BRB No. 01-0887 BLA

RICHARD B. PAZZALIA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
POPPLE BROTHERS	)	
	)	
and	)	
	)	DATE ISSUED:
LACKAWANNA CASUALTY COMPANY	)	
	)	
Employer/Carrier - 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 Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Rocco V. Valvano, Jr. (Mazzoni & Karam), Scranton, Pennsylvania, for claimant.

William E. Wyatt, Jr. (Fine, Wyatt & Carey), Scranton, Pennsylvania, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (00-BLA-0761) of Administrative Law Judge Paul H. Teitler 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] Based upon the date of filing of this claim, July 23, 1998, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718 (2001). After crediting claimant with fourteen years of coal mine employment, the administrative law judge found that claimant failed to establish that he suffered from totally disabling pneumoconiosis. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in his consideration of the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1) and erred in his evaluation of Dr. Levinson's report pursuant to 20 C.F.R. §718.204(b)(2)(iv).[2] Employer responds, urging affirmance of the decision below. The Director, Office of Worker's Compensation Programs, has indicated that he will not participate in this appeal.

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 into the Act 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of

[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, 725, 726 (2001).

[2]The administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2)-(4), 718.204(b)(2)(i)-(iii) and regarding the length of coal mine employment are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant first contends that the administrative law judge failed to "properly and comprehensively evaluate the credible x-ray evidence of record." Claimant's Petition for Review at 5. Claimant specifically asserts that the administrative law judge should have accorded determinative weight to the positive interpretations of his August 20, 1998 x-ray. We disagree. The administrative law judge considered eleven interpretations of five x-rays taken between June 1997 and October 2000. Decision and Order at 5-6. The record indicates that the June 13, 1997, June 18, 1999, and October 4, 2000 x-rays were read as negative. Director's Exhibit 33; Employer's Exhibits 1, 2, 5, 6. The October 4, 2000 film was read by a B reader and the June 18, 1999 x-ray was read three times by physicians who are dually-qualified as Board-certified radiologists and B readers. Director's Exhibit 33; Employer's Exhibits 1, 2. The record also contains a January 29, 1998 x-ray which was read as positive for pneumoconiosis by Dr. Levinson, an A reader. Director's Exhibit 17; Hearing Transcript at 29. The August 20, 1998 x-ray was read five times. Two dually-qualified physicians read the x-ray to be negative, while Dr. Lautin, also dually qualified, Dr. Foreman, a B reader, and Dr. Imperiale, who possesses no special qualifications, read the x-ray to be positive. Director's Exhibits 15, 16; Employer's Exhibits 1, 3, 4.

In resolving the conflict in the x-ray evidence, the administrative law judge relied on the preponderance of the negative readings by the more highly qualified physicians and found the x-ray evidence to be insufficient to establish the existence of pneumoconiosis. Decision and Order at 6. The administrative law judge in this case acted within his discretion in according greater weight to the majority of the interpretations by the better qualified physicians since only one dually-qualified physician interpreted an x-ray as positive. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1 - 65 (1990); *McMath v. Director, OWCP*, 12 BLR 1- 6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Thus, we affirm his finding that claimant failed to establish the existence of pneumoconiosis by x-ray evidence at Section 718.202(a)(1) as it is supported by substantial evidence.

Claimant next contends that the administrative law judge erred in determining that claimant did not establish that he is totally disabled at Section 718.204(b)(2)(iv). The

administrative law judge found that the opinions of Drs. Dittman and Hertz were worthy of the greatest weight.[3] Decision and Order at 9; Director's Exhibit 33; Employer's Exhibits 5, 7. The administrative law judge additionally noted that Dr. Talati also found that claimant is not totally disabled. Decision and Order at 9; Director's Exhibit 11. The administrative law judge determined that Dr. Levinson was the only physician to state that claimant is totally disabled, but noted that the opinion was based in part upon a qualifying pulmonary function study that the administrative law judge deemed to be invalid. Decision and Order at 9; Director's Exhibits 18, 9.[4] The administrative law judge additionally found that Dr. Levinson's opinion failed to adequately explain the non-qualifying blood gas values and the non-qualifying pulmonary function results obtained by the other physicians of record. Finding that the opinions of Drs. Talati, Hertz, and Dittman are supported by the objective laboratory data, the administrative law judge concluded that claimant did not establish total disability. Decision and Order at 9.

We reject claimant's contentions that the administrative law judge failed to provide an "appropriate foundation" for according greater weight to the opinions of Drs. Dittman and Hertz, who were retained by employer. Claimant's Petition for Review at 6. Claimant asserts that Dr. Hertz is "no more credible than Dr. Levinson," who testified for claimant, and that Dr. Dittman's testimony with regard to the x-ray evidence "discredits" his opinion on disability. Claimant's Petition for Review at 7. Claimant has failed to indicate, however, how the administrative law judge erred in his consideration of Drs. Dittman and Hertz on this issue of total respiratory disability. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g Cox v. Director, OWCP*, 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Thus, we affirm the administrative law judge's findings with respect to these medical opinions.

We also reject claimant's argument that the administrative law judge erroneously rejected Dr. Levinson's opinion because it is based on non-qualifying objective studies, *see* Claimant's Petition for Review at 8. Rather, the administrative law judge rationally

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[3]Dr. Dittman stated that claimant's is not disabled by a pulmonary condition. Deposition Transcript at 51. Dr. Hertz diagnosed chronic dyspnea on exertion but found the pulmonary function study and arterial blood gas results were within normal limits. Employer Exhibit 5.

[4]Dr. Levinson performed a pulmonary function study on claimant on January 29, 1998, which yielded qualifying values. This test was invalidated by Dr. Sahillioglu for poor and inconsistent effort on the FVC and MVV maneuvers and no demonstration of inspiratory effort. Director's Exhibit 9.

accorded little weight to Dr. Levinson's opinion because he found that it was based in part upon a qualifying but invalidated pulmonary function study, and that Dr. Levinson had not adequately explained how the remaining objective evidence of record supported his opinion. Decision and Order at 9. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge accorded determinative weight to the opinions of Drs. Dittman, Hertz, and Talati, as he permissibly found these opinions to be better supported by the non-qualifying objective tests in the record. *Id.* As the administrative law judge's findings are supported by substantial evidence, we affirm his finding that the medical opinions are insufficient to establish total disability at Section 718.204(b)(2)(iv).

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) *supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and total disability pursuant to Section 718.204(b)(2)(iv).

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge