BRB No. 01-0644 BLA

JIMMIE MACK MARTIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
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 Denying Living Miner's Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart, & Eskridge), Abingdon, Virginia, for employer.

Edward Waldman (Eugene Scalia, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Living Miner's Benefits (00-BLA-0130) of Administrative Law Judge Thomas M. Burke 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 procedural history of this case is as follows. Claimant filed an application for benefits on April 25, 1994. Director's Exhibit 1. After holding a hearing, Administrative Law Judge Nicodemo De Gregorio issued his Decision and Order – Rejection of Claim on January 31, 1996. Judge De Gregorio found that claimant had about thirty-five years of coal mine employment and found the evidence insufficient to support a finding of a totally disabling respiratory or pulmonary impairment. Accordingly, he denied benefits. Director's Exhibit 43.

On claimant's *pro se* appeal, the Board affirmed the administrative law judge's length of coal mine employment finding and affirmed his finding that the evidence was insufficient to establish total disability. *Martin v. Clinchfield Coal Co.*, BRB No. 96-0673 BLA (June 26, 1996)(unpub.); Director's Exhibit 51. Claimant requested reconsideration by the Board, and submitted medical evidence with his request. Director's Exhibit 52. The Board issued an Order denying claimant's request for reconsideration and returned the medical evidence which claimant had submitted. *Martin v. Clinchfield Coal Co.*, BRB No. 96-0673 BLA (Aug. 26, 1996)(Order)(unpub.); Director's Exhibit 53.

On June 24, 1997, claimant requested modification before the district director. Director's Exhibit 54. On July 24, 1997, the district director issued a Proposed Decision and Order Denying Request for Modification. Director's Exhibit 56. At claimant's request, the case was transferred to the Office of Administrative Law Judges. Director's Exhibit 58.

After holding a hearing, Administrative Law Judge Lawrence P. Donnelly issued his Decision and Order Denying Benefits on July 24, 1998. Judge Donnelly found the newly submitted evidence insufficient to demonstrate modification based on a change in conditions. In finding that the evidence did not establish modification based on a mistake

[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 65 Fed. Reg. 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.

in a determination of fact, Judge Donnelly found the evidence insufficient to establish the existence of pneumoconiosis arising out of coal mine employment or a totally disabling respiratory condition due to pneumoconiosis. Accordingly, he denied benefits. Director's Exhibit 62.

On July 9, 1999, claimant requested reconsideration and submitted new evidence. Director's Exhibit 63. The district director informed claimant that this request constituted a request for modification, Director's Exhibit 64, and issued a Proposed Decision and Order Denying Request for Modification, Director's Exhibit 66. At claimant's request, this case was considered by an administrative law judge. On April 13, 2001, Administrative Law Judge Thomas M. Burke (the administrative law judge) issued his Decision and Order Denying Living Miner's Benefits, which is the subject of the instant appeal.

The administrative law judge noted the procedural history of this case. The administrative law judge found that the amended regulations would not affect his consideration of the case, and he adopted Judge De Gregorio's length of coal mine employment finding. The administrative law judge, based on all the evidence of record, found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, he denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the medical opinion evidence does not establish the existence of pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, maintaining that the amended regulations do not impact the adjudication of this case.[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

[2] We affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Claimant asserts that the administrative law judge erred in weighing the medical opinion evidence in finding it insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Specifically, claimant asserts that the administrative law judge erred by according probative weight to the opinions of physicians who are not treating physicians, in violation of 20 C.F.R. §718.104(d), and by not finding the diagnoses of chronic obstructive pulmonary disease to constitute diagnoses of coal workers' pneumoconiosis.

Initially, we reject claimant's assertion that the administrative law judge erred by failing to accord preference to his treating physician, in violation of Section 718.104(d). The requirement that special consideration be accorded to a treating physician's report, contained in Section 718.104(d), applies only to evidence developed after January 19, 2001. *See* 20 C.F.R. §718.101(b). Since the record does not contain any evidence developed after January 19, 2001, this provision does not apply in this case.

We now turn to claimant's assertion that the diagnoses of chronic bronchitis and chronic obstructive pulmonary disease constitute diagnoses of coal workers' pneumoconiosis. The relevant medical opinion evidence is as follows. In 1999, Dr. Smiddy diagnosed carcinoma, chronic obstructive pulmonary disease, chronic bronchitis and pneumoconiosis.[3] Director's Exhibits 69, 74. In several other reports written in 1999, Dr. Smiddy diagnosed acute and chronic bronchitis, in addition to noting the miner's lung cancer. Employer's Exhibit 18; Claimant's Exhibit 73. In 1994, Dr. Paranthaman diagnosed chronic bronchitis due to cigarette smoking and coal mine employment. Director's Exhibits 14, 15. Dr. Rosser, in a 1998 opinion, diagnosed chronic bronchitis with a history of tobacco dependence. Claimant's Exhibit 1. In 1999, Dr. Tholpady diagnosed pneumonia complicated by lung cancer. Employer's Exhibit 20. In 1995, Dr. Sargent opined that claimant does not have coal workers' pneumoconiosis. Director's Exhibit 37. Drs. Hippensteel and Fino, in reports written in 1999 and 2000, opined that claimant does not suffer from coal workers' pneumoconiosis or an occupationally acquired disease of the lung. Director's Exhibit 60; Employer's Exhibits 45, 46. Drs. Fino and Wheeler reviewed several CT scans taken in 1999 and opined that

[3] The administrative law judge found that Dr. Smiddy's diagnosis of pneumoconiosis was not explained and, therefore, the administrative law judge accorded this diagnosis no weight on the issue of the existence of pneumoconiosis. *See* Decision and Order at 14, n.6. Inasmuch as claimant does not challenge this finding, it is affirmed. *See Skrack, supra*.

they did not show pneumoconiosis. Employer's Exhibits 15, 22, 33, 34. In reports written from 1997 through 1999, Dr. Escasinas noted claimant's lung cancer and often diagnosed chronic obstructive pulmonary disease and bronchitis. Claimant's Exhibits 11, 18; Employer's Exhibits 10-14. In addition, the record contains the medical opinions of Drs. Sy, Hire, Peterson, Escasinas, Smiddy and Ally addressing the diagnosis and treatment of claimant's lung cancer. Director's Exhibit 60; Claimant's Exhibit 9; Employer's Exhibits 5-9, 18, 19.

The administrative law judge found the opinions of Drs. Hippensteel, Fino and Sargent, who opined that claimant does not suffer from coal workers' pneumoconiosis or an occupationally acquired pulmonary condition, *see* Director's Exhibits 37, 60; Employer's Exhibits 15, 22, 45, 46, to be more persuasive than the opinion of Dr. Paranthaman, who diagnosed chronic bronchitis due to cigarette smoking and coal mine employment, *see* Director's Exhibits 14, 15. The administrative law judge accorded greatest weight to the opinions of Drs. Hippensteel, Fino and Sargent based on his finding that these opinions are the best supported by the evidence of record. Decision and Order at 15. We affirm the administrative law judge's decision to accord greatest weight to the opinions of Drs. Hippensteel, Fino and Sargent, based on the administrative law judge's reasonable finding that these opinions are better supported by the evidence of record.[4] *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youghiogheny & Ohio Coal Co.*, 7 BLR 1-829 (1985). In addition, we hold that the opinions of Drs. Smiddy, Rosser and Escasinas, diagnosing chronic obstructive pulmonary disease,

[4] Dr. Sargent examined claimant in 1995 and administered a battery of objective tests. Director's Exhibit 37. Dr. Hippensteel reviewed claimant's extensive medical records in 2000. Employer's Exhibit 46. Dr. Fino examined claimant and administered objective tests in 1999. In addition, he reviewed claimant's medical records at that time. Director's Exhibit 60. In 2000, he reviewed claimant's CT scans. Employer's Exhibits 15, 22. Also in 2000, Dr. Fino interpreted claimant's chest x-rays and reviewed additional medical records. Employer's Exhibit 45.

chronic bronchitis or both diseases, do not constitute diagnoses of legal or statutory pneumoconiosis since these opinions do not state whether the conditions are attributable to claimant's coal mine employment. *See* 20 C.F.R. §718.201; *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990); *Biggs v. Consolidation Coal Co.*, 8 BLR 1-317 (1987). Consequently, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4).

The administrative law judge also weighed together all of the evidence relevant to the existence of pneumoconiosis, *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), and found that the negative x-ray interpretations, the preponderance of negative CT scan interpretations, the negative biopsy evidence and the preponderance of medical opinions do not support a finding that claimant suffers from coal workers' pneumoconiosis. Decision and Order at 15. We affirm this finding as it is reasonable and it is supported by substantial evidence. *See Compton, supra*. Accordingly, we affirm the administrative law judge's finding that claimant has not established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Inasmuch as we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis, one of the essential elements of entitlement pursuant to Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm the denial of benefits.

Accordingly, the administrative law judge's Decision and Order Denying Living Miner's Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge