BRB No. 00-0109 BLA

ROBERT D. GRAY, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED:_____
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Ronald K. Bruce, Madisonville, Kentucky, for claimant.

Laura Metcoff Klaus and Harold H. Davis, Jr. (Arter & Hadden LLP), Washington, D.C., for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-1262) of Administrative Law Judge Rudolf L. Jansen 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). The instant case involves a 1997 duplicate claim.[1] The administrative law judge initially found the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. The administrative law judge, therefore, considered claimant's 1997 claim on the merits. The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant argues that the administrative law judge erred in finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[2]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

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[1]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on April 25, 1989. Director's Exhibit 35. The district director denied benefits on October 12, 1989 and November 27, 1989. *Id.* There is no indication that claimant took any further action in regard to his 1988 claim.

Claimant filed a second claim on November 12, 1997. Director's Exhibit 1.

[2]Inasmuch as no party challenges the administrative law judge's findings pursuant to 20 C.F.R. §§725.309, 718.202(a)(2) and (a)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). In determining whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge properly accorded greater weight to the interpretations rendered by physicians dually qualified as B readers and Board-certified radiologists. See *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 9-10. Of the ten x-ray interpretations rendered by physicians dually qualified as B readers and Board-certified radiologists, only three are positive for pneumoconiosis.[3] Director's Exhibits 15, 31, 33, 35; Claimant's Exhibits 2, 8; Employer's Exhibits 5. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding

[3]Dr. Sargent, a B reader and Board-certified radiologist, interpreted claimant's May 25, 1989 and November 25, 1997 x-rays as negative for pneumoconiosis. Director's Exhibits 15, 35. Dr. Spitz, a similarly qualified physician, interpreted claimant's March 6, 1999 x-ray as negative for pneumoconiosis. Employer's Exhibit 5. There are no positive interpretations of these x-rays rendered by physicians dually qualified as B readers and Board-certified radiologists.

Dr. Brandon, a B reader and Board-certified radiologist, interpreted claimant's April 7, 1998, January 12, 1999 and March 11, 1999 x-rays as positive for pneumoconiosis. Claimant's Exhibits 2, 8. However, two equally qualified physicians, Drs. Wiot and Sargent, interpreted claimant's April 7, 1998 x-ray as negative for pneumoconiosis. Director's Exhibits 31, 33. Dr. Spitz, a similarly qualified physician rendered a negative interpretation of claimant's January 12, 1990 and March 11, 1999 x-rays. Employer's Exhibit 5.

that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Claimant also argues that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In his consideration of whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge properly credited the opinions of Dr. Branscomb and Fino that claimant did not suffer from pneumoconiosis over the contrary opinions of Drs. Simpao and Myers based upon the superior qualifications of Drs. Branscomb and Fino.[4] *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 11; Director's Exhibits 13, 35; Employer's Exhibits 1, 2, 6; Claimant's Exhibit 1.

Claimant contends that the opinions of Drs. Branscomb and Fino should have been accorded less weight because these physicians did not examine claimant.[5] We disagree. The Board has held that an administrative law judge cannot discredit the report of a physician solely because the physician did not examine the miner. *See Worthington v. United States Steel Corp.*, 7 BLR 1-522 (1984). In determining the weight to be accorded a physician's opinion, an administrative law judge may properly take into consideration the fact that a physician has not personally

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[4]Dr. Branscomb is Board-certified in Internal Medicine. Employer's Exhibit 1. Dr. Fino is Board-certified in Internal Medicine and Pulmonary Disease. Employer's Exhibit 2. The qualifications of Drs. Simpao and Myers are not found in the record.

Claimant contends that Dr. Simpao's opinion is entitled to greater weight based upon his status as the miner's treating physician. We disagree. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises, has held that the opinions of treating physicians are entitled to greater weight than those of non-treating physicians. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). However, because the administrative law judge provided a proper reason for crediting the opinions of Drs. Branscomb and Fino over that of Dr. Simpao, the administrative law judge was not required to mechanistically give greater weight to Dr. Simpao's opinion. *See generally Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995).

[5]Claimant also contends that Drs. Branscomb and Fino did not "review all of the evidence of record." Claimant's Brief at 7. We note that Drs. Branscomb and Fino engaged in a comprehensive review of the evidence of record. *See* Employer's Exhibits 1, 2, 6.

examined the miner, but he is not required to discredit the opinion on that basis.[6] *See Wilson v. United States Steel Corp.*, 6 BLR 1-1055 (1984).

Claimant also asserts that Drs. Branscomb and Fino acted as "hired judges" for employer. Claimant's Brief at 8. There is no logical basis for assuming that evidence prepared in anticipation of litigation is less reliable or unfairly slanted in favor of the party presenting it. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992). Unless the physicians retained by the parties are properly held to be biased, based on the evidence in the record, the administrative law judge may not accord less weight to their opinions based upon their party affiliation. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*). Claimant has not pointed to any evidence of bias in the instant case.

Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[6]We note that the opinions of Drs. Branscomb and Fino corroborate the opinions of two examining physicians, Drs. O'Bryan and Selby. *See* Director's Exhibit 29; Employer's Exhibit 4.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge