BRB No. 00-0218 BLA

TENSLEY CAMPBELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RIVER PROCESSING, INCORPORATED	)	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 of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher (Wolfe & Farmer), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen Chartered), Washington D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (99-BLA-0043) of Administrative Law Judge Daniel J. Roketenetz 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 credited claimant with fifteen and one-

[1] Claimant filed his first application for benefits on January 14, 1974. Director's Exhibit 22. The district director found claimant entitled to benefits on September 11, 1981, a finding which employer contested. *Id*. At the March 25, 1985 hearing, claimant voluntarily withdrew his applications for benefits. *Id*. Administrative Law Judge George A. Fath issued

half years of coal mine employment, and found employer to be the responsible operator. Based on the filing date of February 25, 1998, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1)-(4), 718.203 (b). The administrative law judge also found the evidence of record sufficient to demonstrate the presence of a totally disabling respiratory impairment due to pneumoconiosis at 20 C.F.R. §718.204(c), (b). Accordingly, benefits were awarded.

On appeal, employer challenges the findings of the administrative law judge on the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4) and on the cause of claimant's totally disabling respiratory impairment at 20 C.F.R. §718.204(b). Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.

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 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. *See* 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);

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a Dismissal Order on March 18, 1986 based on claimant's withdrawal. *Id*. In footnote 3 of his Decision and Order, Administrative Law Judge Daniel J. Roketenetz found that the present claim was not a duplicate claim as claimant withdrew his first claim prior to an adjudication. *See* Decision and Order at 2. As employer does not challenge this finding, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] We affirm the findings of the administrative law judge on the length of coal mine employment, on the designation of employer as the responsible operator, at 20 C.F.R. §§718.202(a)(2)-(3), 718.203(b), and 718.204(c), and on onset, as unchallenged on appeal. *See Skrack, supra*.

[3] Since the miner's last coal mine employment took place in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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. At Section 718.202(a)(1), employer argues that the administrative law judge erred in weighing the x-ray evidence of record. In finding the x-ray evidence of record sufficient to meet claimant's burden of proving the existence of pneumoconiosis, the administrative law judge properly considered both the earlier and the later x-ray interpretations in the record after identifying the radiological qualifications of the physicians interpreting the x-rays as well as the physicians' classifications or interpretations of the x-ray. The administrative law judge correctly found that five of the earlier x-rays were positive for pneumoconiosis and three of the earlier x-rays were negative for pneumoconiosis. The administrative law judge also correctly found that the March 16, 1998 x-ray was negative for pneumoconiosis as both Dr. Wicker, a B-reader, and Dr. Sargent, a Board-certified radiologist and B-reader, interpreted

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[4] The record contains 15 x-rays dated February 11, 1974, February 6, 1978, March 12, 1980, June 4, 1980, July 24, 1980, September 10, 1980, September 22, 1980, November 13, 1980, March 2, 1981, June 15, 1981, December 6, 1990, November 4, 1991, December 26, 1993, March 9, 1998, and September 9, 1998. *See* Director's Exhibits 7, 8, 22; Claimant's Exhibits 1, 2; Employer's Exhibits 1. These x-rays were interpreted 17 times by physicians who are B-readers or Board-certified radiologists/B-readers and by physicians with no radiological qualifications of record. *Id*.

[5] Dr. Martin, whose radiological qualifications are not of record, interpreted the June 4, 1980 x-ray as positive for pneumoconiosis. Director's Exhibit 22. Dr. Brandon, a Board-certified Radiologist and B-reader, interpreted the March 12, 1980, March 2, 1981 and June 15, 1981 x-rays as positive for pneumoconiosis, and Dr. Wright, who does not possess radiological qualifications, interpreted the July 24, 1980 x-ray as positive for pneumoconiosis. *Id*. Dr. Williams, whose radiological qualifications are not of record, interpreted the February 11, 1974 x-ray as negative for pneumoconiosis. *Id*. Dr. Felson, a Board-certified Radiologist and B-reader, interpreted the September 10, 1980 x-ray as negative for pneumoconiosis. *Id*. Dr. Anderson, who does not have radiological qualifications, interpreted the July 24, 1980 x-ray as negative for pneumoconiosis. *Id*.

In reviewing the earlier x-ray evidence, the administrative law judge did not consider the September 22, 1980 x-ray read positive for pneumoconiosis by Dr. Clarke, a physician who has no radiological qualifications; the February 6, 1978 x-ray read by Dr. Boggs while claimant was hospitalized; and Dr. Powell's statement in his report that he relied on a negative interpretation of the March 2, 1981 x-ray. *Id*. The failure of the administrative law judge to consider this evidence is harmless as his decision would not be adversely impacted by this evidence. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

this x-ray as showing no pneumoconiosis, and that Dr. Robinette, a B-reader, interpreted the September 9, 1998 x-ray as positive for pneumoconiosis. *See* Director's Exhibits 7, 8; Claimant's Exhibit 2; Employer's Exhibit 1. Employer's argument that the Board's decision in *Marra v. Consolidation Coal Co.*, 7 BLR 1-216 (1984) requires the administrative law judge to treat the x-rays of December 6, 1990, November 4, 1991 and December 26, 1993 as negative is incorrect as employer misreads *Marra*. In *Marra*, the Board held that, in appropriate circumstances, x-ray interpretations that contain no mention of pneumoconiosis will support an inference that the miner did not, or does not, have pneumoconiosis. *Marra*, *supra*. In the instant case, because the x-rays at issue were not properly classified under the regulations, the administrative law judge rationally determined that these x-rays were not probative on the presence or absence of pneumoconiosis since the physicians did not relate their diagnoses of chronic obstructive pulmonary disease (COPD) to claimant's coal mine employment. *Id.*; Claimant's Exhibit 1.

Furthermore, in reviewing both the earlier and later conflicting x-ray evidence of record, the administrative law judge properly found that six x-ray readings, of which three were by Board-certified Radiologists and B-readers and one was by a B-reader, were positive for pneumoconiosis, and that five x-ray readings, of which two were by Board-certified Radiologists/B-readers and two were by B-readers, were negative for pneumoconiosis. *See* Decision and Order at 10. The administrative law judge properly found the preponderance of the x-ray evidence, including the interpretations of the most qualified readers, positive for pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1); *Director, OWCP v. Greenwich Collieries*

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[6] Dr. Patel interpreted the November 4, 1991 x-ray as showing fibrotic changes and COPD. Claimant's Exhibit 1. Dr. Polisetty interpreted the December 6, 1990 x-ray as COPD and the December 26, 1993 x-ray as showing COPD and fibrotic changes. *Id*.

[7] In his Decision and Order the administrative law judge refers to these six x-ray interpretations as negative. *See* Decision and Order at 10. The Board views this reference as a clerical error as a reading of the administrative law judge's Decision and Order indicates that the administrative law judge meant positive. *Id*.

[8] Although the record does not contain Dr. Williams's radiological qualifications, the administrative law judge permissibly took judicial notice that Dr. Williams is a B-reader. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); Decision and Order at 4; Director's Exhibit 22.

[9] Contrary to employer's assertion, the administrative law judge's citation to the quality and quantity of evidence does not violate 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) as the administrative law judge clearly identifies the x-rays in the record and the qualifications of the physicians interpreting the x-rays. *See* Decision and Order at 4-5, 9-10.

[Ondecko], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Finally, the administrative law judge did not mechanically rely on Dr. Robinette's most recent positive x-ray interpretations; rather, the administrative law judge correctly found that Dr. Robinette's positive reading provided further support for finding the majority of credible readings positive for pneumoconiosis. *Id*. We, therefore, affirm the findings of the administrative law judge at 20 C.F.R. §718.202(a)(1) as supported by substantial evidence.

At Section 718.202(a)(4), employer argues that the administrative law judge has offered no valid explanation for according lesser weight to the opinions of Drs. Powell, Anderson, Gilbert, Fino, and Branscomb, and for crediting the opinion of Dr. Robinette. At Section 718.202(a)(4), claimant can establish the existence of pneumoconiosis with medical opinions which diagnose a pulmonary or respiratory impairment significantly related to or substantially aggravated by dust exposure in coal mine employment. *See* 20 C.F.R. §§718.202(a)(4); 718.201; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). The administrative law judge properly accorded less weight to Dr. Powell's report as the physician offered no medical reason for the source of the severe obstructive ventilatory defect he diagnosed. *See* 20 C.F.R. §718.201; *Cornett*, *supra*; Director's Exhibit 22. In so doing, the administrative law judge permissibly declined to accept Dr. Powell's reference to "asthma all his life" in claimant's medical history as an explanation for the source of claimant's ventilatory defect. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Likewise, the administrative law judge did not err when he declined to accord determinative weight to the medical report of Dr. Gilbert, claimant's treating physician, as the administrative law judge correctly found that although Dr. Gilbert repeatedly diagnosed COPD and asthmatic bronchitis, he never addressed the source of these chronic lung conditions. *See* 20 C.F.R. 718.201; *Cornett*, *supra*; Claimant's Exhibit 1.

Employer next argues that Dr. Anderson provided the source for claimant's respiratory impairment as he said that claimant did not have pneumoconiosis and that claimant had "asthma all his life". Dr. Anderson testified that claimant's asthma had progressed to emphysema, a medical condition which had produced claimant's symptoms. *See* Director's Exhibit 22, 112-114. On cross-examination, Dr. Anderson acknowledged that symptoms of emphysema are aggravated by breathing coal dust, that claimant has lung dysfunction; that claimant is a pulmonary cripple who is disabled from manual labor on an 8-

[10] The administrative law judge did not confuse the issue of pneumoconiosis at 20 C.F.R. §718.202(a)(4) with the issue of causation at 20 C.F.R. §718.204(b), as employer argues, because claimant can establish legal pneumoconiosis by showing the presence of a pulmonary or respiratory impairment significantly related to or substantially aggravated by coal dust exposure in coal mine employment. *See* 20 C.F.R. §718.201.

hour day; and that he based his diagnosis of no pneumoconiosis on his negative x-ray interpretation. *Id*. 116-118. Any error the administrative law judge may have made in his review of Dr. Anderson's testimony is harmless in light of the fact that Dr. Anderson's testimony on cross-examination is sufficient to establish legal pneumoconiosis. *See* 20 C.F.R. §718.201; *Cornett*, *supra*. Concerning the report of Dr. Wicker, the administrative law judge correctly declined to credit this report since Dr. Wicker only addresses occupational lung disease based on his x-ray, not on a pulmonary impairment. *See* Director's Exhibit 7. Thus, Dr. Wicker's report is not a relevant medical report at Section 718.202(a)(4).

Employer also argues that the administrative law judge erred in rejecting the reports of Drs. Fino and Branscomb, neither of whom diagnosed coal workers' pneumoconiosis or any chronic respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. The administrative law judge acted within his discretion when he accorded less weight to Dr. Branscomb's opinion because he only reviewed the most recent 1998 report of Dr. Robinette, and thus, did not have adequate knowledge of claimant's medical history and health. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Cosalter v. Mathies Coal Co.*, 6 BLR 1-1182 (1984). Likewise, the administrative law judge permissibly accorded less weight to Dr. Fino's conclusion that the medical records he reviewed revealed no evidence of a coal mine dust related impairment because Dr. Fino had not reviewed all the medical evidence of record, and thus, he did not have a complete picture of the miner's medical history and health. *Id*. In addition, the administrative law judge permissibly accorded less weight to the opinions of Drs. Fino and Branscomb because neither physician examined claimant nor addressed the etiology of claimant's severe respiratory impairment. *See Cornett*, *supra*; *see also Cole v. East Kentucky Collieries*, 20 BLR 1-50 (1996).

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[11] In his report, Dr. Wicker states that claimant's respiratory capacity cannot be determined due to the failure of claimant to comply with testing protocol. *See* Director's Exhibit 7. Dr. Wicker was unable to obtain a valid pulmonary function study. *Id*.

[12] Dr. Branscomb determined that claimant was totally disabled as a result of severe obstructive pulmonary disease. In deciding that claimant's pulmonary disease was not related to coal dust exposure, Dr. Branscomb stated that the severity of the disease and its onset many years (20) after claimant retired from coal mining are not consistent with a coal dust etiology and that he disagreed with Dr. Robinette's positive reading of his x-ray. *See* Employer's Exhibit 1. Dr. Branscomb also indicated that previous medical records, especially between 1979 and the present, would be helpful. *Id*. Dr. Branscomb was not provided with claimant's earlier medical records which reflect the presence of significant pulmonary problems and disability prior to and immediately after claimant retired from his coal mine employment. *See* Director's Exhibit 22.

Finally, employer's argument that the administrative law judge erred when he credited the report of Dr. Robinette because the physician relied on thirty-one years of coal mine employment while the administrative law judge only credited claimant with fifteen and one-half years of coal mine employment and because the physician did not diagnose asthma is rejected. Dr. Robinette examined claimant in September 1998, and at this time, took a medical, social and work history from claimant as well as performed objective testing on claimant. *See* Claimant's Exhibit 2. Like the other physicians of record, Dr. Robinette diagnosed very severe COPD. Dr. Robinette stated that claimant's coal mine employment contributed to his COPD. *Id*. Dr. Robinette based this conclusion, not on claimant's length of coal mine employment, but rather on his knowledge of pneumoconiosis and observations that claimant has coal workers' pneumoconiosis as shown by the following comments in his report:

> The pathological findings of miners with simple coal workers' pneumoconiosis clearly documents [sic] the evolution of coal macules in the formation of centrilobular emphysema with bronchial wall changes. These changes are chronic and result in progressive pathological changes consistent with underlying bronchitis. There is a clear relationship between the evolution of fibrosis and emphysema.

See Claimant's Exhibit 2. As employer has not explained why the difference between Dr. Robinette's knowledge of the disease and the length of claimant's credited coal mine employment would impact Dr. Robinette's decision, the administrative law judge acted within his discretion when he accorded greatest weight to the well-documented and reasoned medical opinion of Dr. Robinette based on his qualifications, recent examination of claimant, and the supportive opinions of three other examining physicians. *See Cornett*, *supra*; *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). We, therefore, affirm the

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[13] Drs. Branscomb, Fino, Wicker, Flannery, and Powell also do not diagnose asthma. *See* Director's Exhibits 7, 22; Employer's Exhibits 1-3.

[14] In addition, Dr. Robinette diagnosed coal workers' pneumoconiosis based on his positive x-ray interpretation and indicated that claimant's very severe chronic obstructive pulmonary disease had underlying hypercapnia and hypoxemia. *See* Claimant's Exhibit 2. Dr. Robinette also noted that claimant had a history of recurrent respiratory failure. *Id.*

[15] Employer does not challenge the administrative law judge decision to rely on the medical opinions of Drs. Flannery, Wright and Clarke which support claimant's burden of proof on the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). We, therefore, affirm these findings of the administrative law judge as unchallenged. *Skrack*, *supra*.

findings of the administrative law judge that claimant established the existence of pneumoconiosis at Section 718.202(a)(4) as it is supported by substantial evidence. *See Perry, supra*.

At Section 718.204(b), employer argues that the administrative law judge failed to properly consider claimant's asthma as the actual cause of claimant's disabling respiratory impairment. Employer asserts that Dr. Anderson related claimant's disabling respiratory impairment to his asthma and emphysema, which are diseases of the general public, that the reports of Drs. Fino and Branscomb are well-reasoned and documented and not inconsistent with the evidence of record, and that the reasons given by the administrative law judge for discrediting the reports of Drs Branscomb are not in compliance with 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). Employer argues for remand for the administrative law judge to provide adequate reasons for crediting the reports of Drs. Wright, O'Neill, Clarke, and Robinette, asserting that these physicians relied on forty-three years or thirty-one years of coal mine employment, while the administrative law judge credited claimant with fifteen and one-half years of coal mine employment, that Dr. Wright did not distinguish between the effects of coal dust and asthma and did not clearly address causation; that Dr. O'Neill attributed claimant's disability to asthma; and that Dr. Robinette did not diagnose asthma.

At Section 718.204(b), claimant must establish that his disabling respiratory impairment at 20 C.F.R. §718.204(c) is due "at least in part" to his pneumoconiosis. *See Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). The administrative law judge correctly found that Drs. Robinette, Wright, Clarke, and O'Neill, all of whom examined claimant, attributed claimant's disabling respiratory impairment, at least in part, to his pneumoconiosis, and that these opinions were sufficient to meet claimant's burden of proof at Section 718.204(b). *See Cross Mountain*, *supra*; *Adams*, *supra*. As Dr. Anderson opined in his deposition of February 9, 1980 that claimant had pulmonary emphysema with severe obstructive ventilatory insufficiency which rendered claimant a pulmonary cripple and

[16] Dr. O'Neill diagnosed a totally disabling respiratory impairment as a result of claimant's chronic obstructive airway disease with a severe restrictive component, which he related primarily to claimant's allergic asthma. *See* Director's Exhibit 22. Dr. O'Neill also opined that coal mine employment probably contributed in some degree to claimant's airway disease. *Id*. Dr. Clarke related claimant's disabling respiratory impairment to his coal workers' pneumoconiosis and Dr. Wright diagnosed simple coal workers' pneumoconiosis, a significant and severe respiratory impairment secondary to coal dust exposure, and emphysema which may, in part, be related to coal dust exposure. *Id*. Dr. Robinette also related claimant's disabling respiratory impairment to his coal dust exposure. *See* Claimant's Exhibit 2.

disabled claimant from manual labor; that claimant's asthma had progressed to emphysema; and that breathing coal dust aggravates emphysema, his opinion is sufficient to support claimant's burden of proof and any error by the administrative law judge is harmless. *Id*.; *Larioni*, *supra*. Furthermore, the administrative law judge did not err when he accorded less weight to the opinions of Drs. Branscomb and Fino because neither physician examined all of the medical evidence of record, and thus, did not have an adequate picture of claimant's health, *Trumbo*, *supra*, and because their conclusion that coal dust was not a factor in claimant's disability was not consistent with the objective evidence of record concerning the presence of pneumoconiosis. *See Cornett*, *supra*. We, therefore affirm the findings of the administrative law judge at Section 718.204(b) and the award of benefits as it is supported by substantial evidence.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge