BRB No. 97-1532 BLA

WORLEY GENE CHEEKS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KENTLAND ELKHORN COAL CORPORATION	)	
	)	
and	)	
	)	
THE PITTSTON COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Party-in-Interest	)	
	)	DECISION AND ORDER

Appeal of the Decision and Order - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Herbert Deskins, Jr., Pikeville, Kentucky, for claimant.

Lois A. Kitts (Baird, Baird, Baird & Jones, P.S.C.), Pikeville, Kentucky, for employer.

Jill M. Otte (Marvin Krislov, Deputy Solicitor for National Operations; 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, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (96-BLA-1123) of Administrative Law Judge Daniel J. Roketenetz 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 credited claimant with thirty-one years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718, based on claimant's December 12, 1994 application for benefits. Initially, the administrative law judge determined that employer was the properly named responsible operator, finding that the Kentucky Department of Mines and Minerals, for which claimant was employed as a mine safety inspector, did not meet the 20 C.F.R. §725.492(a) criteria for being found a responsible operator. Addressing the merits of entitlement, the administrative law judge found the medical evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's denial of benefits, generally arguing that the administrative law judge erred in finding the x-ray and medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4). In a Motion to Remand, the Director, Office of Workers' Compensation Programs (the Director), contends that the administrative law judge erred in his weighing of the medical opinion of Dr. Fritzhand under Section 718.202(a)(4), arguing that the administrative law judge erred in finding this opinion poorly documented and entitled to less probative weight. In response, employer urges affirmance of the administrative law judge's finding that the medical evidence is insufficient to establish the existence of pneumoconiosis and also urges affirmance of the denial of benefits. Employer, moreover, contends that the administrative law judge erred in finding it the properly named responsible operator and employer requests that the Board reverse this finding. In reply to employer's response brief, the Director urges the Board to reject employer's arguments regarding the responsible operator issue, asserting that employer improperly raised this issue in its response brief, rather than in a cross-appeal of the administrative law judge's Decision and Order.[1]

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 applicable law. 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).

[1] Inasmuch as the parties do not challenge the administrative law judge's decision to credit claimant with thirty-one years of coal mine employment, or his findings pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

With regard to the administrative law judge's finding at Section 718.202(a)(1), claimant generally challenges the administrative law judge's finding that the numerous negative interpretations by B readers and Board-certified radiologists substantially outweighed the sole positive x-ray reading by Dr. Musgrave.[2] The administrative law judge correctly set forth the x-ray evidence of record, finding that the record contains forty interpretations of twenty-five x-ray films, *see* Director's Exhibits 17, 18, 29, 32-37; Claimant's Exhibit 1; Employer's Exhibits 2, 3, of which only the September 24, 1996 film was read as positive by Dr. Musgrave, whose credentials are not contained in the record, *see* Claimant's Exhibit 1. Decision and Order at 7-8. The administrative law judge determined that greater weight would be accorded to those physicians with greater professional credentials, that is physicians who are either B readers or Board-certified in Radiology, or are dually qualified. Decision and Order at 8. The administrative law judge, therefore, found that the preponderance of the x-ray evidence, as reviewed by the better qualified physicians, failed to established the existence of pneumoconiosis pursuant to Section 718.202(a)(1).[3] *Id*.

Contrary to claimant's contention, the administrative law judge reasonably exercised his discretion in finding that the preponderance of the x-ray interpretations by the more qualified physicians was negative for the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-710 (1990); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Inasmuch as the administrative law judge weighed all of the relevant x-ray evidence, including the qualifications of the physicians providing these readings, we affirm his finding that claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). 20 C.F.R. §718.202(a)(1); *Woodward, supra; Edmiston, supra; Roberts, supra*.

In addition, claimant generally challenges the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), asserting that the administrative law judge erred in weighing the medical opinion of Dr. Musgrave. In addition, the Director has filed a Motion to Remand, asserting that the administrative law judge erred in finding the

[2] Claimant refers to Section 413(b) of the Act, 30 U.S.C. §923(b), in suggesting generally that the administrative law judge should have found the existence of pneumoconiosis established based on Dr. Musgrave's x-ray reading. *See* Claimant's Brief at 2. As the x-ray rereading prohibition of Section 413(b) of the Act applies only in claims filed before January 1, 1982, 30 U.S.C. §923(b), this provision has no application in the instant case.

[3] The administrative law judge found that the numerous negative x-ray interpretations by physicians who were either B readers or Board-certified radiologists outweighed the lone positive x-ray interpretation by Dr. Musgrave, whose credentials were not a part of the record. Decision and Order at 8.

medical opinion of Dr. Fritzhand poorly documented and, therefore, entitled to less probative weight.

In weighing the medical opinion evidence, the administrative law judge accorded greater weight to the medical opinions of Drs. Broudy, Fino and Chandler, which found that claimant was not suffering from coal workers' pneumoconiosis or an impairment arising out of his coal mine employment, finding that these opinions are better reasoned and better supported by the underlying evidence of record, than the contrary opinions of Drs. Fritzhand and Musgrave. Decision and Order at 11; compare Director's Exhibits 29, 36, 37; Employer's Exhibit 3 *with* Director's Exhibits 13-15, Claimant's Exhibit 1. In addition, the administrative law judge accorded greater weight to the opinions of Drs. Broudy and Fino, who are Board-certified in Internal Medicine and Pulmonary Diseases, based on their superior professional credentials. Decision and Order at 11; Employer's Exhibit 1.

We affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), inasmuch as the administrative law judge reasonably exercised his discretion as trier-of-fact, in according greater weight to the medical opinions of Drs. Broudy and Fino, based on their superior professional qualifications. *See Edmiston, supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge also reasonably credited these opinions, along with the supporting opinion of Dr. Chandler, Director's Exhibit 37, as better supported by the other evidence of record. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp*, 8 BLR 1-46 (1985); *Pastva v. The Youghiogheny & Ohio Coal Co.*, 7 BLR 1-829 (1985). Moreover, contrary to claimant's contention, the administrative law judge did not rely solely on the positive x-ray reading accompanying Dr. Musgrave's opinion diagnosing the existence of pneumoconiosis in according this opinion less probative weight. Rather, the administrative law judge reasonably accorded little weight to Dr. Musgrave's opinion inasmuch as the physician did not discuss claimant's smoking history in his consideration of claimant's condition.[4] *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985).

Lastly, contrary to the Director's contention, any error in the administrative law judge's finding that Dr. Fritzhand's opinion is poorly documented is harmless, inasmuch as the administrative law judge, in according greater weight to Drs. Broudy and Fino based on their superior professional qualifications, has provided a valid alternative basis for crediting the opinions of Drs. Broudy and Fino over that of Dr. Fritzhand, *see* discussion, *supra*. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v.*

[4] The administrative law judge noted that claimant testified at the hearing that he commenced smoking cigarettes in high school and quit in 1994. Decision and Order at 3; Hearing Transcript at 14. The administrative law judge also noted that claimant indicated that he had smoked one-half pack of cigarettes per day. *Id.*

Rochester & Pittsburgh Coal Co., 6 BLR 1-378 (1983). Consequently, we deny the Director's Motion to Remand and affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See Edmiston, supra; Wetzel*, *supra*; *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Inasmuch as we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a), a necessary element of entitlement under Part 718, an award of benefits is precluded.[5] *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Finally, employer, in its response brief, contends that the administrative law judge erred in finding that it was the properly named responsible operator, asserting that claimant's last coal mine employment was for the Kentucky Department of Mines and Minerals. Arguments in response briefs must be limited to those which respond to issues raised in petitioner's brief or those in support of the decision below. 20 C.F.R. §802.212(b). Inasmuch as employer's argument was not raised by claimant in his Petition for Review and brief nor is an argument supportive of the administrative law judge's ultimate disposition on the merits, we decline to address employer's contention as it has not been properly raised before the Board. *See Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984); *King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87 (1983).

[5] We decline to address claimant's contention that the administrative law judge erred in failing to find the evidence sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204 inasmuch as the administrative law judge did not reach that issue within his Decision and Order. In addition, contrary to claimant's contention, as raised in his Petition for Review, that the administrative law judge erred in failing to find the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309, the record is devoid of evidence that the instant case is a duplicate claim. Thus, the administrative law judge properly did not render a finding under Section 725.309.

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge