BRB No. 03-0778 BLA

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| LESTER TACKETT | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| TANSY BETH MINING COMPANY, INCORPORATED | ) | DATE ISSUED: 05/20/2004 |
| | ) | |
| 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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Billy J. Moseley (Webster Law Offices), Pikeville, Kentucky, for claimant.

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

Sarah M. Hurley (Howard M. Radzely, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order--Denying Benefits (2002-BLA-0087) of Administrative Law Judge Daniel J. Roketenetz 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] Claimant's prior application for benefits, filed on January 22, 1981, was finally denied on June 26, 1985 because the evidence did not establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment. Director's Exhibits 40-250, 40-1. On March 7, 2000, claimant filed the current application, which is a duplicate claim for benefits because it was filed more than one year after the final denial of a previous claim. Director's Exhibit 1; see 20 C.F.R. §725.309(d)(2000). The administrative law judge credited claimant with twenty-five years of coal mine employment[2] and found that the medical evidence developed since the denial of claimant's first claim established the existence of a totally disabling respiratory impairment. Consequently, the administrative law judge found that claimant demonstrated a material change in conditions as required by 20 C.F.R. §725.309(d)(2000). *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Considering the merits of the claim, however, the administrative law judge found that the evidence of record failed to establish the existence of pneumoconiosis arising out of coal mine employment, or that claimant's total disability was due to pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4) and (1). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, (the Director) has filed a letter indicating that he will not participate in this appeal.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence,

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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] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 40-248. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] The administrative law judge's findings that claimant has twenty-five years of coal mine employment, that he established a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000), and his findings pursuant to 20 C.F.R. §§718.202(b)(2)(i)-(iv) and 718.204(c) are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

and in accordance with applicable law. 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to 20 C.F.R. §718.202(a)(1), claimant contends that the administrative law judge erred in his analysis of the x-ray evidence. We disagree. In considering the newly submitted x-ray evidence in conjunction with the prior x-ray evidence of record, the administrative law judge properly accorded greatest weight to the x-rays readings by those physicians who were dually qualified as both Board-certified radiologists and B readers, all of which were negative for the existence of pneumoconiosis.[4] Decision and Order at 15; *Staton v. Norfolk & Western Railway Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-6, 1-7 (1999)(*en banc*); *see Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983). Contrary to claimant's argument, the administrative law judge was not required to give greater weight to the positive x-ray reading by Dr. Younes because he was a B-reader. The administrative law judge properly found that the positive x-ray reading of Dr. Younes was outweighed by the negative x-ray readings of the same x-ray by Drs. Sargent and Barrett, each of whom possesses greater qualifications than Dr. Younes. This was proper. Decision and Order at 15; 20 C.F.R. §718.202(a)(1); *Staton*, 65 F.3d at 59, 19 BLR at 281; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; *Cranor*, 22 BLR at 1-6, 1-7. Consequently, we reject claimant's argument that the administrative law judge improperly failed to accord greater weight to Dr. Younes's positive reading based on his status as a B-reader. Because the administrative law judge properly weighed all the x-ray evidence together and considered the quantity of the readings and the qualifications of the x-ray readers, in his consideration of the x-ray evidence, we reject claimant's contentions and affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1). *Staton*, 65 F.3d at 59, 19 BLR 2-279, 2-281 (6th Cir. 1995); *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; *Cranor*, 22 BLR 1-1, 1-6, 1-7; *Kozele*, 6 BLR at 1-382-83 n.4.

[4] Drs. Sargent, Barrett, Wiot, Spitz, Felson, Cole, Quillen and Proto are all Board-certified radiologists as well as B readers. Director's Exhibits 40-52, 40-56, 40-61, 40-68, 40-75, 40-77, 40-87, 40-220.

Pursuant to 20 C.F.R. §718.202(a)(4), claimant contends that the administrative law judge erred in not according more weight to the reasoned opinions of physicians who examined claimant, as well as claimant's treating physician, than to the opinions of physicians who had not examined claimant. Claimant's Brief at 9-10. In considering all the medical opinion evidence, the administrative law judge found that the opinions of Drs. Younes, Wright, Myers, Adams, Martin and Cornish supported a finding of pneumoconiosis, while the opinions of Drs. Broudy, Burki, Repsher, Rosenberg, Fino, Huber, Combs, Quillin, Cooper and O'Neill found no evidence of pneumoconiosis. Decision and Order at 13-15, 16-17; Director's Exhibits 8, 10, 13, 18, 33, 34, 35, 37, 38, 40-84, 40-94, 40-97, 40-113, 40-136, 40-168, 40-188, 40-196, 40-227, 40-231; Employer's Exhibit 1. Contrary to claimant's arguments, the administrative law judge did not rely on the numerical superiority of the evidence, but rather permissibly accorded less weight to the opinions of Drs. Younes, Wright, Myers, Adams, Martin and Cornish, the only physicians who diagnosed the existence of pneumoconiosis. He found them to be poorly documented and reasoned because they gave no explanation for their diagnoses other than their own positive x-ray readings, which, in each case, were re-read as negative by more highly qualified readers. This was rational. Director's Exhibits 40-188, 40-227; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984).

Moreover, the administrative law judge was not, as claimant argues, required to accord greater weight to the opinion of Dr. Younes because he was claimant's treating physician, where his opinion was found less reasoned than other opinions of record. 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003)(opinions of treating physicians get the deference they deserve based on their power to persuade). In addition, the administrative law judge noted that Dr. Martin's opinion was entitled to less weight because he failed to take into consideration claimant's lengthy smoking history. Decision and Order at 16; *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985). By contrast, the administrative law judge accorded greater probative value to the opinions of Drs. Fino, Burki, Rosenberg, Repsher, O'Neill and Broudy, each of whom found no evidence of pneumoconiosis, because they were well reasoned and well documented and based on the objective laboratory data of record, as well as more recent testing. Decision and Order at 16; *Clark*, 12 BLR at 1-155; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). Furthermore, contrary to claimant's arguments, the administrative law judge was not required to discredit the opinions of Drs. Fino, Burki, Rosenberg and Repsher, whose opinions were corroborated by that of Dr. Broudy, an examining physician, because they had not examined claimant. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-104 (1992).

Because the administrative law judge considered the qualifications of the physicians, as well as the degree to which the opinions were documented and reasoned,

we affirm the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Consequently, we affirm the administrative law judge's finding that the existence of pneumoconiosis, an essential element of entitlement, was not established pursuant to 20 C.F.R. §718.202(a).

Accordingly, the administrative law judge's Decision and Order--Denying 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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BETTY JEAN HALL
Administrative Appeals Judge