BRB No. 00-0893 BLA

ERNEST BARKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ADDINGTON ENTERPRISES, 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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Lois A. Kitts (Baird, Baird, Baird & Jones, P.S.C.), Pikeville, Kentucky, for employer.

Mary Forrest-Doyle (Judith E. Kramer, Acting 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: HALL, Chief Administrative Appeals Judge, DOLDER, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-0932) of Administrative Law Judge Daniel J. Roketenetz, 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).[1] After accepting the parties stipulation to eighteen years of coal mine employment, the administrative law judge found that claimant did not establish that he suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) or that he is totally disabled pursuant to 20 C.F.R. §718.204(c) (2000).[2] Accordingly, the administrative law judge denied benefits. On appeal, claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis under Section 718.202(a)(1) and (a)(4) (2000) and total disability under Section 718.204(c)(4) (2000). In response, employer argues that the administrative law judge's denial is supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), did not file a brief on the merits on this appeal.[3]

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[1]This claim was filed on September 17, 1997. Director's Exhibit 1.

[2]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 65 Fed. 80,045-80,107(2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]We affirm, as unchallenged on appeal, the administrative law judge's findings on the length of claimant's coal mine employment, that the existence of pneumoconiosis is not established under 20 C.F.R. §718.202(a)(2) and (a)(3) and that total disability is not established under 20 C.F.R. §718.204(c)(1)-(3)(2000). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Colombia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao,* No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 9, 2001, to which all the parties have responded.[4] Based on the brief submitted by the parties and

[4]Claimant asserts that the new regulations affect the resolution of this claim and that the new regulations should be implemented. The Director, Office of Workers' Compensation Programs (the Director), asserts that the regulations at issue in the lawsuit do not affect the outcome of this case. Employer contends that the regulations at issue, if applied, will impact this claim. Employer also states that the case must be stayed for the duration of the briefing, hearing, and decision schedule in accordance with the preliminary injunction of the United States District Court for the District of Colombia or the case must be remanded to the district director to allow the parties to develop evidence in light of the new regulations. The disposition of the present appeal concerns the administrative law judge's application of 20

our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of 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 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 pneumoconiosis, that the

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C.F.R. §§718.202(a)(1) and (a)(4) and 718.204(c)(4)(2000). Inasmuch as this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit which has recognized the distinction between "clinical" and "legal" pneumoconiosis, the latent and progressive nature of the disease, and that coal mine dust may cause an obstructive lung disease, standards that have been codified in the amended Part 718 regulations, the outcome of the present case is not affected by the new regulations. 65 Fed. Reg. 80048 (2000) (to be codified at 20 C.F.R. §718.201); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Crace v. Kentland-Elkhorn Coal Corp.*, 109 F.3d 1163, 21 BLR 2-73 (6th Cir. 1997); *Peabody Coal Co. v. Holskey*, 888 F. 2d 440, 13 BLR 2-95 (6th Cir. 1989). Additionally, since the revised quality standards requiring that special consideration be given to the report of a miner's treating physician apply only to evidence developed after January 19, 2001, claimant's contention that the Board should stay this appeal because the record contains evidence from his treating physician is without merit. *See* 65 Fed. Reg 80046 (2000) (to be codified at 20 C.F.R. §718.101(b)).

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 & Sons,* 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Perry v. Director, OWCP,* 9 BLR 1-1 (1986)(*en banc*).

Under Section 718.202(a)(1) (2000), the sole allegation of error raised by claimant is that the administrative law judge erred in "going by the number of chest x-rays read as positive rather than the quality of readers."[5] Claimant's Brief at 1. We reject claimant's contention. In resolving the conflicting x-ray interpretations of record, the administrative law judge referred to both the quantity of positive and negative readings and the qualifications of the physicians who performed the readings. The administrative law judge rationally concluded that the preponderance of readings by "experts" was negative, inasmuch as of the thirty-nine interpretations of record, twenty six readings by dually qualified readers were negative, while only four were positive. Decision and Order at 6; Director's Exhibits 9, 10, 11, 29, 30, 32-37, 39, 40, 40A, 43-46, 48 ; Claimant's Exhibit 2; Employer's Exhibit 1, 3-5; *see Woodward v. Director, OWCP,* 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Consequently, we affirm the administrative law judge's finding that the x-ray evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) (2000).

Under Section 718.204(a)(4) (2000), claimant argues that the administrative law judge erred in giving more weight to non-examining physicians than to the examining physicians who diagnosed pneumoconiosis and in not giving more weight to Dr. Sundaram's opinion based upon his status as claimant's treating physician. Although the administrative law judge could have accorded greater weight to the opinion of Dr. Sundaram because he is claimant's treating physician, this is only one of the factors to be considered in evaluating a medical opinion. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6thCir. 1993); *Tedesco v. Director, OWCP,* 18 BLR 1-103 (1994). The administrative law judge within his discretion gave less weight to the opinions of Drs. Sundaram, Wells, Younes, and Wright because they did not consider claimant's history of tuberculosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 10; Director's Exhibits 9, 37, 42, 48;

[5]Claimant also states that x-rays dated October 10, 1997, March 9, 1998, April 10, 1998, and July 16, 1998 were read as positive for pneumoconiosis. The identification of evidence which supports claimant's burden of proof does not constitute an allegation of error sufficient to invoke Board review. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP,* 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Claimant's Exhibits 2, 3. Moreover, the administrative law judge properly gave less weight to Dr. Well's opinion because he did not consider claimant's smoking history. *See Clark, supra*; Decision and Order at 10; Director's Exhibit 37.

Further, the administrative law judge noted that Dr. Fritzhand considered claimant's history of tuberculosis and permissibly gave more weight to the contrary opinions of Drs. Dahhan and Broudy, who also examined claimant, because of their superior qualifications and because their opinions are supported by the objective medical evidence of record and the opinion of Dr. Fino, who reviewed claimant's medical records. *See Clark, supra*; *Fields v. Island Creek Coal Co.,* 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-29 (1984); Decision and Order at 10; Director's Exhibits 29, 40; Employer's Exhibits 6, 10. We affirm, therefore, the administrative law judge's finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Inasmuch as claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement, an award of benefits is precluded under 20 C.F.R. Part 718 (2000). *Anderson v. Valley Camp of Utah, Inc.* 12 BLR 1-111(1989)*; Trent, supra; Perry, supra.*

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge