BRB No. 01-0375 BLA

JOSEPH H. KEEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BEATRICE POCAHONTAS COMPANY	)	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 of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Joseph H. Keen, Doran, Virginia, *pro se*.

Natalie D. Brown (Jackson & Kelly, PLLC), Lexington, Kentucky, for employer.

Timothy S. Williams (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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, without the assistance of counsel, appeals the Decision and Order (00-BLA-

0172) of Administrative Law Judge Thomas M. Burke denying benefits on a duplicate claim[1] 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).[2] Based upon the parties' stipulation, the administrative law judge credited claimant with twenty-seven years coal mine employment and adjudicated this duplicate claim pursuant to the regulations contained in 20 C.F.R. Part

[1]Claimant's first claim was filed with the Social Security Administration on June 28, 1973. Director's Exhibit 67. This claim was denied by the Social Security Administration on December 4, 1973. *Id*. Claimant's second claim was filed with the Department of Labor on October 16, 1980. *Id*. On April 11, 1989, Administrative Law Judge Ben L. O'Brien issued a Decision and Order denying benefits. *Id*. Judge O'Brien's denial was based upon claimant's failure to establish total disability due to pneumoconiosis. *Id*. Since claimant did not pursue this claim any further, the denial became final. Claimant's most recent claim was filed with the Department of Labor on September 18, 1996. Director's Exhibit 1. On September 8, 1997, Administrative Law Judge Edward J. Murty, Jr. issued a Decision and Order denying benefits. Director's Exhibit 41. Judge Murty's denial was based upon claimant's failure to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. *Id*. Claimant filed a requested for modification on July 8, 1998. Director's Exhibit 42.

[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments regarding the impact of the challenged regulations made by employer in its response brief and the Director, Office of Workers' Compensation Programs, in his letter to the Board.

718.[3] The administrative law judge found the evidence sufficient to establish a material change in conditions[4] pursuant to 20 C.F.R. §725.309 (2000).[5] However, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis on the merits pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to respond to claimant's appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers

[3]The parties also stipulated that claimant suffers from a totally disabling respiratory impairment. Hearing Transcript at 6-7.

[4]The administrative law judge stated that "because this case involves a request for modification of a denial of a duplicate claim, the inquiry must be whether there is a mistake in a determination of fact in Judge Murty's denial of benefits or whether a change in conditions has occurred since the denial." Decision and Order at 16. The administrative law judge stated that "[t]he stipulation that the claimant is totally disabled suffices to establish an element which was previously adjudicated against him." *Id*. at 17. Hence, the administrative law judge concluded that "[t]he claimant has demonstrated a change in conditions." *Id*. The administrative law judge therefore stated that "the entire record must be reviewed de novo to determine whether the claimant is entitled to benefits." *Id*.

[5]The revisions to the regulations at 20 C.F.R. §725.309 apply only to claims filed after January 19, 2001.

the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) (2000). Of the seventy-eight x-ray interpretations of record, sixty-three readings are negative for pneumoconiosis, Director's Exhibits 15, 18, 35, 42, 49, 50, 54-63, 67; Employer's Exhibits 10, 12, fourteen readings are positive, Director's Exhibits 17, 30, 34, 42, 48, 67, and one x-ray is unreadable, Director's Exhibit 35. The administrative law judge properly accorded greater weight to the negative x-ray readings which were provided by physicians who are dually qualified as B-readers and Board-certified radiologists.[6] *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Moreover, since sixty-three of the

[6]The administrative law judge stated that "[p]rior to January 29, 1998, the vast majority of dually qualified physicians concluded that the claimant's chest x-ray's (sic) did not demonstrate a finding of pneumoconiosis." Decision and Order at 17. The administrative law judge observed that "Dr. Wiot, whose credentials are superior on this record, did not find the disease to be present by chest X-ray and his opinions were supported by a majority of dually-qualified physicians and B-readers." *Id*. at 19.

seventy-eight x-ray readings of record are negative for pneumoconiosis, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis.[7] *See* 20 C.F.R. §718.202(a)(1); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994).

[7]The administrative law judge indicated that the record contains Dr. Spitz's negative reading of the October 24, 1994 x-ray, Dr. Fino's negative reading of the January 29, 1998 x-ray as well as Dr. Fino's negative reading of the September 2, 1998 x-ray. Decision and Order at 4-6. However, the record does not contain readings of these x-rays by Drs. Fino and Spitz. Further, the administrative law judge did not consider Dr. Peterkin's negative reading of the September 26, 1996 x-ray. Director's Exhibit 35. Nonetheless, in view of the overwhelming negative x-ray readings of record by dually qualified physicians, the administrative law judge's error in this regard is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Next, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis by biopsy or autopsy evidence as there is no such evidence demonstrating the presence of pneumoconiosis in the record.[8] *See* 20 C.F.R. §718.202(a)(2). In addition, we hold that the evidence is insufficient to establish the existence of pneumoconiosis since there is no credible evidence of complicated pneumoconiosis in this living miner's claim which was filed after January 1, 1982.[9] *See* 20

[8]The administrative law judge stated that "Dr. Khuri reported no abnormalities during the bronchoscopy and, although the washings were sent to be analyzed, the record does not contain the results of such testing." Decision and Order at 19; Director's Exhibit 35.

[9]With regard to 20 C.F.R. §718.304(a), the record consists of three relevant x-rays dated October 20, 1994, November 6, 1996 and January 29, 1998. Dr. Bassali found that the October 20, 1994 x-ray demonstrated the presence of complicated pneumoconiosis. Director's Exhibit 34. Drs. Aycoth, Cappiello and Pathak found that the November 6, 1996 x-ray demonstrated the presence of complicated pneumoconiosis. Director's Exhibit 34. Similarly, Drs. Aycoth, Cappiello, Pathak and Robinette found that the January 29, 1998 x-ray demonstrated the presence of complicated pneumoconiosis. Director's Exhibit 42. However, Dr. Wiot found that the October 20, 1994, November 6, 1996 and January 29, 1998 x-rays did not demonstrate the presence of complicated pneumoconiosis. Director's Exhibits 56, 61. In considering the conflicting x-ray evidence at 20 C.F.R. §718.202(a)(1) (2000), the administrative law judge properly accorded greater weight to Dr. Wiot's interpretation than to the contrary interpretations of record because of Dr. Wiot's superior qualifications. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). Dr. Robinette is a B-reader and Drs. Aycoth, Bassali, Cappiello and Pathak are B-readers and Board-certified radiologists. In contrast, the administrative law judge stated that "Dr. Wiot has superior credentials on this record as his *curriculum vitae* demonstrates that he assisted in the development of the ILO-U/ICC classification system and was one of the original C-readers. Decision and Order at 18. Dr. Wiot is also a B-reader and a Board-certified radiologist. The administrative law judge concluded that "[Dr. Wiot's] interpretation, which is supported by a preponderance of the remaining dually-qualified physicians' interpretations, leads the undersigned to conclude that the study does not support a finding of simple or complicated pneumoconiosis." *Id.* Thus, in view of our affirmance of the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of simple pneumoconiosis, *see* 20 C.F.R. §718.202(a)(1), we hold that the x-ray evidence is insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis, *see* 20 C.F.R. §718.304(a); *Melnick, supra*.; *see also Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Hamric v. Director, OWCP*, 6 BLR 1-1091 (1984).

In addition, since there is no autopsy or biopsy evidence demonstrating the presence of complicated pneumoconiosis, we hold that the evidence is insufficient as a matter of law

C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306.

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to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis by autopsy or biopsy evidence. *See* 20 C.F.R. §718.304(b). Finally, since there is no medical opinion or CT scan evidence demonstrating the presence of complicated pneumoconiosis, we hold that the evidence is insufficient as a matter of law to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis by other evidence. *See* 20 C.F.R. §718.304(c).

Further, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4)(2000). The administrative law judge stated that "[t]here are medical opinions and deposition testimony by 15 physicians of record dating from June 18, 1974 through March 3, 2000." Decision and Order at 20. Whereas Drs. Berry, Doupnik, Modi, Robinette and Sutherland opined that claimant suffers from pneumoconiosis, Director's Exhibits 34, 42, 67, Drs. Abernathy, Castle, Dahhan, Fino, Forehand, Iosif and Renn opined that claimant does not suffer from pneumoconiosis,[10] Director's Exhibits 35, 49, 67; Employer's Exhibits 1, 2, 5, 6, 7, 9, 10, 12, 67. Dr. Buddington diagnosed moderate to severe chronic pulmonary disease. Director's Exhibit 67. Dr. Byers diagnosed severe pulmonary emphysema and reversible obstructive airways disease. Employer's Exhibit 12. Dr. Scott diagnosed obstructive airways disease. Director's Exhibit 67. The administrative law judge stated that "the reports of Drs. Byers, Scott, and Buddington will be accorded no weight as they did not reach a conclusion regarding whether the claimant had coal workers' pneumoconiosis." Decision and Order at 20. Further, the administrative law judge permissibly discredited the opinions of Drs. Berry, Doupnik, Modi, Robinette and Sutherland because they are not reasoned.[11] *See Clark v. Karst-Robbins Coal*

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[10]In an earlier report dated July 8, 1987, Dr. Renn diagnosed coal workers' pneumoconiosis. Director's Exhibit 67. The administrative law judge stated that "[b]ecause Dr. Renn failed to explain the discrepancies between his opinions and failed to provide reasoning for the change in his diagnosis, his reports are accorded little weight." Decision and Order at 21. The administrative law judge also stated that "Dr. Dahhan stated that he has since changed his diagnosis to conclude that [claimant] does not suffer from coal workers' pneumoconiosis." Decision and Order at 11. In an earlier report dated March 29, 1985, Dr. Dahhan diagnosed pneumoconiosis. Director's Exhibit 67. In addition, the administrative law judge stated that "[Dr. Fino's] opinion regarding the presence of pneumoconiosis has changed from his earlier September 1988 report." *Id*. at 9-10. Although Dr. Fino, in a report dated September 6, 1988, indicated that "[t]here is sufficient radiographic evidence to justify a diagnosis of simple coal workers' pneumoconiosis," Dr. Fino also indicated, "I cannot diagnose any type of lung disease." Director's Exhibit 67. Dr. Fino stated that "if a lung disease were present, then it is totally reversible with bronchodilator medications." *Id*. Dr. Fino concluded that "[t]his is against a diagnosis of coal workers' pneumoconiosis." *Id*.

[11]The administrative law judge stated that "[a]lthough a finding of pneumoconiosis may be made in the presence of a negative chest x-ray, it is incumbent upon the physician to set forth the data and underlying reasons for such a diagnosis." Decision and Order at 20. The administrative law judge stated that "Dr. Robinette failed to provide such an explanation which leaves his report unreasoned and internally inconsistent." *Id*. The administrative law judge indicated that "Dr. Robinette's observation that the claimant's condition improved with a bronchodilator was, as noted by Dr. Dahhan, inconsistent with a finding of pneumoconiosis." *Id*. With respect to the opinions of Drs. Berry and Sutherland, the

Co., 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Thus, since the administrative law judge properly discredited the only medical opinions of record that could support a finding of the existence of pneumoconiosis, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis by medical report.[12] *See*

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administrative law judge stated that "neither physician provided an explanation for his findings." *Id*. Further, the administrative law judge observed that "Dr. Modi concluded that the miner was totally disabled due to coal workers' pneumoconiosis." *Id*. However, the administrative law judge stated that "[Dr. Modi] provided no reasoning or data to support this conclusion." *Id*. Similarly, the administrative law judge stated that although "Dr. Doupnik stated, by letter dated May 14, 1997, that the miner suffers from coal workers' pneumoconiosis..., he provided no medical data or reasoning in support of this conclusion." *Id*. Moreover, the administrative law judge stated that "Dr. Doupnik failed to indicate the miner's employment and smoking histories." *Id*.

[12]The administrative law judge stated, "it is noted that all of the physicians who reviewed the CT-scans of record, which cover a period of time from December 29, 1989 to November 17, 1999, did not find that coal workers' pneumoconiosis was present." Decision and Order at 22; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *see also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). The administrative law judge stated that "Drs. Spitz, Perme, and Wiot found

20 C.F.R. §718.202(a)(4).

Since claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement, the administrative law judge properly denied benefits under 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

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evidence of an old granulomatous disease." Decision and Order at 22. The administrative law judge additionally stated that "Dr. Perme also concluded that the CT-scan revealed the presence of centrilobular emphysema." *Id*.