BRB No. 02-0768 BLA

BUSTER WELLS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BUFFALO MINING COMPANY	)	
	)	DATE
Employer-Respondent	)	ISSUED:_____
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	
		DECISION and ORDER

Appeal of the Decision and Order of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Dorothea J. Clark and Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Sarah M. Hurley (Howard Radzely, Acting 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 the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order (00-BLA-0820) of Administrative

Law Judge Robert J. Lesnick 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 instant case involves a duplicate claim filed on August 17, 1999.[2] After crediting claimant with twenty-three years of coal mine employment, the administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Although the administrative law judge found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (iii), he found the newly submitted evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iv). The administrative law judge, however, found that the newly submitted evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Because claimant failed to establish the existence of pneumoconiosis or that his total disability was due to pneumoconiosis, the administrative law judge found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Claimant also challenges the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers= Compensation Programs, has

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[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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits with the Social Security Administration (SSA) on May 31, 1973. Director's Exhibit 37. The SSA denied the claim on September 14, 1973, October 13, 1978 and January 29, 1979. *Id.* The Department of Labor denied the claim on February 4, 1980. *Id.* There is no indication that claimant took any further action in regard to his 1973 claim.

Claimant filed a second claim on June 28, 1994. Director's Exhibit 38. The district director denied the claim on November 14, 1994. *Id.* There is no indication that claimant took any further action in regard to his 1994 claim.

Claimant filed a third claim on August 17, 1999. Director's Exhibit 1.

filed a limited response, noting his agreement with claimant's contention that the administrative law judge erred in finding the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). In reply, employer contends that the administrative law judge properly found the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R.§725.309 (2000). Moreover, even if the evidence was sufficient to establish a material change in conditions, employer asserts that "a *de novo* review of the evidence establishes [claimant] has not proven the existence of pneumoconiosis, and has failed to establish a totally disabling pulmonary or respiratory impairment due to pneumoconiosis."

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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).

Claimant argues that the administrative law judge erred in finding the newly submitted x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Claimant contends that it was unfair for the administrative law judge to rely upon the "large number of negative x-rays the employer was able to generate." Claimant's Brief at 8. In his consideration of the x-ray evidence, the administrative law judge noted that an x-ray interpretation rendered by a B reader could be accorded greater weight. *See Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-68 (1985); Decision and Order at 14-15. The administrative law judge also noted that an x-ray interpretation rendered by a physician dually qualified as a B reader and Board-certified radiologist could be found entitled to greater weight than an interpretation rendered by a physician qualified as only a B reader. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 15. In his consideration of the newly submitted x-ray evidence, the administrative law judge stated that:

> An x-ray taken [on August 17, 1994] was interpreted as negative by all six dually qualified physicians interpreting the film. An x-ray taken September 9, 1999 was interpreted as positive by one reader with no special qualifications and one B-reader and was interpreted as negative by seven dually qualified physicians and two B-readers. A film taken February 12, 2000 was interpreted as positive by five B-readers and as negative by eleven dually qualified physicians and four B-readers. Considering both the quantity of the readings and the credentials of the interpreting physicians and giving the most weight to those interpretations by dually qualified physicians, I find the x-ray evidence is

negative for pneumoconiosis.

Decision and Order at 15.

Inasmuch as the preponderance of the x-ray readings rendered by the best qualified physicians (*i.e*, dually qualified physicians) is negative for pneumoconiosis, the administrative law judge properly found that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); Decision and Order at 17. In light of the fact that the administrative law judge did not rely solely upon the numerical superiority of the readings submitted by employer, but also considered the qualifications of the physicians submitting the interpretations, claimant's allegation, that the administrative law judge erroneously relied upon the large number of x-ray reports that employer was able to generate, is without merit. *See generally Woodward v. Director, OWCP,* 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Consequently, we affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

The administrative law judge did not address the x-ray evidence submitted in connection with claimant's previous claims. In connection with his 1973 claim, claimant submitted Dr. Pelaez's interpretation of a July 12, 1973 film. Although Dr. Pelaez found that the x-ray revealed "pneumoconiosis," Dr. Pelaez did not clearly identify the profusion of the x-ray. *See* Director's Exhibit 37-3. Consequently, this x-ray interpretation is not sufficiently classified to support a finding of pneumoconiosis under the regulations. *See* 20 C.F.R. §718.102.

In connection with his 1994 claim, claimant submitted two positive interpretations. Drs. Gaziano and Ranavaya interpreted claimant's August 17, 1994 x-ray as positive for pneumoconiosis. Director's Exhibits 37-12, 37-13. However, Drs. Gaziano and Ranavaya are only B readers, not Board-certified radiologists. *Id.* The administrative law judge properly found that five dually qualified physicians interpreted claimant's August 17, 1994 x-ray as negative for pneumoconiosis. Employer's Exhibits 4-7. Given the state of the evidence, we hold that the administrative law judge's failure to consider the previously submitted x-ray evidence was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Since there is no biopsy evidence of record, the administrative law judge properly found that claimant cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 14. Furthermore, the

administrative law judge properly found that claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3).[3] *Id*.

[3]Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, because this claim is not a survivor's claim, the Section 718.306 presumption does not apply. *See* 20 C.F.R. §718.306.

In his consideration of whether the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge found that two physicians, Drs. Ranavaya and Rasmussen, diagnosed pneumoconiosis. Decision and Order at 15. In his September 9, 1999 report, Dr. Ranavaya diagnosed pneumoconiosis based upon his positive interpretation of claimant's September 9, 1999 x-ray and claimant's history of coal dust exposure. Director's Exhibit 12. The administrative law judge permissibly accorded less weight to Dr. Ranavaya's diagnosis of pneumoconiosis because he found the x-ray evidence negative for pneumoconiosis.[4] *See generally Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000) (Where the sole basis for a doctor's diagnosis of pneumoconiosis has been rejected by the administrative law judge, the doctor's opinion cannot be credited); Decision and Order at 15; Director's Exhibit 12. Moreover, it is well established that occupational exposure is not evidence of pneumoconiosis. *See Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994).

In a report dated January 11, 2001, Dr. Rasmussen opined that claimant's disabling lung disease was attributable to his coal dust exposure and cigarette smoking. Claimant's Exhibit 6. The administrative law judge found that Dr. Rasmussen's diagnosis met the definition of pneumoconiosis. Decision and Order at 15; *see* 20 C.F.R. §718.201(a)(2). However, the administrative law judge discredited Dr. Rasmussen's finding of pneumoconiosis because he found that the doctor failed to explain how his objective findings supported his diagnosis. Decision and Order at 15. Inasmuch as no party challenges the administrative law judge's basis for discrediting Dr. Rasmussen's opinion, it is affirmed. The administrative law judge further found that the opinions of Drs. Ranavaya and Rasmussen that claimant suffered from pneumoconiosis were outweighed by the contrary opinions of Drs. Fino, Jarboe, Castle and Morgan. *Id.* at 16; Employer's Exhibits 2, 8, 11, 14-16. We, therefore, affirm the administrative law judge's finding that the newly submitted

[4]In the instant case, Dr. Ranavaya based his diagnosis of pneumoconiosis in part upon his positive interpretation of a September 9, 1999 x-ray. *See* Director's Exhibits 12, 16. In completing his x-ray report, Dr. Ranavaya did not indicate that he possessed any special radiological qualifications. In his consideration of whether claimant's September 9, 1999 x-ray was positive for pneumoconiosis, the administrative law judge found that although one B reader interpreted the x-ray as positive for pneumoconiosis, Director's Exhibit 14, two other B readers and seven dually qualified physicians interpreted this x-ray as negative for pneumoconiosis. Director's Exhibits 15, 26, 27, 29, 31; Employer's Exhibits 1, 3. The administrative law judge, therefore, found that claimant's September 9, 1999 x-ray was negative for pneumoconiosis. Decision and Order at 15.

medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

The administrative law judge did not consider medical opinion evidence submitted in connection with claimant's two previous claims. Although there was no medical opinion evidence submitted in connection with claimant's 1973 claim, there was one medical opinion submitted in connection with claimant's 1994 claim. In a report dated August 17, 1994, Dr. Ranavaya diagnosed pneumoconiosis "[b]ased on a 23 year long history of occupational exposure to dust in coal mining (all years spent underground) and radiological evidence of it." Director's Exhibit 38-10. As discussed, *supra*, the administrative law judge properly accorded less weight to Dr. Ranavaya's 1999 diagnosis of pneumoconiosis because he had found the x-ray evidence negative for pneumoconiosis. Dr. Ranavaya's 1994 diagnosis of pneumoconiosis is undermined for the same reason.[5] Consequently, we hold that, under the facts of this case, the administrative law judge's failure to consider Dr Ranavaya's earlier 1994 diagnosis of pneumoconiosis is harmless. *See Larioni*, *supra*.

Claimant, citing *Compton*, contends that the administrative law judge erred in failing to weigh all of the relevant evidence together pursuant to 20 C.F.R. §718.202(a). In *Compton*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. *See also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). However, inasmuch as the administrative law judge, in the instant case, properly found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), his findings conform to the Fourth Circuit holding in *Compton*.

In light of our affirmance of the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative

[5]Dr. Ranavaya interpreted claimant's August 17, 1994 x-ray as positive of pneumoconiosis. Director's Exhibit 38-12. At the time that he rendered his interpretation, Dr. Ranavaya indicated that he was a B reader. Although another B reader, Dr. Gaziano, also interpreted claimant's August 17, 1994 x-ray as positive for pneumoconiosis, Director's Exhibit 38-12, five dually qualified physicians, Drs. Wheeler, Scott, Kim, Wiot and Spitz, interpreted the film as negative for pneumoconiosis. Employer's Exhibits 4-7.

law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Consequently, we need not address claimant's contentions regarding the administrative law judge's findings pursuant to 20 C.F.R. §§725.309 (2000) and 718.204(c). *Larioni*, *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

PETER A. GABAUER, JR.
Administrative Appeals Judge