BRB No. 01-0425 BLA

RONALD D. FOLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
HIGH RISE COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
and	)	
	)	
J & D COAL COMPANY	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND	)	
	)	
Employers/Carriers-Respondents	)	
	)	
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 of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

John E. Anderson (Cole, Cole & Anderson, PSC), Barbourville, Kentucky, for claimant.

W. Barry Lewis (Lewis & Lewis Law Office), Hazard, Kentucky, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (1999-BLA-1361) of Administrative Law Judge Robert L. Hillyard denying benefits 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] The administrative law judge credited claimant with at least thirty years of coal mine employment and adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718 (2000).[2] The administrative law judge initially found that there was no dispute that claimant had become totally disabled and had demonstrated a material change in conditions. *See* 20 C.F.R. §725.309(d) (2000). The administrative law judge found, however, that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in his evaluation of the x-ray and medical opinion

[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 20 C.F.R. Parts 718, 722, 725 and 726 (2001).

Pursuant to a lawsuit challenging revisions to 47 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*, 160 F.Supp.2d 147 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2] Claimant filed his initial claim for black lung benefits on December 28, 1978, which was denied by the district director on April 17, 1979, for claimant's failure to provide the evidence necessary to decide his claim. Director's Exhibits 46. The instant claim was filed on January 6, 1999. Director's Exhibit 1.

evidence in finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a) (2000) and that total disability due to pneumoconiosis was not established pursuant to 20 C.F.R. §718.204(b) (2000). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief on the merits in this appeal.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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 establish that he suffers from pneumoconiosis; that the 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 (2000). Failure of claimant to establish any one of these requisite elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings with respect to the responsible operator, the length of coal mine employment and the demonstration of a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000) based on total disability under 20 C.F.R. §718.204(c) (2000). *Skrack v. Island Creek Coal Co.*, 7 BLR 1-710 (1983); Decision and Order at 4, 14, 16; *see* 20 C.F.R. §718.204(b) (2001).

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 Decision and Order is supported by substantial evidence and contains no reversible error. The administrative law judge properly found that the evidence failed to establish the existence of pneumoconiosis pursuant to any of the provisions contained in 20 C.F.R. §718.202(a) (2000). In his consideration of the x-ray evidence, the administrative law judge listed the forty-two x-ray readings of the nine x-rays contained in the record. Decision and Order at 5-8; Director's Exhibits 11, 13-14, 38-39, 42-44; Claimant's Exhibits 1-2, 4-6, 8-9; Employer's Exhibits 1-3, 5-8, 10-20. The administrative law judge permissibly accorded greater weight to the x-ray interpretations of the readers with superior qualifications. *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc)*; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Decision and Order at 14. The administrative law judge noted that there were twenty-five negative x-ray readings and seventeen positive x-ray readings.[4] Decision and Order at 14. The administrative law judge then permissibly found that the x-ray evidence was insufficient to establish the existence of pneumoconiosis by a preponderance of the evidence since the x-ray evidence was "equally weighted on both sides." Decision and Order at 14; *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Edmiston*, *supra*; *Clark*, *supra*; *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994). We, therefore, affirm the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) (2000).

In weighing the medical opinions of record on the issue of the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000), the administrative law judge also rationally concluded that this evidence failed to establish the existence of pneumoconiosis by a preponderance of the evidence. *Perry*, *supra*. The medical opinion evidence consists of the opinion of Dr. Baker, which indicates that claimant has pneumoconiosis, Director's Exhibit 11; Claimant's Exhibit 6, and the contrary opinions of Drs. Branscomb, Broudy, Fino, Dahhan and Lockey, which indicate that claimant suffers from chronic obstructive pulmonary disease due to cigarette smoking, and not pneumoconiosis. Decision and Order at 9-13; Director's Exhibit 38; Employer's Exhibits 4-5, 9-10, 15-17. The administrative law judge, acting within his discretion as fact-finder, determined that Drs. Branscomb, Broudy,

[4] While claimant asserts that the administrative law judge ignored Dr. Shipley's positive x-ray reading of the August 21, 1991, x-ray, Claimant's Exhibit 9, the administrative law judge however included this reading in his list of the evidence, Decision and Order at 7, and also discussed Dr. Shipley's positive interpretation of the June 23, 1999, x-ray wherein Dr. Shipley specifically stated that the changes were not consistent with pneumoconiosis. Decision and Order at 6, 14; Director's Exhibit 38.

Fino, Dahhan and Lockey issued well-documented and well-reasoned reports that outweighed Dr. Baker's medical report diagnosing pneumoconiosis. *Clark, supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-146 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); Decision and Order at 15-16. The administrative law judge thus acted within his discretion as fact-finder in concluding that there was no basis in the record to credit the opinion of Dr. Baker, who diagnosed pneumoconiosis, over the contrary opinions of Drs. Branscomb, Broudy, Fino, Dahhan and Lockey. *Id*.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Trent, supra*; *Perry, supra*; *Oggero, supra*; *White v. Director, OWCP*, 6 BLR 1-368 (1983). The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see 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. *See Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Furthermore, since the determination of whether the miner had pneumoconiosis is primarily a medical determination, claimant's testimony, under the circumstances of this case, could not alter the administrative law judge's finding. 20 C.F.R. §718.202(a)(4) (2000); *Anderson, supra*. Inasmuch as the administrative law judge weighed all of the medical opinions and rationally concluded that the preponderance of the evidence did not establish the existence of pneumoconiosis, we affirm his finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000). *See Clark, supra*; *Wetzel, supra*; *Lucostic, supra*. Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (2000).

Inasmuch as claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (2000), a requisite element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits and we need not address claimant's other arguments on appeal.[5]

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

SO ORDERED.

[5] The amended regulations did not alter 20 C.F.R. §718.202(a) in any material respect. 20 C.F.R. §718.202(a) (2001).

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge