BRB No. 98-1369 BLA

TERRY W. CALDWELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 7/16/99
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Edward Waldman (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-0081) of Administrative Law Judge Thomas F. Phalen, Jr. 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*. (the Act). The administrative law judge credited claimant with six 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, the administrative law judge found the evidence insufficient to establish a mistake in a determination of fact or a

change in conditions pursuant to 20 C.F.R. §725.310,[1] and thus, he denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also contends that the administrative law judge erred in failing to consider whether the evidence is sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203. Further, claimant contends that the administrative law judge erred in failing to consider whether the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(c), and whether the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law

[1]Claimant filed his claim on September 9, 1993. Director's Exhibit 1. On April 18, 1996, Administrative Law Judge Frank D. Marden issued a Decision and Order denying benefits based on claimant's failure to establish the existence of pneumoconiosis. Director's Exhibit 29. Although claimant appealed Judge Marden's denial of benefits to the Board, Director's Exhibit 30, claimant subsequently filed a Motion to Withdraw the Notice of Appeal, Director's Exhibit 35. On June 28, 1996, the Board issued an Order, granting claimant's request and dismissing the appeal. *Caldwell v. Director, OWCP*, BRB No. 96-0966 BLA (Order)(June 28, 1996)(unpub.). Claimant filed his request for modification on April 25, 1997. Director's Exhibit 37.

judge's Decision and Order.[2]

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 Associates, Inc.*, 380 U.S. 359 (1965).

[2]Inasmuch as the administrative law judge's length of coal mine employment finding and his finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) and (a)(3) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Initially, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). We disagree. The x-ray evidence of record consists of four interpretations of two x-rays.[3] The administrative law judge correctly observed that "only one reading, made by Dr. Bushey, is positive for pneumoconiosis." Decision and Order at 7. The administrative law judge also correctly observed that "Dr. Bushey has not been shown to be a B-reader or a [B]oard-certified radiologist, whereas Dr. Sargent, who read the [same] x-ray as negative, is both a B-reader and a [B]oard-certified radiologist." *Id*. The administrative law judge properly accorded greater weight to the numerical superiority of the negative x-ray readings by physicians with superior qualifications. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Thus, we reject claimant's assertions that the administrative law judge erred by "relying almost solely on the qualifications of the physicians" who provided negative x-ray readings, and that the administrative law judge erred by placing "substantial weight on the numerical superiority" of the negative x-ray readings. Moreover, we reject claimant's assertion that the administrative law judge selectively analyzed the x-ray evidence of record. Therefore, we hold that substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *See Woodward, supra*; *Fitts, supra*; *Wetzel, supra*.

[3]Dr. Wicker, who is a B-reader, and Dr. Sargent, who is a B-reader and a Board-certified radiologist, read the October 4, 1993 x-ray as negative for pneumoconiosis. Director's Exhibits 13, 14. Whereas Dr. Bushey, who is not a B-reader or a Board-certified radiologist, read the April 15, 1997 x-ray as positive for pneumoconiosis, Director's Exhibit 37, Dr. Sargent reread the same x-ray as negative, Director's Exhibit 40.

Next, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). We disagree. The administrative law judge considered the relevant medical opinions of Drs. Bushey and Wicker. Whereas Dr. Bushey opined that claimant suffers from pneumoconiosis, Director's Exhibit 37, Dr. Wicker opined that claimant does not suffer from pneumoconiosis, Director's Exhibit 11. The administrative law judge properly discredited the opinion of Dr. Bushey because his diagnosis of pneumoconiosis was based in part on a positive interpretation of an x-ray that was subsequently reread as negative by a physician with superior qualifications.[4] *See Winters v. Director, OWCP*, 6 BLR 1-877, 881 n.4 (1984). Thus, we reject claimant's assertion that the administrative law judge erred in discrediting Dr. Bushey's opinion.[5] Moreover, since the administrative law judge, within a

[4]The administrative law judge stated that "Dr. Bushey diagnosed pneumoconiosis based on his reading of a chest x-ray which was controverted by a more qualified physician." Decision and Order at 7. As previously noted, whereas Dr. Bushey, who is not a B-reader or a Board-certified radiologist, read the April 15, 1997 x-ray as positive for pneumoconiosis, Director's Exhibit 37, Dr. Sargent, who is a B-reader and a Board-certified radiologist, reread the same x-ray as negative, Director's Exhibit 40.

[5]Claimant also asserts that the administrative law judge erred in discrediting Dr. Bushey's medical opinion, which is based in part on a positive x-ray reading, because the administrative law judge found the x-ray evidence of record to be negative for pneumoconiosis. The administrative law judge stated that "Dr. Bushey diagnosed pneumoconiosis based on his reading of a chest x-ray which...is outweighed by the x-ray evidence of record as a whole." Decision and Order at 7. An administrative law judge must consider a medical report as a whole, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984), and may not discredit an opinion merely because it is based on an x-ray interpretation which is outweighed by the other x-ray interpretations of record, *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986); *cf. Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Nonetheless, since the administrative law judge provided a valid alternate basis for discrediting the opinion of Dr. Bushey, *see Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), in that he discredited Dr. Bushey's opinion because Dr. Bushey's diagnosis of pneumoconiosis was based in part on a positive interpretation of an x-ray that was subsequently reread as negative by a physician with superior qualifications, *see Winters v. Director, OWCP*, 6 BLR 1-877, 881 n.4 (1984), we hold that the administrative law judge's error in this regard is harmless, *see Larioni v. Director,*

proper exercise of his discretion, discredited the only medical opinion of record that could establish the existence of pneumoconiosis, we hold that substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

OWCP, 6 BLR 1-1276 (1984).

Since claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement, we hold that the administrative law judge properly denied benefits under 20 C.F.R. Part 718.[6] *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *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.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[6]In view of our disposition of the case on the merits at 20 C.F.R. §718.202(a), we decline to address claimant's contentions at 20 C.F.R. §§718.203, 718.204(c) and 718.204(b). *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Claimant's contention that the administrative law judge erred in failing to considered the evidence in accordance with *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), under 20 C.F.R. §725.309 is misplaced inasmuch as claimant filed a request for modification, not a duplicate claim. *Compare* 20 C.F.R. §725.309 *with* 20 C.F.R. §725.310. In any event, the administrative law judge did not need to consider the newly submitted evidence to determine whether the evidence is sufficient to establish a change in conditions at 20 C.F.R. §§718.203 and 718.204 because the administrative law judge's finding of no pneumoconiosis on the merits at 20 C.F.R. §718.202(a) precludes entitlement to benefits. *See Trent, supra*; *Perry, supra*.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge