BLR at 1-113. Claimant's contentions in this case are

tantamount to a request that the Board reweigh the evidence which it cannot do. *See Anderson*, 12 BLR at 1-113. Consequently, we affirm the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(4).

Accordingly, the administrative law judge's Order rejecting the parties' proposed settlement agreement and the Decision and Order - Denial of Benefits are affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge