BRB No. 00-0699 BLA

JOHN D. CROCKETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
OAKWOOD MINING, INCORPORATED	)	DATE ISSUED:_____
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE 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 Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Lawrence L. Moise, Abingdon, Virginia, for claimant.

Michael F. Blair, Abingdon, Virginia, for employer.

Edward Waldman (Judith E. Kramer, Acting 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-0209) of Administrative Law Judge Daniel F. Sutton denying benefits on a duplicate claim[1] 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 credited claimant with thirty-two years of coal mine employment and found that new evidence submitted in support of this duplicate claim established total respiratory disability pursuant to 20 C.F.R §718.204(c) (2000), thus

[1]Claimant's first claim, filed on June 26, 1986, was denied by the Office of Workers' Compensation Programs on November 5, 1986 because claimant failed to establish that pneumoconiosis was caused at least in part by coal mine work, that claimant was totally disabled by a respiratory or pulmonary disease and that pneumoconiosis caused or contributed to a totally disabling respiratory impairment. Director's Exhibit 37. The instant claim was filed on February 25, 1998. Director's Exhibit 1.

[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. 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.

claimant established a material change in conditions pursuant to 20 C.F.R. §725.309(d) (1999).[3] However, the administrative law judge found the evidence of record insufficient to establish either the existence of pneumoconiosis or disability causation pursuant to 20 C.F.R. §§718.202(a)(1)-(4), 718.204(b) (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant challenges the administrative law judge's findings at Sections 718.202(a)(1), (4), and 718.204(b) (2000). In response, employer argues that the administrative law judge's denial of benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a brief on the merits in this appeal.[4]

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which the parties responded asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. *See* Claimant's letter, dated March 21, 2001; Employer's brief, dated March 27, 2001; Director's brief, dated March 21, 2001. Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged

[3]The amendments to the regulation at 20 C.F.R. §725.309 do not apply to claims, which were pending on January 19, 2001 such as this, rather, the version of this regulation as published in the 1999 Code of Federal Regulations is applicable. *See* 20 C.F.R. §725.2(c), 65 Fed. Reg. 80,057 (2000).

[4]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) (2000), 718.204(c)(2000) and 725.309(d) (1999), are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

regulations. Therefore, the Board will proceed to adjudicate the merits of 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 order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718 (2000), 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 (2000); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant initially contends that the administrative law judge erred in evaluating the x-ray evidence of record pursuant to Section 718.202(a)(1) (2000). Claimant maintains that the administrative law judge failed to consider Dr. Robinette's positive interpretation of the x-ray film taken on November 4, 1998, and erroneously determined that Dr. Robinette was not a B-reader. Claimant's arguments are without merit. The administrative law judge accurately reviewed the x-ray evidence of record, which included five positive and forty-five negative interpretations of sixteen x-rays. In his discussion of the film taken on November 4, 1998, the administrative law judge determined that "Dr. Robinette, a B-reader but not a radiologist, classified the film as 1/1." Decision and Order at 23.[5] The administrative law judge further determined that this film was interpreted as positive for pneumoconiosis by Dr. DePonte, a dually qualified Board-certified radiologist and B-reader, and as negative for pneumoconiosis by two dually qualified physicians, Drs. Scott and Wheeler, and by two B-readers, Drs. Castle and Dahhan. The administrative law judge thus reasonably concluded that the weight of this evidence was "at best in equipoise." Decision and Order at 23; Claimant's Exhibit 5; Employer's Exhibit 3, 24, 25, 28. The administrative law judge additionally determined that, of the remaining fifteen x-ray films of record, the films dated September 3, 1986, April 9, 1998, and September 17, 1999, were each interpreted as positive for pneumoconiosis by a single physician and as negative for pneumoconiosis by multiple physicians with superior qualifications. Decision and Order at 23; Director's Exhibits 13, 14, 37; Claimant's Exhibits

[5]While the administrative law judge, in his analysis of the medical opinion evidence at Section 718.202(a)(4) (2000), incorrectly stated that Dr. Robinette was not a B-reader, *see* Decision and Order at 24, the administrative law judge acknowledged the physician's B-reader status when weighing the x-ray evidence of record, *see* Decision and Order at 23.

1, 3, 5, 9, 11; Employer's Exhibits 1-3, 5-25, 28-31, 33, 35-39, 43-45, 48-50. Accordingly, substantial evidence supports the administrative law judge's finding that claimant did not establish, by a preponderance of the evidence, that the x-ray evidence of record was positive for pneumoconiosis pursuant to Section 718.202(a)(1) (2000). *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993).

Claimant next challenges the administrative law judge's weighing of the medical opinions of record at Section 718.202(a)(4). Specifically, claimant argues that the administrative law judge erroneously accorded reduced weight to the opinion of Dr. Robinette based in part upon the administrative law judge's inaccurate determination that Dr. Robinette is not a B-reader. Claimant also maintains that the opinions of Drs. Castle and Fino are legally flawed, in that they do not recognize that coal dust exposure can cause an obstructive lung impairment which can progress after coal dust exposure ends. Claimant's Brief at 2. Claimant's arguments with regard to the opinions of Drs. Castle and Fino are unsupported by the record.[6] Further, although the administrative law judge misstated Dr. Robinette's qualifications in his analysis of the medical opinions, this error was harmless in that it did not affect the weight the administrative law judge accorded to Dr. Robinette's diagnosis, and the administrative law judge provided multiple valid reasons for his credibility determinations.[7] *See Kozele v. Rochester &Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

---

[6]A review of Dr. Fino's reports reveals no statement which could be construed as contrary to the Act and regulations; Dr. Fino merely concluded that claimant's obstructive impairment was caused entirely by cigarette smoking. Employer's Exhibits 32, 47. In his deposition, Dr. Castle testified that pneumoconiosis "certainly can cause some obstruction," Employer's Exhibit 34 at 29, and that:

> It is true that one can have some mild degree of airway obstruction related to coal working, but that generally occurs in association with some restrictive lung disease, an abnormal x-ray and other findings. In this specific case, there were no other findings whatsoever pointing to an occupational cause for his severe airway obstruction other than historical information of having worked in a coal mine. I found no other objective findings to substantiate that diagnosis.

Employer's Exhibit 34 at 32; *see also* Employer's Exhibits 3, 46.

[7]In evaluating the medical opinions of record, the administrative law judge incorrectly stated that Dr. Robinette was not a B-reader, and went on to note that Dr. Robinette relied upon his own x-ray interpretation over that of the radiologist in diagnosing pneumoconiosis

radiographically, whereas the administrative law judge found the x-ray evidence insufficient to establish the existence of pneumoconiosis. Decision and Order at 24. On the issue of legal pneumoconiosis, however, the administrative law judge acknowledged Dr. Robinette's qualifications as a Board-certified pulmonary specialist, but reasonably found that the physician's opinion was outweighed by the contrary opinions of employer's experts. *Id*.

In finding the weight of the medical opinions of record insufficient to establish the existence of pneumoconiosis, the administrative law judge, within a proper exercise of his discretion, determined that Dr. Robinette's generalized discussion of the effects of coal dust exposure and conclusion of "early dust reticulation which occurred as a consequence of [claimant's] prior coal mining employment," Claimant's Exhibit 11, did not constitute a reasoned diagnosis of pneumoconiosis. Decision and Order at 24; *see Knizner v. Bethlehem Mines*, 8 BLR 1-5 (1985). The administrative law judge further found that, unlike Drs. Castle, Dahhan and Fino, who opined that claimant's respiratory impairment was unrelated to dust exposure in coal mine employment, Dr. Robinette did not have the opportunity to review claimant's past medical records and reports. Decision and Order at 24. The administrative law judge found that Dr. Dahhan in particular was able to review extensive medical records prior to issuing his opinion, which the administrative law judge determined was corroborated by the objective medical evidence and the opinions of Drs. Castle and Fino. Decision and Order at 24; *see Hall v. Director, OWCP*, 8 BLR 1-193 (1985). The administrative law judge thus reasonably credited the opinions of Drs. Fino, Castle, and Dahhan, which he found to be better supported by the objective evidence of record, over the opinion of Dr. Robinette. Decision and Order at 24; *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).[8] The administrative law judge's findings pursuant to Section 718.202(a)(4) (2000) are supported by substantial evidence, and therefore are affirmed.

Inasmuch as claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement, an award of benefits is precluded under 20 C.F.R. Part 718 (2000). *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111(1989)*; Trent, supra; Perry, supra*. Consequently, we need not address claimant's arguments on the issue of disability causation under Section 718.204(b) (2000). *Endrizzi v. Bethlehem Mines Corp.*, 8 BLR 1-11 (1985).

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

SO ORDERED.

---

[8]The administrative law judge also permissibly found the opinions of Drs. Mitchell and Forehand insufficient to establish the existence of pneumoconiosis, based on his findings that both physicians were less qualified than the pulmonary experts of record, *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Dr. Mitchell did not diagnose pneumoconiosis or relate any respiratory condition to dust exposure in claimant's coal mine employment; and Dr. Forehand's opinions, when taken together, were confusing, vague and equivocal. Decision and Order at 15-18; 23-24; Director's Exhibits 10, 11; Claimant's Exhibit 4; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge