BRB No. 01-0412 BLA

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| PAUL G. BENSON | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | DATE ISSUED: |
| | ) | |
| Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits (Upon Second Remand By The Benefits Review Board) of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

George Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for claimant.

Jeffrey S. Goldberg (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (Upon Second Remand By The Benefits Review Board)(96-BLA-1881) of Administrative Law Judge Robert D. Kaplan 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).[1] This case is before the

[1] 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.

Board for a third time. In his initial Decision and Order, the administrative law judge found that claimant established seven and three-quarters years of coal mine employment, but failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied. Subsequent to an appeal by claimant, the Board, in *Benson v. Director, OWCP*, BRB No. 98-0411 BLA (Apr. 30, 1999) (unpub.), affirmed the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3)(2000) as unchallenged on appeal, but vacated his finding at 20 C.F.R. §718.202(a)(4)(2000) and his length of coal mine employment determination and remanded the case for reconsideration of the opinions of Drs. Aquilina and Cali pursuant to Section 718.202(a)(4)(2000) and for further consideration of the length of coal mine employment determination.

On remand, the administrative law judge found that claimant established at least ten years of coal mine employment and, weighing the relevant evidence of record together, pursuant to the holding of *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), concluded that the evidence was insufficient to establish the existence of pneumoconiosis. Accordingly, benefits were again denied.

Subsequent to another appeal by claimant, the Board, in *Benson v. Director, OWCP*, BRB No. 99-1287 BLA (Oct. 12, 2000)(unpub.), affirmed the administrative law judge's finding of at least ten years of coal mine employment as unchallenged on appeal, but agreed with the Director, Office of Workers' Compensation Programs (the Director), that because the administrative law judge's consideration of the medical opinion evidence failed to comply with the requirements of the Administrative Procedure Act (the APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), that every adjudicatory decision be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record, the administrative law judge's finding at Section 718.202(a)(4), must be vacated and the case remanded for further consideration of the medical opinions along with the other evidence relevant to the existence of pneumoconiosis pursuant to *Williams, supra*. The Board noted, however, that contrary to claimant's argument, the administrative law judge was not required to accord dispositive weight to the opinion of Dr. Aquilina merely because he was claimant's treating physician. *Id*.

Pursuant to the second remand from the Board, the administrative law judge again found that the medical opinion evidence failed to establish the existence of pneumoconiosis and, weighing all evidence together pursuant to *Williams, supra*, that claimant failed to establish the existence of pneumoconiosis. Accordingly, benefits were again denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established by the medical opinion evidence. Claimant

further contends that the administrative law judge erred in failing to consider whether pneumoconiosis arose out of coal mine employment and whether claimant was totally disabled due to pneumoconiosis. Claimant contends that the evidence of record established both of these elements. The Director responds urging affirmance of the denial of benefits.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law 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 into the Act 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 20 C.F.R. Part 718, claimant must prove that he suffers from 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. Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant contends that the administrative law judge erred in not according dispositive weight to the opinion of Dr Aquilina, claimant's treating physician, that claimant has coal workers' pneumoconiosis and a coal dust induced pulmonary disease, Director's Exhibit 11; Claimant's Exhibit 13. Specifically, claimant asserts that the administrative law judge erred in according greater weight to the opinions of Drs. Sahillioglu and Levinson, based on their superior credentials, since Dr. Aquilina had as much experience as they did in the treatment of coal dust induced pulmonary diseases, despite his lack of board certifications, *see* Claimant's Brief at 6. Claimant further asserts that Dr. Aquilina's diagnosis was based on his physical examination of claimant and abnormal pulmonary function and blood gas studies and was independent of positive x-ray interpretations which were later re-read as negative. Finally, claimant contends, generally, that Dr. Aquilina's status as claimant's treating physician, entitles his opinions to greater weight since it is supported by underlying evidence.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's consideration of the evidence on remand complies with the Board's remand instructions and we therefore affirm the administrative law judge's determination that the medical opinion evidence fails to establish the existence of pneumoconiosis. Contrary to claimant's assertion, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Levinson and Sahillioglu based on their board certification and board eligibility in internal and pulmonary disease, respectively, as opposed to Dr. Aquilina's board certification in anesthesiology. Director's Exhibits 16, 18, 27. Further, aside from claimant's general contention that Dr. Aquilina has as much experience in treating miners,

claimant has presented no evidence of Dr. Aquilina's particular expertise in pulmonary medicine. We conclude, therefore, that the administrative law judge permissibly accorded greatest weight to the opinions of Drs. Levinson and Sahillioglu based on their superior credentials. *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *see also McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *see generally Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Contrary to claimant's assertion, the administrative law judge did not discredit Dr. Aquilina's opinion merely because he relied on positive x-ray interpretations. Rather, the administrative law judge acknowledged that while Dr. Aquilina relied on clinical findings and laboratory studies, in addition to positive x-ray interpretations, in reaching his conclusions, Decision and Order on Second Remand at 3, his opinion was, nonetheless, outweighed by the opinions of Drs. Sahillioglu and Levinson. Such a determination is within the administrative law judge's purview as trier-of-fact, *see Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *see also Dillon*, *supra*.

Lastly, contrary to claimant's contention, the opinion of Dr. Aquilina, claimant's treating physician is not entitled to dispositive weight. *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Hicks*, *supra*; *Akers*, *supra*. We thus hold that the administrative law judge has complied with our previous remand instructions and has rationally determined that claimant has failed to establish the existence of pneumoconiosis by medical opinion evidence. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Hence, he has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *See Williams*, *supra.* Since claimant is unable to establish the existence of pneumoconiosis, a requisite element of entitlement pursuant to Part 718, we must affirm the denial of benefits and we need not address claimant's arguments relevant to Section 718.203(b) or total disability due to pneumoconiosis at Section 718.204(b), (c). *See Trent*, *supra*; *Perry*, *supra*.

Accordingly, the administrative law judge's Decision and Order Denying Benefits (Upon Second Remand By The Benefits Review Board) is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge