BRB No. 02-0583 BLA

JIMMY DOUGLAS GARRETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED:_____
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley), Madisonville, Kentucky, for claimant.

Natalie D. Brown (Jackson & Kelly), Lexington, Kentucky, for employer.

Rita Roppolo (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (00-BLA-0790) of Administrative Law Judge Robert L. Hillyard 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 that claimant established sixteen years of coal mine employment and a smoking history of one pack of cigarettes per day for fifty years. Considering the medical evidence, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) - (4) (2000). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge's weighing of the x-rays and medical opinions pursuant to Sections 718.202(a)(1) and (a)(4) is erroneous. Claimant further contends that the administrative law judge erred in admitting Employer's Exhibits 4-20 into the record. Lastly, claimant contends that the administrative law judge erred by failing to consider the cause of claimant's pulmonary disability. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has also responded but he has declined to address the merits of the case.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable 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 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. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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*).

Initially, claimant contends 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), by admitting

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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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] We affirm the administrative law judge's findings pursuant to Section 718.202(a)(2) and (3) as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

into evidence Employer's Exhibits 4-20, which claimant contends are unduly repetitious, as they are "nothing more than x-ray readings or cumulative consultation reports." Brief for Claimant at 3. Claimant further contends that the administrative law judge failed to provide reasons for overruling claimant's objections to this evidence. Claimant relies on *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993), in support of his contention that employer's superior financial resources undermine the truth-seeking function of the administrative process. As acknowledged by the administrative law judge, the United States Court of Appeals for the Sixth Circuit declared in *Woodward* that the fact-finder should make a qualitative evaluation of the evidence if cumulative evidence is involved. *Woodward*, 991 F.2d at 321; 17 BLR at 2-87; Decision and Order at 18. Consideration of the quantity of x-ray evidence without a consideration of the qualifications of the readers or an examination of the party affiliation of the experts constitutes legal error. *Id*. The record in this case reveals that the administrative law judge evaluated the evidence in accordance with the teaching of *Woodward*. *See discussion*, *infra*.

In addition, an administrative law judge is allowed considerable discretion in admitting evidence, as the APA requires the admission of all evidence, timely exchanged, unless it is irrelevant, immaterial, or unduly repetitious. 5 U.S.C. §556(d), 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); *see Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989). The Board has construed 20 C.F.R. §725.456 to favor the admission of all evidence that is relevant, and then allow the administrative law judge to determine the weight to be assigned to the evidence. *Cochran*, 12 BLR at 1-139. We affirm the administrative law judge's determination to allow employer to submit Employer's Exhibits 4-20 in its defense of the claim, as a permissible exercise of the administrative law judge's discretion. *See* 5 U.S.C. §556(d); *see also* 20 C.F.R. §725.456; *Lemar*, *supra*; *Cochran*, *supra*.

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[3] Claimant argues that Employer's Exhibits 4-20 are unduly repetitious of the evidence contained in Employer's Exhibits 1-3. Employer's Exhibit 1 is a report by Dr. Wiot, a B-reader and Board-certified radiologist who reviewed CT scans and a chest x-ray dated January 18, 2000. Employer's Exhibit 2 is a pulmonary examination report by Dr. Selby. Employer's Exhibit 3 is a consultation report by Dr. Broudy. Employer's Exhibits 4-20 contain two negative interpretations of an x-ray dated February 23, 2001, two negative interpretations of an x-ray dated February 15, 2001, seven negative interpretations of a May 16, 2000 x-ray, one negative interpretation of the January 18, 2000 x-ray, and two negative interpretations of a November 9, 1999 x-ray. Employer's Exhibits 4-9, 12, 15, 17. Additionally, the exhibits contain several consultative reports and depositions. Employer's Exhibits 6, 10, 11, 13, 14, 17-20.

Next, we consider claimant's contention that the administrative law judge erred in his consideration of the x-ray evidence. The administrative law judge found that the record contains thirty interpretations of fourteen x-rays. Decision and Order at 19. Of these interpretations, the administrative law judge found that twenty-five were by B-readers, eleven of whom were also Board-certified radiologists. The administrative law judge next found that there were fourteen interpretations of the most recent x-rays, *i.e.*, those which are dated from January 18, 2000 to August 16, 2001. Thirteen of these interpretations were negative and one was positive, a 1/1 p/p reading of the August 16, 2001 x-ray by Dr. Brandon, a Board-certified radiologist and B-reader. The administrative law judge found, however, that Drs. Scott and Wheeler, who are also Board-certified radiologists and B-readers, read as negative for pneumoconiosis two of the most recent x-rays, those dated February 15, 2001 and February 23, 2001. The administrative law judge concluded that because of the numerous negative x-ray interpretations by highly qualified readers, the x-ray evidence fails to establish the existence of pneumoconiosis.

We disagree with claimant that the administrative law judge failed to conduct a qualitative analysis of the x-ray evidence. Contrary to claimant's contentions, the administrative law judge reasonably considered all of the recent x-rays, but ultimately relied on the x-ray interpretations from readers who were both Board-certified radiologists and B-readers, due to their superior qualifications. *See Woodward*, *supra*; *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Trent*, *supra*. Because the administrative law judge's weighing of the evidence was based upon his consideration of the qualifications of the physicians, his conclusion that the preponderance of the evidence fails to establish the presence of pneumoconiosis is in accord with the holding of the United States Court of Appeals for the Sixth Circuit in *Woodward*.

Regarding the medical opinions, claimant contends that Drs. Selby, Jarboe, Broudy and Fino expressed opinions which are hostile to the Act. Claimant's Brief at 10-14, 17, 19-21. We disagree. Contrary to claimant's assertion, none of the physicians categorically stated that coal dust exposure cannot produce a disabling obstructive defect or that pneumoconiosis cannot be progressive absent further exposure to coal dust. *See Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); *Doris Coal Co. v. Director, OWCP [Stiltner]*, 938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991); Director's Exhibit 17 at 52-53; Employer's Exhibit 3; Employer's Exhibit 10 at 16-20; Employer's Exhibit 17 at 36-41 (unpaginated); Employer's Exhibit 20 at 25-27. Therefore, we reject claimant's contention that the administrative law judge erred in considering these opinions.

Claimant also contends that the administrative law judge erred in relying upon the opinion of Drs. Selby, Broudy, Jarboe, Lane, Fino, Castle and Dahhan, over the opinions of Drs. Clapp, Simpao and Houser. In concluding that claimant failed to establish the existence of pneumoconiosis by medical opinion evidence, the administrative law judge acted within his discretion in according great weight to the opinions of Drs. Broudy, Jarboe, Selby, and Lane based upon the expertise of Drs. Broudy, Jarboe and Selby in Internal Medicine and Pulmonology, as well as Dr. Selby's additional expertise in Critical Care, and Dr. Lane's expertise in Internal Medicine. Decision and Order at 20; *see Woodward*, *supra*; *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). The administrative law judge also noted that all four physicians are B-readers. Decision and Order at 21. The administrative law judge found that these physicians examined claimant, that they specifically identified the studies upon which they relied and they rendered opinions that were consistent with the medical evidence of record. Therefore, the administrative law judge rationally determined these opinions were reasoned and documented and entitled to substantial weight. Decision and Order at 21; *see Woodward*, *supra*; *Tussey*, *supra*; *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark*, *supra*.

Furthermore, in according diminished weight to the opinion of Dr. Clapp, a treating physician, the administrative law judge rationally found that it was unsupported by any objective test data, and thus, entitled to less weight. Decision and Order at 21; *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Clark*, *supra*; *Fields*, *supra*; *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985); *White v. Director, OWCP*, 6 BLR 1-368, 1-371 (1983). The administrative law judge further determined that the record does not establish that either Dr. Clapp or Dr. Simpao has specialized skills; but the record does reveal that Dr. Houser possesses credentials as a Board-certified internist, pulmonologist and critical care physician. The administrative law judge also permissibly found Dr. Houser's opinion outweighed by the opinions of Drs. Selby, Broudy, Jarboe and Lane, which are better reasoned, documented and supported by the medical evidence of record. Decision and Order at 22; *see Woodward*, *supra*; *Perry*, *supra*.

In according substantial weight to the opinions of consulting physicians, Drs. Fino, Castle, and Dahhan, the administrative law judge permissibly found that the opinions were "thoroughly documented" and based on a consideration of all of the medical evidence of record. *Woodward*, *supra*; *Clark*, *supra*; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Fields*, *supra*. The administrative law judge also rationally found the consultative opinions by Drs. Broudy and Jarboe to be

entitled to substantial weight based on their examinations of claimant and the review of the medical evidence of record. *Id*. Thus, we reject claimant's contention that the administrative law judge
should have accorded determinative weight to the opinions of Drs. Houser, Clapp and Simpao, over the contrary, better reasoned and documented opinions by physicians with superior credentials. The Board must affirm the findings of fact of an administrative law judge that are supported by substantial evidence. We therefore affirm the administrative law judge's finding that claimant did not meet his burden of establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). As the administrative law judge's findings are supported by substantial evidence, we affirm the denial of benefits. Furthermore, as the administrative law judge's finding regarding the existence of pneumoconiosis is affirmed, he properly declined to consider any other element of entitlement. *See Anderson*, *supra*; *Trent*, *supra*; *Perry*, *supra*.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge