BRB No. 00-0899 BLA

PAUL HOISKA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
APOGEE COAL COMPANY	)	
	)	
and	)	
	)	
ARCH MINERAL CORPORATION	)	DATE ISSUED:
	)	
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 of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Ronald C. Cox (Johnnie L. Turner, P.S.C.), Harlan, Kentucky, for claimant.

Denise M. Davidson (Barrett, Haynes, May, Carter & Roark, P.S.C.), Hazard, Kentucky, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order (1999-BLA-1241) of Administrative Law Judge Donald W. Mosser 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).[2] The administrative law judge found that the parties agreed that claimant established at least twenty-eight years of qualifying coal mine employment and total respiratory disability pursuant to 20 C.F.R. §718.204(c)(4) (2000), but that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2000). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in weighing the evidence of record pursuant to Sections 718.202(a)(4) and 718.204(b) (2000). Employer responds urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds, declining to submit a brief on appeal.[3]

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[1]Claimant is Paul Hoiska, the miner, who filed a claim for benefits on July 28, 1998. 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. Reg. 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 the administrative law judge's findings regarding the length of the miner's coal mine employment and pursuant to 20 C.F.R. §718.202(a)(1)-(3) (2000) as unchallenged on appeal. *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 Columbia 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 claimant, employer and the Director have responded.[4] Having considered the briefs submitted by the parties, as well as the record in this case, 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 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 pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988);

[4]Claimant asserts that the amended regulations would affect the outcome of the case. The amendments to the regulations cited by claimant at 20 C.F.R. §718.104(d) apply only to claims filed after January 19, 2001, and thus do not apply to the instant claim. Although claimant also argues that 20 C.F.R. §§718.201(a)(2), 718.201(c), 718.204(a) and 718.20(d)(5), as amended, affect the outcome of the case, claimant has not demonstrated, and we cannot discern, how the administrative law judge's analysis and weighing of the evidence is impacted by the revisions to this regulation. Employer too, asserts that the regulations would, if applied, have an effect on the outcome of the case. Employer states that the amended regulations should not be applied because the claim was filed prior to the effective date of the amendments and that the case should be held in abeyance until there has been a final determination concerning the applicability of the amended regulations or the claim should be remanded to the district director for the development of additional evidence in light of the new regulations. The Director, Office of Workers' Compensation Programs, asserted that the regulations at issue in the lawsuit do not affect the outcome of the case.

Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Failure to prove any of these requisite elements compels a denial of benefits. *See Anderson*, *supra*; *Baumgartner*, *supra*. Additionally, all elements of entitlement must be established by a preponderance of the evidence. *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence and contain no reversible error therein. Initially, claimant contends that the administrative law judge erred in failing to assign greater weight to the opinions of Drs. Baker, Younes, Westerfield and Fleenor when considering whether the medical opinions established that claimant suffers from pneumoconiosis. *See* 20 C.F.R. §718.202(a)(4) (2000); Claimant's Brief at 5-8. The record contains the medical opinions of Drs. Westerfield, Younes, Fleenor and Baker, all of whom diagnosed pneumoconiosis, as well as the opinions of Drs. Powell, Lockey, Jarboe and Broudy, all of whom opined that claimant does not have pneumoconiosis. Claimant's Exhibit 1; Director's Exhibits 14, 26, 27, 29, 31; Employer's Exhibit 3.

As trier of fact, the administrative law judge acted within his discretion in giving the opinions of Drs. Westerfield and Younes little weight because they did not indicate the underlying bases for their conclusions. Decision and Order at 12-13; Claimant's Exhibit 1; Director's Exhibit 29; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). Dr. Westerfield diagnosed "coal workers' pneumoconiosis, category 1/0" and "Chronic Obstructive Pulmonary Disease" without providing any further discussion of his diagnosis. Claimant's Exhibit 1.[5] Dr. Younes, in response to questions on a form letter, indicated that claimant has an occupational lung disease which was caused by his coal mine employment. Director's Exhibit 29. The only basis provided by Dr. Younes for his opinion was that claimant has "severe COPD that is caused by his smoking history [and] his 23 yr. work in the coal mines." *Id; Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989) (*en banc*).

The administrative law judge further acted within his discretion in finding Dr. Fleenor's opinion, that claimant "might" have pneumoconiosis, to be equivocal. Decision and Order at 12; Director's Exhibit 26; Employer's Exhibit 2 at 26; *Lafferty, supra; Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Additionally, claimant argues that Dr. Fleenor's opinion is entitled to greater weight because he is claimant's treating physician.

[5]A credible medical opinion which establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202 (2000) must be based on more than x-ray evidence. *See* 20 C.F.R.§718.202(a)(4) (2000); *Anderson v. Valley Camp of Utah, Inc.* 12 BLR 1-111 (1989).

Claimant's Brief at 6. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises, has held that it is "clearly established that opinions of treating physicians are entitled to greater weight than those of non-treating physicians." *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). In the instant case, however, the administrative law judge correctly determined that, notwithstanding Dr. Fleenor's status as claimant's treating physician, his opinion could not be relied upon because it was equivocal and he properly accorded it less weight. Decision and Order at 9, 12; *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Lafferty, supra; Justice, supra.* Consequently, we affirm the administrative law judge's weighing of Dr. Fleenor's opinion.

Further, the administrative law judge acted within his discretion in assigning Dr. Baker's opinion less weight because the physician's conclusion that claimant has pneumoconiosis is based solely on an x-ray interpretation and coal dust exposure and the administrative law judge found the x-ray evidence to be negative for the existence of pneumoconiosis. Decision and Order at 12; Director's Exhibit 14; *Lafferty, supra; Clark, supra.* Claimant contends that Dr. Baker's opinion is well-reasoned and well-documented because he obtained claimant's history, performed a physical examination, and obtained objective test results from claimant. Claimant's Brief at 7. Although Dr. Baker's opinion indicates that he examined claimant and obtained information concerning his medical condition, Dr. Baker indicates in his report that he determined that claimant has pneumoconiosis on the basis of his x-ray finding and the fact that he had coal dust exposure. Director's Exhibit 14. Because Dr. Baker does not provide any other explanation for his finding that claimant has pneumoconiosis, we affirm the administrative law judge's weighing of Dr. Baker's opinion. Decision and Order at 12; *Lafferty, supra; Clark, supra.*

Claimant also argues that the opinions of Drs. Baker and Younes should be given "great weight" because they are truly "independent evaluations and opinions." Claimant's Brief at 5-6. While the administrative law judge need not accept the opinion of any particular medical witness or expert, he must weigh all the evidence and draw his own conclusions and inferences. *Lafferty, supra.* In the instant case, the administrative law judge provided specific reasons for his weighing of the opinions of Drs. Baker and Younes which are supported by the evidence of record. Decision and Order at 12-13. Consequently, we reject claimant's contention that the administrative law judge is required to give greater weight to the opinions of Drs. Baker and Younes and affirm his weighing of those opinions.

Inasmuch as the administrative law judge provided adequate rationale for his decision to accord less weight to the medical opinions that supported a finding of the existence of pneumoconiosis and because claimant does not challenge the administrative law judge's weighing of the opinions of Drs. Powell, Lockey, Jarboe and Broudy, all of whom opined that the miner does not have pneumoconiosis, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000). Additionally, inasmuch as claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement pursuant to 20 C.F.R. Part 718 (2000),

we need not address claimant's arguments regarding the existence of total disability due to pneumoconiosis. We affirm, therefore, the administrative law judge's denial of benefits.

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

SO ORDERED.

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge