BRB No. 96-0150 BLA

THOMAS KOSIKOWSKI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
CONSOLIDATION COAL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson & Kelly), Morgantown, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (91-BLA-1578) of Administrative Law Judge Gerald M. Tierney awarding benefits on a claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act

[1] Claimant is Thomas Kosikowski, the miner, whose claim for benefits filed on August 9, 1989 was awarded on August 15, 1990. Director's Exhibits 1, 17. After considering additional evidence submitted by employer, the Department of Labor again approved the claim for benefits on January 14, 1991. Director's Exhibit 29. Employer contested the award and requested a hearing. Director's Exhibit 30.

of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). This case is before the Board for the third time. Initially, the Board vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1) and remanded the case for him to consider all the x-ray evidence of record. *Kosikowski v. Consolidation Coal Co*., BRB No. 92-2339 BLA (Feb. 28, 1994)(unpub.) The Board affirmed, however, the administrative law judge's findings pursuant to

Sections 718.203(b) and 718.204. *Kosikowski*, slip op. at 3-5.

On remand, the administrative law judge found the existence of pneumoconiosis established pursuant to Section 718.202(a)(1) and reinstated the award of benefits. On appeal, the Board again vacated the administrative law judge's finding at Section 718.202(a)(1) and remanded the case for him to make findings sufficient to permit appellate review, and to consider the evidence pursuant to Sections 718.202(a)(2)-(4). *Kosikowski v. Consolidation Coal Co*., BRB No. 95-0800 BLA (June 28, 1995)(unpub.).

On remand, the administrative law judge found that the evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(3), but that pneumoconiosis was established pursuant to Section 718.202(a)(4). Accordingly, he awarded benefits.

On appeal, employer challenges the administrative law judge's weighing of the evidence pursuant to Section 718.202(a)(4). Employer also requests *de novo* consideration of entitlement before a different administrative law judge, alleging that Judge Tierney has exhibited bias against employer. Claimant has not responded, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[2]

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 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).

Employer initially contends that the opinions of Drs. Blatt and Del Vecchio should not have been credited because they are "not well reasoned." Employer's Brief at 6-11. Both physicians examined claimant, recorded employment, medical, and smoking histories, administered pulmonary function and blood gas studies, and

[2] We affirm as unchallenged on appeal the administrative law judge's findings regarding entitlement date, [1992] Amended Decision and Order, and pursuant to 20 C.F.R. §718.202(a)(1)-(3). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

considered chest x-ray readings. Director's Exhibits 27, 31. The administrative law judge found their opinions to be "well-reasoned" and "consistent" with claimant's seventeen years of coal mine employment, his symptoms, and his testimony as well as objective diagnostic testing. Decision and Order on Remand at 8.

Inasmuch as the administrative law judge has broad discretion in assessing the medical opinion evidence to determine whether an opinion is documented and reasoned, *see Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987); *see also Lafferty v. Cannelton Industries, Inc*., 12 BLR 1-190 (1989), and provided a reasonable rationale for according determinative weight to the opinions of Drs. Blatt and Del Vecchio, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co*., 14 BLR 1-135 (1990), *aff'd sub nom. Maddaleni v. Director, OWCP*, 961 F.2d 1524, 16 BLR 2-68 (10th Cir. 1992), we reject employer's contention.

We also reject employer's assertion that the opinions of these physicians should not be credited because they relied primarily on an x-ray they "mistakenly believed" indicated pneumoconiosis. Employer's Brief at 8. Section 718.202(a) provides alternative methods of establishing pneumoconiosis. *Beatty v. Danri Corp*., 16 BLR 1-11 (1991), *aff'd* 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995); *Dixon v. North Camp Coal Co*., 8 BLR 1-344 (1985); *see generally Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989). Therefore, the administrative law judge properly did not discredit the opinions of Drs. Blatt and Del Vecchio merely because they relied in part on positive x-ray readings, when the administrative law judge found the x-ray evidence to be negative for pneumoconiosis. Employer's Brief at 8-11; *see Church v. Eastern Associated Coal Corp.*, BLR , BRB No. 95-0516 BLA (Jan. 24, 1996); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986). Furthermore, contrary to employer's assertion, Employer's Brief at 10, the administrative law judge was not required to weigh the objective medical evidence against each individual medical report in determining whether it was reasoned and documented. *See Trumbo v. Reading Anthracite Co*., 17 BLR 1-85 (1993). Therefore, we reject employer's contention.[3]

Employer further contends that the administrative law judge mechanically accorded greater weight to the opinion of claimant's treating physician, Dr. Blatt. Employer's Brief at 12-13. We hold that the administrative law judge's reliance on the treating physician's opinion was reasonable. The record indicates that Dr. Blatt,

[3] Employer alleges a host of additional shortcomings that "undercut the reliability" of these two medical opinions. Employer's Brief at 6-11. We decline, as we must, employer's invitation to reweigh the evidence. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988).

board-certified in internal medicine and board-eligible in pulmonary medicine, examined, tested, and treated claimant during five office visits over the course of a year. Director's Exhibit 27; Employer's Exhibit 5. The administrative law judge permissibly accorded greater weight to Dr. Blatt's opinion as a treating physician, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Berta v. Peabody Coal Co*., 16 BLR 1-69 (1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), and less weight to the opinions of Drs. Renn and Fino, who examined claimant once. Therefore, we reject employer's contention.

Employer argues that the administrative law judge erred in stating that Dr. Blatt's opinion is more consistent with the definition of pneumoconiosis than are the opinions of Drs. Renn and Fino. Employer's Brief at 13-14. Initially, the administrative law judge noted that Drs. Renn and Fino ruled out pneumoconiosis because claimant had a purely obstructive impairment. [1992] Decision and Order at 6; Director's Exhibit 23; Employer's Exhibit 6. Dr. Blatt disagreed with their view that a purely obstructive disease could not be pneumoconiosis, Director's Exhibit 27, and the administrative law judge permissibly credited his opinion. *See Tussey*; *supra*.

The administrative law judge's additional comment that Dr. Blatt's "opinion is also more consistent with the broader view of the disease recognized in the regulations," Decision and Order on Remand at 8, is in accord with the definition of pneumoconiosis at Section 718.201, *see Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984); *see also Warth v. Southern Ohio Coal Co*., 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), and is supported by substantial evidence. Therefore, we reject employer's contention.

Employer argues that the administrative law judge erred by according diminished weight to the opinions of Drs. Renn and Fino because they allegedly evaluated claimant's x-rays under non-regulatory criteria. Employer's Brief at 15-16. Both Drs. Renn and Fino read claimant's x-rays as negative for pneumoconiosis and based their opinions that claimant did not have pneumoconiosis, in part, on their negative x-ray readings. Employer's Exhibits 10, 11. The administrative law judge noted their view that for x-rays to show coal workers' pneumoconiosis, regular opacities must be seen in the upper lung zones, and Dr. Fino's testimony that an x-ray read as 1/0 was in fact negative for pneumoconiosis because there were no rounded opacities in the upper lungs. Decision and Order on Remand at 9; Employer's Exhibits 10, 11.

The administrative law judge permissibly found their reasoning unpersuasive in light of the regulation that a 1/0 reading constitutes evidence of pneumoconiosis, 20 C.F.R. §718.102; *see Handy v. Director, OWCP*, 16 BLR 1-73 (1990), and

accorded their opinions less weight. Because Section 718.202(a) provides alternative methods of establishing pneumoconiosis, *see Beatty*, *supra*, and the administrative law judge may discount opinions whose reasoning he finds to be flawed, *see Debusk v. Pittsburg & Midway Coal Co*., 12 BLR 1-15 (1988); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Goss v. Eastern Associated Coal Corp*., 7 BLR 1-400 (1984) we reject employer's contention.

Finally, employer alleges that the administrative law judge was biased. Employer's Brief at 17-18. Employer points to no evidence of bias in the record, but merely recites the administrative law judge's earlier errors and states that he still "fails to provide a clear basis for his conclusion" that the miner suffers from pneumoconiosis. Employer's Brief at 18. Because employer has failed to demonstrate any evidence of bias, we reject employer's request for consideration of entitlement *de novo* and affirm the administrative law judge's finding pursuant to Section 718.202(a)(4). *See Cochran v. Consolidation Coal Co*., 16 BLR 1-101 (1993); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31 (1991)(*en banc*); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge