BRB No. 04-0431 BLA

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| MILLER RICE | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| SHAMROCK COAL COMPANY, INC. | ) | DATE ISSUED: 10/28/2004 |
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| and | ) | |
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| JAMES RIVER COAL 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 of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edward Collett, P.S.C.), Hyden, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2002-BLA-5390) of Administrative Law Judge Joseph E. Kane 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). The administrative law judge found, and employer stipulated to, at least thirty years of qualifying coal mine employment and, based on the date of filing, adjudicated the

claim pursuant to 20 C.F.R. Part 718.[1] Decision and Order at 2, 6; Hearing Transcript at 10; Director's Exhibit 42. The administrative law judge determined, after considering all of the evidence of record, that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 6-9. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1) and (4). Employer responds urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs has filed a letter indicating that he will not respond to the instant appeal.[2]

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).

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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.[3] Claimant's assertion that the administrative law judge failed to find the

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[1]Claimant filed his claim for benefits with the Department of Labor on February 14, 2001, which was denied by the district director on June 6, 2002. Director's Exhibits 2, 38. Claimant subsequently requested a formal hearing before the Office of Administrative Law Judges.

[2]The administrative law judge's length of coal mine employment determination as well as his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in the Commonwealth

existence of pneumoconiosis established lacks merit. The administrative law judge rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

The administrative law judge, in the instant case, considered the x-ray evidence of record and properly noted that the x-ray interpretations dated June 16, 2003, by Dr. Rosenberg who is a B-reader and Board-certified in internal medicine and pulmonary disease as well as being a professor of Medicine, and August 8, 2001, by Dr. Broudy who is a B-reader and Board-certified in internal medicine, were negative for the existence of pneumoconiosis. Decision and Order at 6-7; Employer's Exhibits 1, 2. The administrative law judge also noted that the interpretations dated May 23, 2001, by Dr. Hussain who has no special qualifications for the interpretation of x-rays, April 18, 2001, by Dr. Baker who is a B-reader and Board-certified in internal medicine, and December 19, 2001, by Dr. Alexander who is a B-reader and Board-certified radiologist, were positive for the existence of pneumoconiosis. Decision and Order at 6-7; Director's Exhibits 10, 11; Claimant's Exhibit 1. The administrative law judge concluded that based on the qualifications of the physicians the sum of the x-ray evidence does not compel a finding of pneumoconiosis. Decision and Order at 7.

The administrative law judge, within his discretion as fact-finder, rationally determined that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) based on the conflicting x-ray interpretations by readers with superior qualifications. Decision and Order at 7; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294 (2003); *Worhach v. Director,* OWCP, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Kuchwara*, 7 BLR 1-167. Consequently, the administrative law judge permissibly concluded that the claimant failed to carry his burden of proof to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) as the x-ray evidence of pneumoconiosis is not compelling in this case. *Ondecko,* 512 U.S. 267, 18 BLR 2A-1; *Chaffin*, 22 BLR 1-294.

Claimant further asserts that the administrative law judge failed to find the existence of pneumoconiosis established based upon the medical opinions of Drs. Baker and Hussain. Claimant's Brief at 4-5. We disagree. In determining if the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge properly

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of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 3, 5.

noted the entirety of the medical opinion evidence of record and rationally considered the quality of the evidence in determining whether the opinions of record are supported by the underlying documentation and adequately explained. *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Worhach*, 17 BLR 1-105; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark*, 12 BLR 1-149; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Kuchwara*, 7 BLR 1-167; Decision and Order at 7-9. The administrative law judge acted within his discretion, as fact-finder, in concluding that the opinion of Dr. Baker was insufficient to meet claimant's burden of proof as the physician relied on non-qualifying pulmonary function and blood gas studies[4] and offered an equivocal opinion as the physician found that claimant's pulmonary impairment may be due to welding fumes as well as coal dust exposure and Dr. Baker's positive interpretation of the x-ray was based on the conclusion that no other condition would account for the x-ray changes. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145 (1984); *Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984); *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984); *Stanley v. Eastern Associated Coal Corp.*, 6 BLR 1-1157 (1984); *see also Hutchens*, 8 BLR 1-16; Decision and Order at 8; Director's Exhibit 11.

Additionally, the administrative law judge rationally found the opinion of Dr. Hussain insufficient to establish the existence of pneumoconiosis as the opinion was not well reasoned or documented since the physician did not offer any other explanation for his diagnosis of pneumoconiosis other than his own x-ray interpretation and claimant's length of coal dust exposure and the results of the objective tests were normal. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach*, 17 BLR 1-105; *Trumbo*, 17 BLR 1-85; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark*, 12 BLR 1-149; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985); *Hutchens*, 8 BLR 1-16; Decision and Order at 8; Director's Exhibit 10. Therefore, contrary to claimant's assertion, the administrative law judge, in a proper exercise of his discretion, fully addressed the opinions of Drs. Baker and Hussain and rationally found that their opinions were insufficient to establish the existence of pneumoconiosis. Decision and Order at 8; Director's Exhibits 10, 11.

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[4]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

Moreover, the administrative law judge permissibly accorded greater weight to the opinion of Dr. Rosenberg, than to the contrary opinions of Drs. Baker and Hussain, as the physician offered well reasoned and documented opinion which is supported by the objective medical evidence of record. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Stephens*, 298 F.3d 511, 22 BLR 2-495; *Worhach*, 17 BLR 1-105; *Trumbo*, 17 BLR 1-85; *Lafferty*, 12 BLR 1-190; *Clark*, 12 BLR 1-149; *Fields*, 10 BLR 1-19; *Hutchens*, 8 BLR 1-16; Decision and Order at 8; Employer's Exhibit 5. We therefore affirm the administrative law judge's credibility determinations with respect to the medical opinion evidence as they are supported by substantial evidence and are in accordance with law.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Ondecko*, 512 U.S. 267, 18 BLR 2A-1; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge permissibly concluded that the evidence of record does not establish the existence of pneumoconiosis, claimant has not met his burden of proof on all the elements of entitlement. *Clark*, 12 BLR 1-149; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark*, 12 BLR 1-149; *Anderson*, 12 BLR 1-111; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis as it is supported by substantial evidence and is in accordance with law. *See Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge