BRB No. 01-0834 BLA

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

Appeal of the Decision and Order of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Kenneth S. Stepp, Inverness, Florida, for claimant.

Rita Roppolo (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2000-BLA-0827) of Administrative Law Judge Larry W. Price, 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 judge found that claimant established six

[1]The Department of Labor has amended several of 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 20 C.F.R. Parts 718, 725, and 726 (2001). Unless otherwise noted, all citations are to the amended regulations.

years and nine months of coal mine employment and based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718 (2000).[2] Decision and Order at 6-7. On the merits, the administrative law judge found the evidence of record sufficient to establish the presence of total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000), but insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4) (2000) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000).[3] Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge did not properly weigh the x-ray evidence or the medical opinions of Drs. Adams and Bowers. Claimant also asserts that the administrative law judge erred in failing to weigh his hearing testimony and that of his wife under Section 718.202(a). The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the Decision and Order of the administrative law judge as it is rational and supported by substantial evidence.[4]

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

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[2]The record indicates that claimant filed a claim for benefits on October 12, 1995, which was denied by the district director on April 9, 1996 and February 25, 1997. Director's Exhibits 1, 22, 36. Claimant requested a formal hearing which was held on February 22, 1999, before Administrative Law Judge Jeffrey Tureck. After reviewing the record evidence, Judge Tureck remanded the case to the district director to obtain credible medical opinion evidence. Director's Exhibit 63. After considering the newly developed evidence, the district director again denied benefits on October 15, 1999 and May 17, 2000. Director's Exhibits 70, 73. On May 23, 2000, claimant again requested a formal hearing. Director's Exhibit 74. The case was transferred to the Office of Administrative Law Judges and assigned to Administrative Law Judge Larry W. Price (the administrative law judge). The administrative law judge conducted the hearing on February 2, 2001.

[3]The provision concerning total respiratory or pulmonary disability is now set forth in 20 C.F.R. §718.204(b). The regulation concerning the cause of the miner's totally disabling respiratory or pulmonary impairment now appears at 20 C.F.R. §718.204(c).

[4]We affirm the administrative law judge's findings with respect to the length of coal mine employment and with respect to 20 C.F.R. §718.202(a)(2) and (a)(3) (2000), as they are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

With respect to the administrative law judge's weighing of the x-ray evidence relevant to Section 718.202(a)(1), claimant argues that the administrative law judge erred in preferring the negative x-ray interpretation of one B reader over the positive reading of the same film by another B reader, without providing an adequate rationale. Claimant also contends that the positive x-ray interpretations submitted by Drs. Baker, Vaezy, and Mathur are sufficient to establish the existence of pneumoconiosis. These contentions are without merit. The administrative law judge weighed the conflicting interpretations of the x-rays of record and acted within his discretion in according determinative weight to the greater number of negative interpretations by physicians who are either B readers or Board-certified radiologists or who possess both qualifications.[5] Thus, the administrative law judge rationally found that claimant did not satisfy his burden of proof of establishing the existence of pneumoconiosis by a preponderance of the evidence. Decision and Order

[5]A B reader is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E) (2001); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135 n.16, 11 BLR 2-1 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

at 8-9; Director's Exhibits 13, 15, 16, 18, 19, 26-30, 40-42, 68, 69; *Director, OWCP v. Greenwich Collieries [Ondecko],* 512 U.S. 267, 18 BLR 2A-1 (1994); *Adkins v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992);[6] *Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.,* 11 BLR 1-113 (1988).

Claimant also asserts on appeal that Drs. Adams and Bowers opined that he is totally disabled; that the administrative law judge cannot reject the opinions of Drs. Adams and Bowers without explanation; and that the administrative law judge did not consider the hearing testimony of claimant and his wife. These contentions are also without merit. Inasmuch as Dr. Adams's and Dr. Bowers's diagnoses of a totally disabling impairment pertain to an element of entitlement that the administrative law judge found that claimant established, we need not address claimant's assertions in this regard. Furthermore, the administrative law judge provided reasons in support of his finding that the opinions of Drs. Adams and Bowers did not satisfy claimant's burden pursuant to Section 718.202(a)(4) (2000). Decision and Order at 10; Director's Exhibits 10, 49. Because claimant has not identified with specificity any error of fact or law in the rationales set forth by the administrative law judge, claimant has not properly invoked Board review of the administrative law judge's findings. *See Sarf v. Director, OWCP,* 10 BLR 1-119 (1987); *Fish v. Director, OWCP,* 6 BLR 1-107 (1983). We affirm, therefore, the administrative law judge's determination that the opinions of Drs. Adams and Bowers are insufficient to establish the existence of pneumoconiosis.

Finally, as the determination of the existence of pneumoconiosis requires supportive medical evidence, *see* 20 C.F.R. §718.202(c), the administrative law judge did not err by failing to consider the lay testimony when considering whether claimant established the existence of pneumoconiosis under Section 718.202(a) (2000). *See Trent, supra*. We affirm, therefore, the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis, an essential element of entitlement. Thus, we must also affirm the denial of benefits under Part 718. *See Trent, supra*; *Perry, supra*.

[6]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit inasmuch as claimant's most recent coal mine employment occurred in the Commonwealth of Virginia. *See* Director's Exhibit 2; *Shupe v. Director, OWCP,* 12 BLR 1-200 (1989)(*en banc*).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge