BRB No. 97-1434 BLA

WILLIAM PHILLIPS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD 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 After Remand of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

William Phillips, Clintwood, Virginia, *pro se*.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order After Remand (93-BLA-1620) of Administrative Law Judge Edward C. Burch denying 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). This case is before the Board for the second time. In the original Decision and Order, Administrative Law Judge Charles P. Rippey adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718 and found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Hence, Judge Rippey concluded that the evidence was insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310.[1] Consequently, Judge Rippey denied benefits. In response to

[1]Claimant filed his initial claim on March 23, 1983. Director's Exhibit 45. This claim was denied by the Department of Labor on June 11, 1984 because claimant failed to

claimant's appeal, the Board held that Judge Rippey erred by failing to consider the previously submitted evidence and two newly submitted medical opinions from Drs. Abernathy and Sutherland in his determination that claimant failed to establish a change in conditions. The Board also held that Judge Rippey erred by failing to consider all of the evidence of record to determine if claimant has established a mistake in a determination of fact. Therefore, the Board vacated Judge Rippey's denial of benefits and remanded the case for further consideration. *Phillips v. Clinchfield Coal Co.*, BRB No. 94-3971 BLA (Sept. 26, 1995)(unpub.).

On remand, the case was reassigned to Administrative Law Judge Edward C. Burch (the administrative law judge) who found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Accordingly, the administrative law judge found the evidence insufficient to establish a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310, and thus, he denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order After Remand. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

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establish the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. *Id*. On June 14, 1985, claimant filed his most recent claim, dated June 11, 1985, which was treated as a request for modification. Director's Exhibit 1.

After consideration of the Decision and Order and the relevant evidence of record, we conclude that the administrative law judge's decision is supported by substantial evidence and contains no reversible error and, therefore, it is affirmed. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), based on his consideration of all of the x-ray evidence of record. Of the one hundred and five x-ray interpretations of record, ninety-six readings are negative for pneumoconiosis, Director's Exhibits 17, 30, 31, 35, 38; 42, 45, 59, 61, 62, 64, 82-84, 87, 94, 109, 110, 112, 113, 120, 121, 129, 133, 135, 136, 144, 147, 158, 165, 166, 185, 188, 194, 199, 200; Employer's Exhibits 1-4, 9-11, 14, 18-25, 28-30, 35-37, 39-43, and nine readings are positive, Director's Exhibits 18, 19, 25, 45, 91, 107, 142, 186; Claimant's Exhibits 2, 3. The administrative law judge properly accorded greater weight to the numerical superiority of the negative x-ray readings by physicians with superior qualifications.[2] *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Thus, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).

Next, we hold as a matter of law that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) since the record does not contain any biopsy results demonstrating the presence of pneumoconiosis. In addition, we hold as a matter of law that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) since none of the presumptions set forth therein is applicable to the instant claim. *See* 20 C.F.R. §§718.304, 718.305, 718.306. The

[2]The administrative law judge stated that "[o]nly three of the positive x-ray interpretations were turned in by physicians who were...B-readers." Decision and Order After Remand at 18. Dr. Myers, who is a B-reader, read the x-ray dated October 16, 1987 as positive for pneumoconiosis. Director's Exhibits 91, 186. Similarly, Drs. Aycoth and Cappiello, who are also B-readers, read the x-ray dated March 19, 1990 as positive for pneumoconiosis. Director's Exhibits 107, 186. The administrative law judge observed that "[o]f those, the October 16, 1987, x-ray was re-read by three other B-readers as completely negative..., and the March 19, 1990, x-ray, which two physicians read as 1/0 [for] pneumoconiosis, was re-read by four other B-readers as completely negative." *Id*.

presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Similarly, claimant is not entitled to the presumption at 20 C.F.R. §718.305 because he filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

Further, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge considered all of the relevant medical opinions of record. Whereas Drs. Baxter, Kanwal, Robinette, Smiddy,[3] Smith and Vanover opined that claimant suffers from pneumoconiosis, Director's Exhibits 15, 23, 45, 98, 108, 186; Claimant's Exhibits 1, 4, Drs. Castle, Endres-Bercher, Fino, Renn, Sargent and Tuteur opined that claimant does not suffer from pneumoconiosis,[4] Director's Exhibits 82, 87, 133, 137-139; Claimant's Exhibit 5; Employer's Exhibits 12, 13, 31, 44. Although Dr. Molina diagnosed chronic obstructive lung disease, he did not specifically opine that this condition arose out of coal dust exposure.[5] Director's Exhibit 95. The administrative law judge properly accorded determinative weight to the opinions of Drs. Castle, Endres-Bercher, Fino, Renn, Sargent and Tuteur over the contrary opinions of Drs. Baxter, Kanwal, Robinette, Smiddy and Smith, because he found them to be better reasoned.[6] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149

[3]Dr. Smiddy opined that he "believed that an element of pneumoconiosis is present." Director's Exhibit 108.

[4]The administrative law judge stated that Dr. Abernathy "agreed that the x-rays did not show evidence of coal worker's pneumoconiosis." Decision and Order After Remand at 16; Director's Exhibit 85.

[5]In addition, the administrative law judge found that although the chart notes from the Sutherland Clinic contained the diagnosis of "chronic obstructive pulmonary disease, and that the term 'Black Lung' appears on the chart..., these types of entries do not comply with Section 718.202(a)(4), as they are unaccompanied by a reasoned medical opinion." Decision and Order After Remand at 20; *see* 20 C.F.R. §718.202(a)(4).

[6]The administrative law judge found that "Drs. Endres-Bercher, Sargent, Tuteur, Renn, Castle and Fino all submitted detailed, well-reasoned reports in support of their opinions." Decision and Order After Remand at 20. In contrast, the administrative law judge found that "Dr. Kanwal...provided no rationale on his report." *Id.* at 17. Similarly, the administrative law judge stated that Dr. Baxter "did not identify any specific rationale for his opinion that Claimant had pneumoconiosis." *Id.* at 19. Further, the administrative law judge stated that Dr. Smith's "failure to document which medical records he reviewed, his failure to record an occupational or smoking history, and the lack of any reference to objective medical tests render his opinion devoid of proper reasoning." *Id*. Additionally, the administrative law judge observed that "the rationale for [Dr. Smiddy's] belief is unclear." *Id*. Finally, the administrative law judge stated that although "Dr. Robinette...describes an August 30, 1989, chest x-ray as demonstrating a profusion abnormality of 1/0 -- a reading

(1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). In addition, the administrative law judge properly discounted the opinions of Drs. Robinette and Vanover because they failed to consider the significance of claimant's smoking history.[7] *See Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Thus, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Since claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement, the administrative law judge properly denied benefits on the merits under 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the administrative law judge's Decision and Order After Remand denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief

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which would be considered evidence of pneumoconiosis, pursuant to Section 718.102(b)..., no report of such an interpretation appears in the voluminous record in this case." *Id*.

[7]The administrative law judge found that "Dr. Robinette's opinion that Claimant had pneumoconiosis appears in a report in which Claimant's smoking history is never mentioned...[a]lthough Dr. Robinette did note Claimant's smoking history in two earlier hospital reports." *Id*. The administrative law judge also found that although "Claimant has an extensive smoking history, which was well documented in numerous medical reports and in his own testimony...[,] Dr. Vanover made no mention of this history in her report, and neither did Dr. Zaidi, whose report was referenced in Dr. Vanover's report." *Id.* at 19-20.

Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge