BRB No. 00-0903 BLA

CHARLIE MOORE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Glen B. Rutherford (Lockett, Slovis, Rutherford & Weinstein), Knoxville, Tennessee, for claimant.

Helen H. Cox (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: DOLDER and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-0330) of Administrative Law Judge Richard T. Stansell-Gamm 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] The administrative law

[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 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.

judge noted that this case involves a request for modification, and stated that to avoid any prejudice to claimant, he would review the entire record. The administrative law judge credited claimant with "about eleven years" of coal mine employment and found the evidence insufficient to establish the existence of pneumoconiosis. Accordingly, he denied benefits.

On appeal, claimant asserts that the administrative law judge erred in his evaluation of the x-ray evidence and the medical opinion evidence. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of benefits.[2]

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 Ass'n 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 the Director has responded. Claimant has not responded to this Order.[3] The Director states that application of the amended regulations will not affect this case. Based on the brief submitted by the Director, and our review, we hold that the disposition of this

[2] Inasmuch as the administrative law judge's length of coal mine employment finding and his finding that the existence of pneumoconiosis is not established pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3) (2000), have not been challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 9, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

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).

Initially, we consider claimant's assertions concerning the administrative law judge's consideration of the x-ray evidence. Claimant asserts that the administrative law judge relied upon the numerical superiority of the negative x-rays, although he is not required to do so. Claimant also notes that the administrative law judge failed to determine whether the x-rays of record are in substantial compliance with 20 C.F.R. §718.201(2000).

In considering the x-ray evidence, the administrative law judge summarized the nine interpretations of seven films contained in the record. The administrative law judge found that the existence of pneumoconiosis is not established by x-ray evidence, since none of the x-ray interpretations are positive for pneumoconiosis. Decision and Order at 8.

As the administrative law judge found, all nine x-ray interpretations of record are negative for pneumoconiosis. *See* Director's Exhibits 7, 16, 17, 29; Claimant's Exhibit 1. Claimant bears the burden of establishing the elements of entitlement. *See* 20 C.F.R. §§718.403(2000), 725.103. Inasmuch as all of the x-ray evidence is negative for pneumoconiosis, we affirm the administrative law judge's finding as it is supported by substantial evidence. Since the record does not contain any x-ray evidence which would support claimant's burden of establishing the existence of pneumoconiosis, we reject claimant's assertions regarding the administrative law judge's weighing of the x-ray evidence. *See* 20 C.F.R. §718.202(a)(1).

Claimant also challenges the administrative law judge's weighing of the medical opinion evidence. Claimant cites case law regarding weighing of the medical opinion evidence, and contends that the administrative law judge erred by failing to rely on Dr. Rehm's opinion because he examined claimant most recently.

In evaluating the medical opinion evidence, the administrative law judge detailed the medical opinions of record.[4] The administrative law judge found that Dr. Vranian did

[4] In 1995, Dr. Mansour opined that claimant's lungs were clear. Director's Exhibit

not render a pulmonary diagnosis, that Drs. Mansour and Hudson clearly concluded that claimant does not have pneumoconiosis, that Dr. Seargeant ultimately did not diagnose pneumoconiosis, and that Dr. Rehm's opinion is too equivocal to definitively establish the presence of pneumoconiosis. Therefore, the administrative law judge determined that the medical opinion evidence fails to establish the existence of pneumoconiosis.

We hold that the administrative law judge, who is charged with evaluating the

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29. In 1995, Dr. Seargeant examined claimant and opined that he did not have pneumoconiosis. Director's Exhibit 29. Dr. Seargeant treated claimant during 1997 for several non-pulmonary problems, diagnosed chronic obstructive pulmonary disease, and indicated that claimant "probably has pneumoconiosis." Director's Exhibit 29. Dr. Seargeant treated claimant in 1998 for chronic obstructive pulmonary disease. Director's Exhibit 7. Dr. Hudson examined claimant in 1998 and diagnosed chronic obstructive bronchitis/asthma, noted that claimant's airway obstruction improves after inhalation of the bronchodilator, and opined that claimant's condition is due to intrinsic asthma and smoking. Director's Exhibit 14. In January 1999, claimant was examined by Dr. Vranian, who opined that claimant's chest was clear. Claimant's Exhibit 1. Claimant was examined by Dr. Rehm in March 1999. Dr. Rehm diagnosed emphysema, which he noted is the most common problem resulting from coal dust exposure, and he opined that claimant's emphysema is possibly related to coal dust exposure, possibly related to his cigarette smoking history. Claimant's Exhibit 2. Dr. Rehm examined claimant again in August 1999, and diagnosed severed obstructive lung disease which may result from a combination of his smoking and his coal dust exposure. Claimant's Exhibit 4.

evidence and determining the credibility of the medical opinions, *see Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), permissibly determined that Dr. Rehm's opinion regarding the existence of pneumoconiosis is too equivocal to support a finding of pneumoconiosis, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Worrell v. Consolidation Coal Co.*, 8 BLR 1-158 (1985). Inasmuch as we affirm the administrative law judge's finding that Dr. Rehm's opinion is insufficient to support claimant's burden of establishing the existence of pneumoconiosis, we need not address claimant's assertion that Dr. Rehm's opinion is entitled to greater weight based on its recency, as such a finding would not affect the outcome of the case. Since claimant has not challenged the administrative law judge's weighing of any of the other medical opinions, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(4).

Inasmuch as we have affirmed the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis, one of the essential elements of entitlement at Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm 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