

BRB No. 97-0602 BLA

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| JOHN G. BOLLING |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| WESTMORELAND COAL COMPANY |) | |
| |) | |
| Employer-Respondent |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | DATE ISSUED: |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Party-in-Interest |) | DECISION and ORDER |

Appeal of the Decision and Order - Denying Benefits of Robert M. Glennon, Administrative Law Judge, United States Department of Labor.

John G. Bolling, Pound, Virginia, *pro se*.

Douglas A. Smoot and Kathy L. Snyder (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denying Benefits (85-BLA-6176) of Administrative Law Judge Robert M. Glennon, 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

¹ Claimant sent his Notice of Appeal of the administrative law judge's denial of benefits to the Office of the Director, Office of Workers' Compensation Programs (the Director), on November 26, 1988. In a letter from the Director to the Board dated January 21, 1997, the Director stated "a thorough search of the Benefits Review Board's computerized docket system indicates the Board has not received this appeal. Pursuant to 20 C.F.R. §802.207(a)(2), the Director therefore forwards a copy of

law judge credited claimant with fourteen years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied.

Employer responds to claimant's appeal, urging affirmance of the administrative law judge's denial of benefits. Employer also asserts, if the Board does not affirm the denial of benefits, that it should be dismissed as the responsible operator, urging that the Director's failure to timely forward claimant's appeal to the Board has denied it the right to due process and violates the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 30 U.S.C. §919(d) and 33 U.S.C. §932(a)(the APA). The Director, Office of Workers' Compensation Programs (the Director), has indicated that he will not file a brief in this appeal.

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 into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In finding the x-ray evidence insufficient to establish the existence of pneumoconiosis, the administrative law judge considered the eight interpretations of three x-rays, Director's Exhibits 11, 12, 20; Employer's Exhibits 1, 3, 5, 7; Claimant's Exhibit 1. As the administrative law judge noted, Dr. Robinette's interpretation was the only interpretation positive for the existence of pneumoconiosis, see Claimant's Exhibit 1, and that film was read by two other physicians, with equal qualifications, as negative, see Employer's Exhibits 5, 7. We affirm the administrative law judge's weighing of the x-ray evidence, as he properly considered both the quality and the quantity of the x-ray evidence in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), see Decision and Order-Denying Benefits at 4; *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); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Dixon v. Director, OWCP*, 8 BLR 1-150 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

claimant's Notice of Appeal dated November 26, 1988." Director's letter of January 21, 1997. The Board accepted claimant's appeal, see Order dated February 7, 1997.

Inasmuch as the record does not contain any biopsy evidence or any evidence of complicated pneumoconiosis in this living miner's claim filed in 1983, we affirm the administrative law judge's finding that the existence of pneumoconiosis is not established pursuant to Section 718.202(a)(2) and (a)(3).

In finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Kanwal and Robinette, who diagnosed pneumoconiosis, and Drs. Dahhan, Morgan and Sobieski, who opined that claimant does not suffer from pneumoconiosis. The administrative law judge, within a proper exercise of his discretion, relied on the opinion of Dr. Dahhan, finding his opinion better reasoned than Dr. Robinette's opinion, see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), and better supported by "the other clinical data," Decision and Order - Denying Benefits at 7, see *Wetzel v. Director, OWCP*, 8 BLR 1-138 (1985); *Pastva v. The Youghiogheny & Ohio Coal Co.*, 7 BLR 1-829 (1985). However, the administrative law judge failed to explain the weight he accorded to Dr. Kanwal's opinion diagnosing pneumoconiosis. Inasmuch as the administrative law judge has not weighed all of the evidence of record, we vacate his finding pursuant to Section 718.202(a)(4). See *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). On remand, the administrative law judge must consider all of the evidence and explain the weight he accords to each opinion. See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Employer also contends that it should be dismissed as the responsible operator in this case, due the Director's delay in forwarding claimant's appeal to the Board. Employer contends that the delay violates the APA and its right to due process. We reject this assertion. Employer has not established that it has been prejudiced by the delay in any way which warrants dismissal of employer particularly since entitlement is being evaluated solely on the evidence currently contained in the file. See generally *Gladden v. Eastern Associated Coal Corp.*, 7 BLR 1-577, 1-579 (1984).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge