BRB No. 05-0883 BLA

STANLEY D. BLACK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
C & K COAL COMPANY	)	DATE ISSUED: 05/30/2006
	)	
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Joseph F. Quinn (Klett, Rooney, Lieber & Schorling), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (03-BLA-5667) of Administrative Law Judge Michael P. Lesniak 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). The administrative law judge found 4.78 years of coal mine employment and that employer was the proper responsible operator. Decision and Order at 3-4. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 9. After determining that the instant claim was

a subsequent claim,[1] the administrative law judge found that the newly submitted evidence was sufficient to establish the existence of totally disabling pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202, 718.203, 718.204 and thus established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Decision and Order at 2, 4, 10-13; Director's Exhibits 1, 2. Considering the record *de novo*, the administrative law judge concluded that in weighing all of the evidence together, the more recent evidence was entitled to the greatest weight and that claimant established all elements of entitlement by a preponderance of the evidence. Decision and Order at 13-14. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in failing to consider all the x-ray evidence of record and in finding that claimant's pneumoconiosis arose out of coal mine employment. Claimant responds asserting that substantial evidence supports the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he would not participate in this appeal.[2]

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 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; *Gee v. W.G. Moore and Sons*, 9

[1] Claimant filed his initial claim for benefits with the Department of Labor on September 26, 1986; it was denied by the district director on March 6, 1987 by reason of abandonment. Director's Exhibit 1. Claimant filed a second claim for benefits on May 18, 1988, which was denied by the district director on November 14, 1988 as claimant failed to establish any element of entitlement. Director's Exhibit 2. Claimant took no further action until he filed the instant claim on August 6, 2001, which was denied by the district director on December 19, 2002. Director's Exhibits 4, 24. Claimant subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 25.

[2] The administrative law judge's length of coal mine employment and responsible operator determinations as well as his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(4) and 718.204 are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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*).

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 contains no reversible error.[3] The administrative law judge rationally found that the x-ray evidence of record was sufficient to establish the existence of pneumoconiosis. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge, in the instant case, considered the x-ray evidence and properly noted that the x-ray interpretations dated October 12, 2001 and October 10, 2002 were interpreted as positive. Decision and Order at 4, 10, 13; Director's Exhibits 13, 16. The administrative law judge further considered the x-ray evidence submitted in the previous claim and noted that the July 1, 1988 x-ray was interpreted by Dr. Cole, a B-reader and Board-certified radiologist, as negative for the existence of pneumoconiosis. Decision and Order at 13; Director's Exhibit 2. The administrative law judge concluded that the more recent x-ray evidence provided a clearer picture of the miner's current medical condition and was entitled to the greatest weight and therefore sufficient to meet claimant's burden of proof. Decision and Order at 13.

Employer contends that the administrative law judge erred in failing to consider all the x-ray evidence in determining if claimant established the existence of pneumoconiosis. Specifically, employer asserts that the administrative law judge failed to consider the negative interpretation of the October 12, 2001 x-ray by Dr. Harron, a B-reader. Employer's Brief at 3-4. But employer does not provide a record citation for this document, nor does employer provide a citation to the record indicating that the document was offered for submission. In the absence of proof that the document was admitted, we cannot hold that the administrative law judge erred in failing to consider it.[4] The administrative law judge has no affirmative obligation to secure all relevant and material evidence and his findings must be based solely on the medical evidence in the record before him. *See* 20 C.F.R. §725.414; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *White v. New White Coal Co., Inc.*, 23 BLR 1-1 (2004); *Pruitt v. USX Corp.*, 14 BLR 1-129 (1990); *Somonick v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-892 (1984).

The administrative law judge, within his discretion as fact-finder, rationally determined that the current x-ray evidence of record was sufficient to establish the existence

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was last employed in the coal mine industry Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 1, 2, 6, 9.

[4] Our review of the record did not reveal the document.

of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) as he permissibly accorded greater weight to the more recent interpretations. *See Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995)*; Abshire v. D & L Coal Co.*, 22 BLR 1-202 (2002); *Worhach v. Director,* OWCP, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). Thus, the administrative law judge permissibly concluded that the x-ray evidence was sufficient to establish the existence of pneumoconiosis.

Moreover, the administrative law judge properly considered all of the relevant evidence relating to the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4) in accordance with the decision by the United States Court of Appeals for the Third Circuit in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d. Cir. 1997), and rationally found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 9-10, 13. The administrative law judge is empowered to weigh the medical 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*, 12 BLR 1-149; *Anderson v. Valley Camp of Utah*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). 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 x-ray evidence established the presence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Williams*, 114 F.3d 22, 21 BLR 2-104; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Employer further generally contends that the administrative law judge erred in finding that claimant's pneumoconiosis arose out of coal mine employment. Employer asserts that because the administrative law judge erred in finding the existence of pneumoconiosis established, his finding of causation must also be erroneous. Employer's Brief at 4. Employer, however, has failed to identify any specific errors made by the administrative law judge in finding that the miner's pneumoconiosis arose out of coal mine employment. Thus, as we have affirmed the administrative law judge's determination that the evidence of record is sufficient to establish the existence of pneumoconiosis and employer has failed to adequately raise or brief any other issue regarding the administrative law judge's evaluation of the evidence pursuant to 20 C.F.R. §718.203, the Board has no basis upon which to review that finding. *See* 20 C.F.R. §802.211(b) (2000); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf,* 10 BLR 1-119; *Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983); *Fish*, 6 BLR 1-107.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge