BRB No. 97-0819 BLA

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| CURTIS RAY SWINEY | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| TROJAN MINING AND PROCESSING | ) | |
| | ) | |
| Employer-Respondent | ) | |
| | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | DATE ISSUED: |
| | ) | |
| Party-in-Interest | ) | DECISION AND ORDER |

Appeal of the Decision and Order Denying Benefits of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Curtis Ray Swiney, Elkhorn City, Kentucky, *pro se*.

J. Logan Griffith (Wells, Porter, Schmitt & Jones), Paintsville, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order Denying Benefits (95-BLA-2409) of Administrative Law Judge Daniel A. Sarno, Jr. on a

[1] The Board, in acknowledging claimant's Notice of Appeal, stated that claimant was not represented by legal counsel and, therefore, the Board would provide a general review of the administrative law judge's Decision and Order to determine whether the decision is rational, is in accordance with law and is supported by substantial evidence. 20 C.F.R. §§802.211, 802.220; *see Swiney v. Trojan Mining and Processin*g, BRB No. 97-0819 BLA (Apr. 4, 1997)(Order)(unpub.).

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). Based on a stipulation of the parties, the administrative law judge credited claimant with at least twenty years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718, based on claimant's June 1994 filing date. The administrative law judge found the medical evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.[2]

In an appeal by a claimant filed without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). 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 are 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).

In order to establish entitlement to benefits under Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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. *Id.*

[2] The parties do not challenge the administrative law judge's decision to credit claimant with at least twenty years of coal mine employment. Inasmuch as this finding is not adverse to claimant, we affirm it as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge, in finding that claimant failed to establish entitlement to benefits, correctly determined that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).[3] In weighing the x-ray evidence, the administrative law judge reasonably found that the preponderance of the x-ray interpretations by the better qualified physicians, *i.e.*, B readers and/or Board-certified radiologists, was negative for the existence of pneumoconiosis.[4] 20 C.F.R. §718.202(a)(1); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Inasmuch as a review of

[3] The administrative law judge stated that the record contains twenty-one x-ray readings, Decision and Order at 5. A review of his decision indicates that he did not include Dr. Scott's negative December 1996 reread of the May 1, 1996 film, *see* Employer's Exhibit 10. However, since this interpretation is supportive of the administrative law judge's weighing of the x-ray evidence, any error in the administrative law judge's failure to include this interpretation is harmless. *See generally Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[4] The record contains twenty-two interpretations of seven x-ray films, of which three readings were positive for the existence of pneumoconiosis and nineteen readings were negative for the existence of pneumoconiosis. *See* Director's Exhibits 12, 13, 24-26, 28; Claimant's Exhibit 1; Employer's Exhibits 2, 3, 5-7, 9, 10, 12-14. Of the nineteen negative readings, twelve readings were by physicians who are dually qualified as B readers and Board-certified radiologists and three other readings were by B readers. *See* Director's Exhibits 12, 16, 28; Employer's Exhibits 3, 5, 6, 9, 10, 12-14. Of the three positive readings, one reading was provided by a dually qualified physician and one was provided by a B reader, *see* Director's Exhibit 24; Claimant's Exhibit 1.

the record demonstrates that the administrative law judge properly found that the preponderance of the x-ray interpretations by the better qualified physicians was negative for the existence of pneumoconiosis, we affirm this finding as supported by substantial evidence. Decision and Order at 4-5; Director's Exhibits 12, 13, 24-26, 28; Claimant's Exhibit 1; Employer's Exhibits 3, 5-7, 9, 10, 12-14.

In addition, we affirm the administrative law judge's determination that claimant has not established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3). The administrative law judge properly found that there is no autopsy or biopsy evidence of record and, therefore, that claimant has not established the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2). Decision and Order at 5; 20 C.F.R. §718.202(a)(2). In addition, the administrative law judge properly found that claimant was not entitled to the presumptions set forth at 20 C.F.R. §718.202(a)(3), *i.e*., there is no evidence of complicated pneumoconiosis, see 20 C.F.R. §718.304; the claim was not filed prior to January 1, 1982, see 20 C.F.R. §718.305(e); and the instant case involves a living miner's claim, see 20 C.F.R. §718.306(a). Decision and Order at 5; 20 C.F.R. §718.202(a)(3).

We, however, vacate the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In concluding that the medical opinions of record were insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge has not provided an adequate explanation of his findings. Decision and Order at 6-8; *see generally Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). The administrative law judge, in discrediting the medical opinions of Drs. Baker and Guberman, *see* Director's Exhibit 24; Claimant's Exhibit 2, found that their diagnoses of total respiratory disability were not supported by their underlying pulmonary function studies and blood gas studies and, therefore, their failure to discuss adequately this discrepancy negatively affected the entire report.[5] Decision and Order at 6, 8. However, the relevant inquiry at Section 718.202(a)(4) is whether claimant has established the existence of pneumoconiosis, *see* 20 C.F.R. §§718.201, 718.202(a)(4), an inquiry that is separate from the inquiry of whether claimant suffers from a totally disabling respiratory or pulmonary impairment. *See* 20 C.F.R. §718.204(c)(1)-(4); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Moreover, the results of pulmonary functions studies and blood gas studies are relevant to the degree of respiratory or pulmonary impairment and are not diagnostic, in and of themselves, of the presence or absence of pneumoconiosis. *See Trent, supra*. Inasmuch as the administrative law judge erred in discrediting the opinions of Drs. Baker and Guberman, we vacate his finding that claimant failed to establish the

[5] The record contains the medical opinions of Drs. Baker, Fritzhand, Guberman and Myers, each of whom diagnosed that claimant was suffering from pneumoconiosis. Director's Exhibits 10, 24, 25; Claimant's Exhibit 2. In addition, the record contains the contrary medical reports of Drs. Branscomb, Broudy, Fino, and Lane, each of whom opined that claimant was not suffering from pneumoconiosis. Director's Exhibit 26; Employer's Exhibits 2, 4, 8.

existence of pneumoconiosis under Section 718.202(a)(4) and remand the case for the administrative law judge to reconsider the medical opinion evidence at Section 718.202(a)(4). 20 C.F.R. §718.202(a)(4); *see Peabody Coal Co. v. Hill,* 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Perry, supra*. In considering the medical opinion evidence on remand, the administrative law judge must consider the entirety of the medical opinions and not perform a selective analysis of the individual parts, in determining whether the opinions are well-reasoned and well-documented. *See Fields, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *see also Fitch v. Director, OWCP*, 9 BLR 1-45, 1-47 n.2 (1986); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984).

Finally, if, on remand, the administrative law judge determines that the evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), he must also determine whether the evidence is sufficient to rebut the presumption that claimant's pneumoconiosis arose from his coal mine employment pursuant to 20 C.F.R. §718.203(b). Furthermore, the administrative law judge must determine whether the medical evidence of record, like and unlike, is sufficient to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). *See Fields, supra*; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*). Finally, if, the administrative law judge finds the evidence sufficient to establish a totally disabling respiratory impairment, he must then determine whether claimant's total disability is due at least in part to his pneumoconiosis. *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *see also Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge