BRB No. 00-0894 BLA

WOODROW W. FARLEY, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NATIONAL MINES CORPORATION	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
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.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Henry C. Bowen (Steptoe & Johnson), Charleston, West Virginia, for employer.

Helen H. Cox (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 DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (97-BLA-01825) of Administrative Law Judge Daniel F. Sutton awarding 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).[1] The administrative law judge found at least twenty-eight years of qualifying coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] Decision and Order at 4-5; Director's Exhibit 1. The administrative law judge concluded that the evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b) (2000). Decision and Order at 5-13. The administrative law judge further found that claimant established that he was totally disabled and that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c)(1)-(4), (b) (2000). Decision and Order at 13-16. Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established based upon the x-ray evidence and further erred in finding that claimant's total disability was due to pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[3]

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[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.

[2]Claimant filed his claim for benefits on February 3, 1997. Director's Exhibit 1.

[3]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)-(4), 718.203(b) and 718.204(c)(1)-(4) (2000) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 9, 2001, to which employer and the Director have responded asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Claimant has not responded to the Board's order.[4] Based on the briefs submitted by employer and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the 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).

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 (2000); *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*).

[4]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 9, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

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 that there is no reversible error contained therein.[5] Initially, employer contends, with respect to Section 718.202(a)(1) (2000), that the failure of claimant to timely provide the most recent x-ray for review prejudiced employer. Employer's Brief at 5. An administrative law judge is obligated to insure a full and fair hearing on all the issues; nonetheless, he is afforded broad discretion in dealing with procedural matters. *See Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1985) *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986). Due process requires that employer be given some opportunity to respond to evidence submitted immediately prior to or, if good cause is established, after the twenty day deadline imposed by Section 725.456 (2000). *See Owens, supra*; *North American Coal Corp. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *Shedlock, supra*; *Lane v. Harmon Mining Co.*, 5 BLR 1-85 (1982). Moreover, in rendering his Decision and Order, the administrative law judge must base his findings solely on the record made before him. 20 C.F.R. §725.477(b) (2000). Section 725.456(b)(2) (2000) allows the administrative law judge to admit documentary evidence not submitted to the district director and not exchanged by the parties within twenty days before a hearing if the parties waive the requirement or if a showing of good cause is made as to why such evidence was not exchanged. 20 C.F.R. §725.456(b)(2) (2000). If the administrative law judge permits the late evidence into the record, Section 725.456(b)(3) (2000) requires that the record be left open for thirty days thereafter to permit the parties to take such action as each considers appropriate in response to such evidence. *See Baggett v. Island Creek Coal Co.*, 6 BLR 1-1311 (1984).

A review of the hearing transcript in the instant case indicates that claimant sought to have evidence admitted that was not exchanged between the parties within twenty days of the hearing. Hearing Transcript at 7-14. The administrative law judge found that claimant established good cause for the late submission and overruled employer's objection to the admission of the evidence. Hearing Transcript at 12-14; Decision and Order at 2. The administrative law judge held the record open for sixty days to allow employer to submit rebuttal evidence. Hearing Transcript at 37-38. Employer subsequently requested an enlargement of the rebuttal period from January 3, 2000 to March 3, 2000, which was granted by the administrative law judge. Decision and Order at 3. We discern no abuse of discretion by the administrative law judge in the instant case. The administrative law judge

[5]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the State of West Virginia. *See* Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

has fully provided employer with the opportunity to rebut the evidence submitted by claimant at the hearing. *See* 20 C.F.R. §725.456 (2000); Hearing Transcript at 13-14, 37-38; Decision and Order at 2-3. Consequently, we hold, based upon the circumstances of the instant case, that employer has not been prejudiced by the late submission of evidence by claimant.

With respect to the merits, employer contends that the administrative law judge erred in his weighing of the x-ray evidence. We disagree. The administrative law judge, in the instant case, permissibly determined that the evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (2000). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge rationally found that the evidence of record was sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) (2000) as the preponderance of the x-ray readings, including the interpretations of the most recent x-rays, by physicians who are dually qualified as B-readers and board-certified radiologists were positive. Director's Exhibits 13, 14; Claimant's Exhibits 1, 2, 4-9, 11; Employer's Exhibits 7-9, 11, 13; Decision and Order at 6-7; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*). The administrative law judge properly considered the B-reader and board-certified status of the readers as required by Section 718.202(a)(1) (2000), and contrary to employer's contention, the administrative law judge may, but is not obligated to rely on a physician's additional credentials as a basis for according greater weight to his interpretation. *See* 20 C.F.R. §718.202 (2000); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991). We, therefore, affirm the administrative law judge's finding that the x-ray evidence of record is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000) as it is supported by substantial evidence and is in accordance with law. Decision and Order at 6-7; *Adkins, supra*; *Trent, supra*; *Perry, supra*. As employer makes no other specific challenge to the administrative law judge's findings on the merits, we affirm the administrative law judge's finding that the evidence of record is sufficient to establish the presence of pneumoconiosis pursuant to Section 718.202(a) (2000). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-
(4th Cir. 2000); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Employer also challenges the administrative law judge's causation finding pursuant to Section 718.204(b) (2000). Employer argues that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), in determining that the evidence of record was sufficient to establish that claimant's total disability was due to pneumoconiosis.[6] Employer's Brief at 6. We disagree. In finding that claimant established

[6]The Administrative Procedure Act requires each adjudicatory decision to include a

that his disability was due to pneumoconiosis, the administrative law judge fully discussed the relevant evidence of record and his reasoning is readily ascertainable from his discussion of the evidence.

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statement of "findings and conclusions, and the reasons or basis therefore, on all material issues of fact, law or discretion presented on the record...." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

With respect to the weighing of the evidence, employer contends that the administrative law judge erred in finding that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b) (2000) as he impermissibly discredited the opinions of Drs. Zaldivar and Renn. Employer argues that the administrative law judge selectively analyzed the medical opinion evidence when he discredited the opinions of the physicians as the evidence of record supports their conclusions. We do not find merit in employer's argument. Employer's contention constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988). In the instant case, the administrative law judge considered the relevant evidence of record and permissibly determined that the opinions of Drs. Zaldivar and Renn were entitled to little probative value.[7] *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Piccin, supra*; Decision and Order at 16. Employer asserts that the administrative law judge erred in rejecting the opinions of Drs. Zaldivar and Renn as the physicians did not diagnose pneumoconiosis. We disagree. As an administrative law judge may permissibly accord less weight to an opinion regarding causation where it is based on a faulty underlying premise regarding the presence or absence of pneumoconiosis, *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986), we reject employer's contention. *See Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1989). The administrative law judge is empowered to weigh the medical opinion evidence of record 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, supra*; *Anderson, supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the medical opinions of record establish causation pursuant to Section 718.204(b) (2000) and the award of benefits.

[7]Contrary to employer's contention, an administrative law judge may, within his discretion, permissibly credit the opinions of the examining or treating physicians he found most persuasive over those of non-examining physicians. *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge