BRB No. 01-0813 BLA

HAROLD K. SULLIVAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Keeley, P.S.C.), Madisonville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (01-BLA-236) of Administrative Law Judge Donald W. Mosser rendered 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

[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.

twenty one years of coal mine employment established and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that claimant failed to establish the existence of pneumoconiosis, that pneumoconiosis arose out of coal mine employment, and that claimant's total disability was due to pneumoconiosis.[2] Benefits were, accordingly, denied.

On appeal, claimant contends that the administrative law judge erred in finding that the medical opinion evidence was insufficient to establish the existence of coal workers' pneumoconiosis and total disability due to pneumoconiosis. Employer responds, urging affirmance of the denial of benefits as the administrative law judge's findings are fully supported by the record. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he is not 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 order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish 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. Failure to establish any 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*).

After careful consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. In finding that the medical opinion evidence failed to establish the existence of pneumoconiosis as defined by the Act, the administrative law judge permissibly accorded greater weight to the opinions of

[2] The administrative law judge noted that employer had stipulated that claimant had a totally disabling respiratory impairment. Decision and Order at 9.

Drs. Branscomb and Fino because they were based on a review of all the medical evidence, consistent with the overall x-ray evidence, and explained why claimant's symptoms were not consistent with pneumoconiosis as opposed to the other opinions of record which the administrative law judge found were not as well supported or fully explained. This was rational. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-113 (1988); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-880 n.4 (1984). Further, the administrative law judge properly noted that their superior qualifications entitled their opinions to greater weight. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988).

Contrary to claimant's contention, any error made by Dr. Branscomb in characterizing Dr. Simpao's finding regarding the length of claimant's wheezing history was harmless inasmuch as Dr. Branscomb did not conclude that the length of claimant's wheezing history was inconsistent with pneumoconiosis as defined by the Act, but rather, that claimant's positive response to bronchodilators and the variability in the severity of his wheezing history was inconsistent with a finding of pneumoconiosis as defined by the Act. *See Clark*, *supra*; *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-389 n.4 (1983); *Compare*. *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). Likewise, contrary to claimant's contention, the administrative law judge did not err in crediting Dr. Fino's opinion inasmuch as Dr. Fino discussed the results of examinations, x-ray, and testing conducted on claimant in April 2000, and February 2001. Employer's Exhibit 4. We cannot, therefore, say that the administrative law judge erred in accepting Dr. Fino's conclusions. *Clark*, *supra*; *Anderson v. Valley Camp ov Utah, Inc.*, 12 BLR 1-111 (1989); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984). Further, contrary to claimant's contention, the administrative law judge reasonably found that the opinions of Drs. Givens and O'Bryan failed to establish the existence of pneumoconiosis as defined by the Act, 20 C.F.R. §718.201; *Justice*, *supra*; *Fuller*, *supra*, and permissibly accorded less weight to Dr. Simpao's opinion concerning the existence of pneumoconiosis. *Winters*, *supra*. We, therefore, affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).[3] Consequently, because we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement, we

[3] The administrative law judge's finding that the existence of pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1)-(3) is affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

need not address the administrative law judge's finding regarding disability causation. *Trent*, *supra*; *Perry*, *supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge