BRB No. 99-0236 BLA

EDGAR R. SADLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BIG HORN COAL COMPANY	)	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 Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

John S. Lopatto III, Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (97-BLA-0277) of Administrative Law Judge Donald W. Mosser (the administrative law judge) 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]

[1] Claimant filed a claim for benefits on February 14, 1990. (DX-1). The Department of Labor denied this claim on May 17, 1990, and claimant filed a request for a formal hearing. (DX-15, 17). In spite of his request, the case was never forwarded to the Office of Administrative Law Judges and subsequently, claimant's counsel withdrew from the case.

When claimant filed a second claim on February 3, 1994, it was determined that the

first claim was still pending. On August 26, 1996, the miner's claim was denied following an informal conference and the case was referred to the Office of Administrative Law Judges for a formal hearing.

After crediting claimant with approximately 20 years of coal mine employment, the administrative law judge found Big Horn Coal Company to be the properly designated responsible operator. Adjudicating the claim pursuant to 20 C.F.R. Part 718 *et. seq*., the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(a)(4). The administrative law judge then found that assuming that pneumoconiosis was established, the evidence was insufficient to rebut the Section 718.203(b) presumption that the pneumoconiosis arose at least in part out of the miner's coal mine employment. 20 C.F.R. §718.203(b). However, the administrative law judge further found that claimant failed to establish the existence of a totally disabling respiratory condition pursuant to 20 C.F.R. §718.204(c)(1)-(c)(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that he failed to establish either the existence of pneumoconiosis or a totally disabling respiratory condition. Employer responds urging the Board to affirm the denial of benefits.[2] The Director, Office of Workers' Compensation Programs, has not responded in this appeal.

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, 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. Failure of the claimant to establish any of the foregoing elements precludes entitlement to benefits. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis. Claimant argues that the record contains "numerous ILO readings positive for category 1 simple coal worker's

[2] On November 25, 1998, employer filed a cross appeal. However, in response to an order from the Board, employer filed a motion requesting that its cross appeal be dismissed. Consequently, by Order dated March 12, 1999, the Board dismissed employer's cross appeal.

pneumoconiosis, particularly the chest x-rays of August 29, 1994, February 21, 1996, and January 27, 1997." Claimant's Brief at 4. In order to invoke Board review of an administrative law judge's findings, the challenging party must do more than merely recite evidence favorable to his claim. *See* 20 C.F.R. §802.211(b). *See generally Sarf v. Director, OWCP*, 10 BLR 1-119 (1987), *Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983). Therefore, since claimant has not raised a valid challenge to the weighing of the x-ray evidence, we affirm the administrative law judge's finding that pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1).

Claimant also challenges the administrative law judge's weighing of the CT scan evidence. In addressing the CT scan evidence, the administrative law judge indicated that the radiologist who conducted the scan did not note any evidence consistent with pneumoconiosis and then observed that the "highly qualified" Dr. Repsher found from his review that there was no evidence of pneumoconiosis. Claimant contends that it was error to give more weight to Dr. Repsher's reading of the CT scan since he was only a pulmonologist. While the administrative law judge's decision only refers to Dr. Repsher's status as a B-reader, the record contains Dr. Repsher's curriculum vitae which fully supports the finding that Dr. Repsher is highly qualified.[3] Therefore, the administrative law judge's weighing of the CT scan evidence is reasonable, as well as supported by substantial evidence in the record, and consequently is affirmed.

With respect to his weighing of the medical reports at 20 C.F.R. §718.202(a)(4), claimant contends that the administrative law judge erred in finding Dr. Batty's deposition testimony insufficient to establish the existence of pneumoconiosis. The administrative law judge found that Dr. Batty did not provide a rationale for relating the respiratory impairment to coal dust, that there was nothing in the record to suggest why this doctor was treating the miner, and that there was no discussion of any objective tests that this doctor himself had performed. Thus, the administrative law judge did not accept Dr. Batty's report since he found it not well reasoned or documented.

Although Dr. Batty did not perform any objective testing of his own, his deposition testimony clearly indicates that he had treated claimant since May 28, 1986, and that he had reviewed pulmonary function and blood gas study results. Therefore, Dr. Batty's testimony

[3] The record does not contain the qualifications of Dr. Deardorff, the only physician to read the CT scan evidence as positive for pneumoconiosis. However, the administrative law judge took official notice of Dr. Repsher's status as a B-reader.

is documented. Nevertheless, as the administrative law judge observed, Dr. Batty simply answers "yes" when asked if the respiratory impairment was significantly related to coal dust exposure (CX-24, at 37) and later simply diagnoses chronic obstructive pulmonary disease secondary to coal mine exposure (CX-24 at 41). Dr. Batty never provides an explanation or basis for this conclusion. Consequently, we affirm the administrative law judge's determination that Dr. Batty's testimony is not well reasoned, and on this basis, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Moreover, in light of our affirmance of the administrative law judge's findings that neither the x-ray or CT-scan evidence, nor the medical reports establish the existence of pneumoconiosis, we affirm the administrative law judge's finding that the existence of pneumoconiosis has not been established.[4] Consequently, since claimant has failed to establish an essential element of entitlement, we affirm the administrative law judge's denial of benefits. *Trent*, *supra*; *Perry*, *supra*.

[4] The administrative law judge's determination that Sections 718.202(a)(2) and (a)(3) were not applicable is not challenged on appeal, and therefore is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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