BRB No. 00-0962 BLA

KENNETH E. BRASHARS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BIZWIL, INCORPORATED	)	DATE ISSUED:____________
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 on Remand of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Joseph Kelly (Monhollon & Kelley), Madisonville, Kentucky, for claimant.

Mark E. Solomons (Greenberg Traurig LLP), Washington, D.C., for employer.

Edward Waldman (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 and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (96-BLA-0206) of Administrative Law Judge Mollie W. Neal denying benefits on a duplicate 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] This is the second time this case has been before the Board. In her initial Decision and Order, the administrative law judge determined that claimant had established a material change in conditions, but further found that the evidence of record, as a whole, was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2000).[2] Upon consideration of claimant's appeal, the Board affirmed the administrative law judge's findings under Section 718.202(a)(2)-(4)(2000), but vacated the administrative law judge's finding under Section 718.202(a)(1)(2000), as the administrative law judge did not accurately characterize Dr. Bassali's qualifications. The case was remanded to the administrative law judge for reconsideration of Dr. Bassali's x-ray reading in light of his status as a B reader and a Board-certified radiologist. *Brashars v. Bizwil, Inc.*, BRB No. 98-0549 BLA (Jan. 8, 1999)(unpublished).

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[1]Claimant's first claim, filed on October 27, 1987, was denied by the district director on February 4, 1988. Director's Exhibits 30, 31. A second claim, filed on March 9, 1989, was denied by the district director on June 22, 1989. Director's Exhibit 30. There is no record that claimant appealed or further pursued benefits until he filed the instant claim on January 17, 1995. 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.

On remand, the administrative law judge determined that the existence of pneumoconiosis was not established under Section 718.202(a)(1)(2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4)(2000). In response, employer argues that the administrative law judge's denial of benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), declined to file a brief regarding the merits of claimant's appeal in this case.

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 16, 2001, to which all the parties responded asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Based on the briefs submitted by the parties, and 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. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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 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); *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*).

On remand, the administrative law judge summarized the x-ray evidence of record, noted the qualifications of the readers, and found "the greater weight of x-ray evidence to be negative for pneumoconiosis." Decision and Order at 4. Claimant argues that the administrative law judge erred in considering the x-ray readings submitted in conjunction

with claimant's prior claims and in failing to discuss the reports in which Dr. Wiot determined that the x-ray taken on March 16, 1995 was unreadable and Dr. Sargent stated that the x-ray was of very marginal quality. Claimant asserts that if the administrative law judge had excluded the readings of the March 16, 1995 film, Dr. Bassali's positive reading of the x-ray dated December 22, 1995, the most recent film of record, is sufficient to establish the existence of pneumoconiosis based upon Dr. Bassali's qualifications and the recency of the film.

Claimant allegations of error are without merit. Upon determining that claimant established a material change in conditions, the administrative law judge acted rationally in considering the merits of entitlement based upon a weighing of all of the evidence of record. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Regarding the quality of the x-ray dated March 16, 1995, the administrative law judge adequately addressed this issue inasmuch as she noted the determination made by Drs. Wiot, in contrast to the ILO/UC interpretations proffered by Drs. Sargent, Deal, and Pendergrass, and acted within her discretion in treating the latter as probative evidence regarding the existence of pneumoconiosis.[3] Decision and Order at 3; Director's Exhibits 13, 14; Employer's Exhibits 1, 3; *see Preston v. Director, OWCP*, 6 BLR 1-1229, 1-1233 (1984); *Wheatley v. Peabody Coal Co*., 6 BLR 1-1214, 1215-16 (1984). Moreover, the administrative law judge rationally determined that the interpretations of the x-rays of record did not support a finding of pneumoconiosis under Section 718.202(a)(1)(2000), as the preponderance of readings by highly qualified readers was negative for pneumoconiosis. Decision and Order at 4; *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).

Finally, claimant reiterates the arguments raised in his prior appeal concerning the administrative law judge's discrediting of the medical opinion in which Dr. Deal indicated that claimant has pneumoconiosis. The Board held that the administrative law judge acted within her discretion in according little weight to Dr. Deal's opinion, as it was equivocal . *Brashars v. Bizwil, Inc.*, BRB No. 98-0549 BLA (Jan.8, 1999)(unpublished), slip op. at 3. Inasmuch as there was no error in the Board's prior holding and there has been no change in applicable law, we decline to alter the prior disposition of this issue. *See Brinkley v. Peabody*

[3]Drs. Wiot and Sargent are dually qualified as B readers and Board-certified radiologists. Director's Exhibit 13; Employer's Exhibit 1. Dr. Pendergrass is a B reader. Employer's Exhibit 3. Dr. Deal has no special radiological qualifications. Director's Exhibit 14.

Coal Co., 14 BLR 1-147 (1990); *see also Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge