BRB No. 97-0737 BLA

FRED M. HOLBROOK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
C&N COAL COMPANY, INCORPORATED	)	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 J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

Fred M. Holbrook, Mayking, 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 legal representation, appeals the Decision and Order (95-BLA-1312) of Administrative Law Judge J. Michael O'Neill 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*. Claimant filed his claim on September 22, 1990. The administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found that claimant failed to establish that he is totally disabled pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits. Claimant appeals without legal representation, contesting the denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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

considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *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 consistent 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).

Initially, we note that claimant filed a motion requesting that the administrative law judge strike cumulative x-ray readings proffered by employer with respect to the issue of the existence of pneumoconiosis. Decision and Order (D&O) at 2. Based on *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993), the administrative law judge determined to strike some of the x-ray evidence. The administrative law specifically found that "the record often contains four or more readings submitted by employer for each x-ray while claimant has submitted at most, one to two readings of the same film." *Id*. The administrative law judge advised in his Decision and Order that he would consider "only one re-reading by each party in addition to the original x-ray report submitted by the Director or prepared by a physician separate from these proceedings."[1] D&O at 2, 5-7.

Under 20 C.F.R. §718.202(a)(1), the administrative law judge found the x-ray evidence insufficient to establish the existence of pneumoconiosis. Consistent with his ruling to limit the cumulative x-ray readings, the administrative law judge found the record to be evenly balanced between positive and negative re-readings made by physicians who are Board-certified radiologists and B-readers, with the exception of the July 6, 1993 film, which was only read once as positive for pneumoconiosis by Dr. Marshall, a Board-certified radiologist and B-reader. D&O at 12. With respect to the original readings, the

[1] The administrative law judge's x-ray chart lists a negative x-ray reading by Dr. Sargent, a Board-certified radiologist and B-reader, of a film dated August 23, 1992, but the administrative law judge improperly failed to identify, in accordance with his ruling, a positive x-ray reading by Dr. Bassali, a Board-certified radiologist and B-reader, of that same film, Director's Exhibit 59. Decision and Order (D&O) at 7. Notwithstanding, to the extent that the administrative law judge's analysis implies that he would have only found the positive and negative x-ray re-readings of the August 23, 1992 film to be equally balanced, the administrative law judge's failure to list Dr. Bassali's reading is harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); D&O at 12.

administrative law judge found only one film dated November 10, 1992 to be positive for pneumoconiosis. *Id*. In contrast, the administrative law judge found that nine of the original readings were interpreted as showing no pneumoconiosis or they failed to discuss any changes due to pneumoconiosis. *Id*. Because the administrative law judge found the initial negative readings to be supportive of the negative re-readings by Board-certified radiologists and B-readers, the administrative law judge permissibly concluded that the weight of the x-ray evidence is negative for pneumoconiosis. *Id*. Moreover, the administrative law judge permissibly found that among the re-readings by the Board-certified radiologists and B-readers, at best the x-ray evidence is equally probative. D&O at 13. Therefore, the administrative law judge concluded that claimant is unable to carry his burden of proof. D&O at 13; *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). Inasmuch as the administrative law judge acted within his discretion in weighing the conflicting x-ray evidence, his finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) is affirmed.

Because there is no autopsy or biopsy evidence of record, claimant is unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Additionally, claimant is unable to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) as he is not eligible for the presumptions described therein. *See* 20 C.F.R. §§718.304, 718.305 and 718.306.

Under Section 718.202(a)(4), the administrative law judge found that there are eight physicians' reports in the record, of which, Drs. Soto, Williams, Sundaram and Bennet opined that claimant has pneumoconiosis, while Drs. Broudy and Fino opined that claimant did not have pneumoconiosis.[2] In weighing the conflicting medical opinion evidence, the administrative law judge erred in rejecting the diagnoses of pneumoconiosis by Drs. Soto, Williams, Sundaram and Bennet simply because those doctors based their opinions in part on positive x-ray evidence. *See Winters v. Director, OWCP*, 6 BLR 1-877 (1984). Each of the x-rays relied upon by those physicians are evenly balanced between positive and negative readings by Board-certified radiologists and B-readers.

Notwithstanding, the administrative law judge also provided a proper basis for weighing the conflicting medical opinion evidence at Section 718.202(a)(4). Because the

[2] Dr. Bulle treated claimant during his hospitalization from August 5-8, 1992, but the doctor did not address whether claimant had pneumoconiosis. Director's Exhibit (DX) 39. Dr. Westerfield, likewise, did not offer an opinion with regard to the existence of pneumoconiosis. DX 82.

administrative law judge properly found Drs. Broudy and Fino to be better qualified than Drs. Soto, Williams and Bennet, he had discretion to accord their opinions determinative weight. *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987). Furthermore, the administrative law judge permissibly found the opinions of Drs. Soto, Williams and Sundaram less credible because those doctors reported an overinflated coal mine history of forty to fifity years, compared to the administrative law judge's finding of twenty-one years of coal mine employment. *See Long v. Director, OWCP*, 7 BLR 1-254 (1984). We, therefore, affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Even assuming arguendo that claimant has pneumoconiosis, the administrative law judge further found that he is not totally disabled. As noted by the administrative law judge, none of claimant's pulmonary function study or arterial blood gas study evidence is qualifying for total disability pursuant to 20 C.F.R. §718.204(c)(1) and (c)(2).[3] D&O at 14; DXs 11, 27, 39, 54, 82. The administrative law judge also properly found that the record is devoid of any evidence that claimant has cor pulmonale with right sided congestive heart failure, which would establish total disability pursuant to 20 C.F.R. §718.204(c)(3). D&O at 14.

With respect to 20 C.F.R. §718.204(c)(4), we hold that the administrative law judge permissibly rejected the opinions of Drs. Soto, Sundaram and Westerfield because the administrative law judge found that the doctors did not adequately explain the basis for their opinions that claimant is totally disabled from a respiratory or pulmonary impairment.[4] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988). In contrast, the administrative law judge properly found the opinions of Drs. Broudy and Fino to be better supported by the objective evidence. S*ee King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Because the weight of the evidence and determinations concerning the

[3] Pulmonary function studies are considered "qualifying" when they show values equal to or less than those listed in 20 C.F.R. Part 718, Appendix B. 20 C.F.R. §718.204(c)(1). Arterial blood gas studies are considered "qualifying" when they satisfy the values listed in 20 C.F.R. Part 718, Appendix C. 20 C.F.R. §718.204(c)(3).

[4] The administrative law judge also specifically found that Dr. Westerfield diagnosed that claimant is totally disabled based on maximum oxygen testing results. As noted by the administrative law judge, Dr. Broudy disagreed that claimant's maximum oxygen results, in light of normal pulmonary function study results, demonstrated a respiratory impairment. According to Dr. Broudy, Dr. Westerfield's findings were consistent with claimant's cardiac problems. Because the administrative law judge considered Dr. Broudy to be better qualified, and he found claimant's cardiac problems to be documented in the record, the administrative law judge permissibly rejected Dr. Westerfield's opinion that claimant is totally disabled. D&O at 14-15.

credibility of the medical experts is within the discretion of the administrative law judge, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985), we affirm his finding that claimant failed to establish that he is totally disabled pursuant to 20 C.F.R. §718.204(c)(4).

Inasmuch as claimant has failed to establish pneumoconiosis and total disability, essential elements of entitlement, the administrative law judge properly denied benefits. *See 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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge