BRB No. 01-0755 BLA

CARL H. HOPPER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GREAT WESTERN COAL, INC. d/b/a CROCKETT COLLIERIES	)	DATE ISSUED:
	)	
	)	
	)	
and	)	
	)	
GREAT WESTERN RESOURCES	)	
	)	
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 Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Carl H. Hopper, Middlesboro, Kentucky, *pro se*.

Denise M. Davidson (Barret, Haynes, May, Carter & Roark, P.S.C.), Hazard, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order (00-

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v.*

BLA-0713) of Administrative Law Judge Donald W. Mosser 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).[2] The administrative law judge accepted the issues conceded by employer, *i.e.*, that claimant had sixteen years of coal mine employment and that employer was the responsible operator.[3] On the merits, the

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Claude V. Keen Trucking Co., 19 BLR 1-88 (1995)(Order).

[2] 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, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] Claimant filed a prior claim for benefits on September 17, 1991, which was denied on March 13, 1992, because claimant failed to establish any of the elements of entitlement. The administrative law judge found that, inasmuch as the weight of the medical evidence establishes total disability, a material change in conditions was established and, therefore, considered the claim on the merits. Because we affirm the administrative law judge's finding that the existence of pneumoconiosis, an essential element of entitlement, is not established in this case, after consideration of all the relevant evidence, we will not address the administrative law judge's finding on material change. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); *see also Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Director's Exhibit 30.

administrative law judge found the evidence of record sufficient to demonstrate the presence of a totally disabling respiratory impairment, but insufficient to establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant generally challenges the findings of the administrative law judge. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), contends that the new regulations will not affect the outcome of this case, but is not otherwise participating in this appeal.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a).

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 (2000). 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*).

In finding that the x-ray evidence of record did not establish the existence of pneumoconiosis, the administrative law judge placed greater weight on the majority of negative interpretations by physicians possessing the dual qualifications of Board-certified radiologist and B reader. This was rational. 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*), *see Perry, supra*; *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Further, inasmuch as there were no

biopsy reports, the administrative law judge correctly found that claimant could not establish the existence of pneumoconiosis based on that evidence. 20 C.F.R. §718.202(a)(2). Likewise, the administrative law judge properly found that claimant could not establish the existence of pneumoconiosis by the use of presumptions covering: complicated pneumoconiosis; claims filed prior to January 1, 1982; or claims of certain deceased miners. 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306.

Turning to the physicians' opinions of record, the administrative law judge noted that while he accorded some weight to Dr. Baker's opinion as it was well documented and because Dr. Baker was a Board certified internist and pulmonary specialist, the fact that the x-rays Dr. Baker read as positive were reread as negative by at least one dually qualified reader detracted from the credibility of his opinion. This was rational. Director's Exhibits 6, 30; *see Worhach, supra*; *Clark, supra*; *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). The administrative law judge credited as more persuasive the opinions of Drs. Dahhan, Lane and Broudy, that claimant showed no evidence of coal workers' pneumoconiosis or any occupationally acquired disease, and that claimant's obstructive impairment was due to his smoking history, because of the physicians' qualifications[4] and because he found their opinions documented and reasoned. Director's Exhibits 23, 30-14; Employers Exhibits 1, 4. Decision and Order at 9, 10; *Id*. This was rational. *See Burns v. Director, OWCP*, 14 BLR 1-2 (1989); *Fields, supra*. Accordingly, the administrative law judge's finding that the existence of pneumoconiosis was not established by the medical opinion evidence is affirmed. 20 C.F.R. §718.202(a)(4).

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 if the administrative law judge's findings are supported by substantial evidence. *See Clark, supra*; *Anderson, supra*. Thus, we affirm the administrative law judge's finding that the evidence of record failed to establish the existence of pneumoconiosis.

[4] Drs. Dahhan and Broudy are Board certified in internal medicine and pulmonary diseases; Dr. Lane is Board certified in internal medicine. Director's Exhibits 23, 30-14, Employer's Exhibits 1, 4.

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