BRB No. 00-0229 BLA

RAY GIBSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TALON RESOURCES, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
WEST VIRGINIA COAL-WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
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 - Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

K. Keian Weld (Counsel for the West Virginia Coal-Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (99-BLA-0530) of Administrative Law Judge Daniel L. Leland 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 seventeen years and eight months of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718, based on claimant's May 28, 1998 filing date. Addressing the merits, the administrative law judge found the medical evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). In addition, he found the medical evidence insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

In challenging the administrative law judge's denial of benefits, claimant generally contends that the administrative law judge erred in finding the medical evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) and total respiratory disability pursuant to Section 718.204(c). In response, employer through its carrier, the West Virginia Coal-Workers' Pneumoconiosis Fund, has filed a letter stating that it will not file a response brief in this appeal. In addition, the Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.

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

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish 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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Failure of claimant to establish any of these

[1] We affirm the administrative law judge's decision to credit claimant with seventeen years and eight months of coal mine employment and his findings pursuant to 20 C.F.R. §718.202(a)(2)-(3), inasmuch as the parties do not challenge these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

elements precludes entitlement. *Id*.

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 administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. The administrative law judge, in the instant case, permissibly determined that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *See Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). In finding that the weight of the x-ray evidence of record was negative for the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge correctly determined that the record contains eleven readings of the three x-ray films of record, of which eight interpretations were negative for pneumoconiosis and three were positive for pneumoconiosis. Of these readings, the administrative law judge found that seven interpretations were read as negative by physicians who are dually qualified as B readers and Board-certified radiologists, whereas, only one of the three positive interpretations was provided by a dually qualified physician. Decision and Order at 3, 5; *see* Director's Exhibits 15-17; Claimant's Exhibits 1, 2; Employer's Exhibits 1-3, 5, 6, 8. Inasmuch as the administrative law judge reasonably exercised his discretion as fact-finder in relying on the preponderance of negative interpretations provided by the best qualified physicians, those physicians who are dually qualified as B readers and Board-certified radiologists, we affirm his finding that the weight of the x-ray evidence is negative for the existence of pneumoconiosis. Decision and Order at 5; 20 C.F.R. §718.202(a)(1); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Edmiston v. F & R Coal Co.*, 14 BLR 1-710 (1990); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Consequently, we affirm his finding that the x-ray evidence of record failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

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[2] The record contains eleven readings of the three x-ray films of record. Director's Exhibits 15-17; Claimant's Exhibits 1, 2; Employer's Exhibits 1-3, 5, 6, 8. In setting forth these readings, the administrative law judge found that the August 7, 1998 film was interpreted seven times as negative for pneumoconiosis and one time as positive for pneumoconiosis, all by physicians who are dually qualified as B readers and Board-certified radiologists. Decision and Order at 3; Director's Exhibits 15-17; Employer's Exhibits 1, 2, 5, 6, 8. In addition, the administrative law judge found the January 20, 1999 film was interpreted as negative for pneumoconiosis by Dr. Zaldivar, a B reader, whereas, the January 27, 1999 film was read as positive for pneumoconiosis by Drs. Aycoth and Cappiello, both of whom are B readers. Decision and Order at 3; Claimant's Exhibits 1-2; Employer's Exhibit 3.

Claimant further challenges the administrative law judge's finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), arguing that the administrative law judge erred in crediting the medical opinion of Dr. Zaldivar over the contrary medical opinion of Dr. Rasmussen. In addition, claimant contends that the administrative law judge erred in discrediting the opinion of Dr. Rasmussen at Section 718.202(a)(4) because he considered a positive x-ray interpretation in reaching his conclusion regarding the existence of pneumoconiosis. We disagree.

The administrative law judge, in finding that Dr. Rasmussen diagnosed coal workers' pneumoconiosis, determined that the physician's diagnosis was based on a positive x-ray reading which was re-read as negative by seven other physicians. In addition, the administrative law judge noted the equivocacy in Dr. Rasmussen's opinion inasmuch the physician "admitted that claimant's disabling hypoxemia could be caused either by his coal mine dust exposure or a right to left shunt," which the administrative law judge found to be an inappropriate basis to diagnose pneumoconiosis. Decision and Order at 5; Director's Exhibit 14. Rather, the administrative law judge accorded greater weight to the medical opinion of Dr. Zaldivar, that claimant does not suffer from pneumoconiosis, as he found the opinion to be well reasoned and consistent with the objective tests. Decision and Order at 6; Employer's Exhibit 3.

Contrary to claimant's contention, an administrative law judge may, in a permissible exercise of discretion, determine that a medical opinion is based only on an x-ray reading even if it purports to be based on clinical findings, where there is a rational basis for his conclusion, as in the case at bar. In the paragraph in which Dr. Rasmussen diagnosed pneumoconiosis, his diagnosis appears to be based on two factors stated prior to the diagnosis: "significant exposure to coal mine dust ..." and "x-ray changes consistent with pneumoconiosis." Director's Exhibit 14 at 3; *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). The administrative law judge rationally questioned the underlying documentation of Dr. Rasmussen's opinion inasmuch as the x-ray, upon which this opinion was based, was read seven times as negative for pneumoconiosis. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). In addition, the administrative law judge reasonably exercised his discretion in determining that Dr. Rasmussen's opinion was not a definitive diagnosis of pneumoconiosis. Decision and Order at 5; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Moreover, the administrative law judge explained fully why he found Dr. Zaldivar's opinion to be better reasoned and entitled to greater weight than the contrary opinion of Dr. Rasmussen, inasmuch as it was more consistent with the objective evidence of record. *See Lafferty v. Cannelton Industries, Inc*.,

12 BLR 1-190 (1989); *Clark, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Pastva v. The Youghiogheny & Ohio Coal Co.*, 7 BLR 1-829 (1985); *see also Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2- (4th Cir. 2000). Inasmuch as the administrative law judge is empowered to weigh the medical opinion 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, *Anderson v. Valley Camp of Utah*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we affirm the administrative law judge's finding that claimant failed to satisfy his burden of proof in establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order at 6; *see Perry, supra*; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *see also Compton, supra*.

Since claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), a necessary element of entitlement under Part 718, an award of benefits in this miner's claim is precluded. *See Trent, supra; Perry, supra*.

[3] In light of our affirmance of the administrative law judge's finding that the medical evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), a necessary element of entitlement, we decline to address the remainder of claimant's contentions. *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986); *see also Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge