BRB No. 00-0930 BLA

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| BUFORD C. DUNBAR, SR. | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| CONSOLIDATION COAL COMPANY | ) | DATE ISSUED: |
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| 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 Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Buford C. Dunbar, Sr., Clear Creek, West Virginia, *pro se.*

Mary Rich Maloy and Ann B. Rembrandt (Jackson & Kelly PLLC), Charleston, West Virginia, 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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order (99-BLA-0036) 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).[2] The administrative law judge credited claimant with twenty years

[1] Claimant was not represented by counsel at the hearing before the administrative law judge. The administrative law judge, however, questioned claimant regarding his intention to proceed without an attorney, and afforded him the opportunity to submit evidence on his own behalf, testify, provide statements and question witnesses. Consequently, there was a valid waiver of claimant's right to representation and the hearing before the administrative law judge was properly conducted. 20 C.F.R. §725.362(b) (2000); *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984).

[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

of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718 (2000), based on claimant's January 22, 1998 filing date. In weighing the medical evidence of record, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). Accordingly, the administrative law judge denied benefits. In response to claimant's appeal, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that he will not file a response brief in this appeal.[3]

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 amended 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 16, 2001, to which all the parties have responded. The Director asserts that the amended regulations at issue in the lawsuit do not affect the outcome of this case. Employer initially asserts that the amended regulations should not be applied retroactively to cases before the Board. In addition, employer argues that this case should be held in abeyance pending the outcome of the lawsuit inasmuch as the amended version of 20 C.F.R. §718.201(c) could affect the outcome of this case. Lastly, employer contends that if the new regulations are to be applied, the proper procedure is to remand the case to the Office of Workers' Compensation Programs for the parties to develop evidence responsive to the new regulations. In his response to the

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regulations.

[3] The parties do not challenge the administrative law judge's decision to credit claimant with twenty years of coal mine employment. Inasmuch as this finding is not adverse to claimant, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Board's Order, claimant requests that the case be held in abeyance in order that the amended definitions and regulations may be used to evaluate the evidence. After considering the briefs submitted by the parties, and reviewed the record, we hold that the ultimate disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). If the findings of fact and conclusions of law of the administrative law judge 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 under Part 718, claimant must establish the existence of 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 (2000); *Hobbs v. Clinchfield Coal Co.* [*Hobbs II*], 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Id.*

After consideration of the administrative law judge's Decision and Order and the relevant evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. The administrative law judge, in the instant case, permissibly determined that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (2000). *See Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). In his consideration of the evidence pursuant to Section 718.202(a)(1) (2000), the administrative law judge correctly determined that the record contains multiple readings of six x-ray films, dated between February 21, 1992 and April 27, 1999. Decision and Order at 5-8. Of these films, the administrative law judge found that the April 27, 1999 x-ray film was unequivocally interpreted as positive for the existence of pneumoconiosis, Claimant's Exhibit 1, whereas the x-ray films dated February 21, 1992, November 6, 1997, September 2, 1998 and March 3, 1999, were unequivocally interpreted as negative for the existence of pneumoconiosis. Decision and Order at 8; Director's Exhibits 19, 21; Employer's Exhibits 1, 2, 5, 8, 10, 11, 14. Lastly, the administrative law judge found that the March 4, 1998 x-ray film was read as

positive for pneumoconiosis by Drs. Patel and McFarland, both of whom are dually qualified as Board-certified in Radiology and B readers, and the film was also read as negative for pneumoconiosis by Drs. Cole, Wiot, Spitz, Wheeler and Scott, all of whom are also dually qualified physicians. Decision and Order at 8; Director's Exhibits 9, 12, 20; Employer's Exhibits 3, 6, 15.

In weighing the March 4, 1998 x-ray film, the administrative law judge found that the preponderance of the interpretations were negative for the existence of pneumoconiosis, and, therefore, reasonably exercised his discretion as fact-finder in concluding that the x-ray film was negative for pneumoconiosis. Decision and Order at 8; *Edmiston v. F & R Coal Co.*, 14 BLR 1-710 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984), *aff'd*, 806 F.2d 258 (4th Cir.1986)(table). Weighing the x-ray evidence as a whole, the administrative law judge concluded that five of the six x-ray films were negative for the existence of pneumoconiosis and, therefore, reasonably found that the preponderance of the x-ray evidence was negative for the existence of pneumoconiosis. Decision and Order at 8; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Edmiston, supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Consequently, we affirm the administrative law judge's finding that the x-ray evidence of record failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) (2000).

In addition, we affirm the administrative law judge's determination that claimant has not established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3) (2000). The administrative law judge properly found that there is no biopsy or autopsy evidence of record and, therefore, that claimant has not established the existence of pneumoconiosis under Section 718.202(a)(2) (2000). Decision and Order at 5; 20 C.F.R. §718.202(a)(2) (2000). In addition, he properly found that claimant was not entitled to the presumptions set forth at Section 718.202(a)(3) (2000), *i.e.*, there is no evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304 (2000); the claim was not filed prior to January 1, 1982, *see* 20 C.F.R. §718.305(e) (2000); and the instant case involves a living miner's claim, *see* 20 C.F.R. §718.306(a) (2000). Decision and Order at 5; 20 C.F.R. §718.202(a)(3) (2000).

With respect to Section 718.202(a)(4) (2000), the administrative law judge properly considered the entirety of the medical opinion evidence of record and reasonably concluded that the preponderance of the evidence did not establish the existence of pneumoconiosis. *Perry, supra*. In so finding, the administrative law judge acted within his discretion as fact-finder in concluding that the opinion of

Dr. Rasmussen, that claimant suffered from pneumoconiosis, was outweighed by the contrary medical opinions of Drs. Castle, Fino, Dahhan, Tuteur and Zaldivar, that claimant did not have an impairment related to his coal mine employment. Decision and Order at 21; *compare* Director's Exhibit 9 with Employer's Exhibits 1, 4, 6, 7, 9, 10, 12, 13, 16; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Specifically, while finding that all of the aforementioned medical opinions were well-documented and well-reasoned, nevertheless, the administrative law judge found the opinions of Drs. Castle and Zaldivar, that claimant's pulmonary condition was not related to his coal mine employment, entitled to greater weight, based on his determination that they provided a more thorough analysis of claimant's condition. *Id*. The administrative law judge found that the opinions of Drs. Castle and Zaldivar, each of whom based his conclusions on physical examinations of the miner and a review of all of the other medical evidence of record, including the March 1999 CT scan, were better reasoned inasmuch as these doctors fully discussed their rationale for finding that claimant's emphysema was due to cigarette smoking and not coal mine dust exposure. Decision and Order at 21; Employer's Exhibits 1, 6, 9, 10, 13, 16; *Hicks, supra*; *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993); *Clark*, *supra*; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Lucostic v. United States Steel Corp.*, 8 BLR 1-146 (1985).

Furthermore, the administrative law judge reasonably exercised his discretion in finding that the opinion of the West Virginia Occupational Pneumoconiosis Board was entitled to little probative weight as it did not include an adequate rationale for its conclusion that claimant was suffering from pneumoconiosis. Decision and Order at 21; Claimant's Exhibit 1; *Clark, supra*. Inasmuch as the administrative law judge rationally considered all of the medical opinion evidence and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we affirm his finding that the weight of the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000).

Moreover, we affirm the administrative law judge's finding that the preponderance of the medical evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4) (2000) as it is supported by substantial evidence and in accordance with law. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000). Claimant's failure to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (2000) or 65 Fed. Reg. 80,048-80,049, an essential element of entitlement, precludes an

award of benefits under Part 718. *Compton, supra; Trent, supra; Perry, supra.*

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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge