

BRB No. 00-0239 BLA

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| DANNY BRUCE |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| NEW HORIZONS COAL, INCORPORATED |) | |
| |) | |
| and |) | DATE ISSUED:_____ |
| |) | |
| GREAT WESTERN RESOURCES |) | |
| |) | |
| 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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Denise M. Davidson (Barret, Haynes, May, Carter & Roark, P.S.C.), Hazard, Kentucky, for employer.

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-0021) of Administrative Law Judge Joseph E. Kane 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). Claimant filed a claim for benefits on February 8, 1994. In a Decision and Order dated March 27, 1996, Administrative Law Judge Stuart A. Levin credited claimant with at least twenty years of coal mine employment based upon the stipulation of the parties, and properly considered the claim under the permanent regulations at 20 C.F.R. Part 718. Judge Levin found that claimant established the

existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), a presumption which Judge Levin found was not rebutted. Judge Levin further found, however, that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) and, accordingly, denied benefits. Claimant appealed. The Board affirmed Judge Levin's finding that the evidence was insufficient to establish total disability under Section 718.204(c)(1)-(4) and holding it was thus unnecessary to review Judge Levin's findings under Section 718.202(a), affirmed the denial of benefits. *Bruce v. New Horizons, Inc.*, BRB No. 96-0867 BLA (Jan. 23, 1997)(unpublished).

Claimant thereafter filed a request for modification pursuant to 20 C.F.R. §725.310 with the district director. In a Decision and Order dated October 29, 1999, Administrative Law Judge Joseph E. Kane (the administrative law judge) considered the newly submitted x-ray readings in conjunction with the previously submitted x-ray evidence, and found that, contrary to Judge Levin's finding, the evidence was insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1). The administrative law judge thus determined that a mistake in a determination of fact in Judge Levin's prior Decision and Order was established pursuant to 20 C.F.R. §725.310. The administrative law judge then considered all of the evidence of record and found it insufficient to establish the existence of pneumoconiosis and total disability under Sections 718.202(a)(1)-(4) and 718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant challenges the administrative law judge's findings under Section 718.202(a)(1) and (a)(4), and contends that the administrative law judge erred in failing to find total disability established under Section 718.204(c)(4). Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend to participate 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 rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a 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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

¹The case was assigned to Administrative Law Judge Joseph E. Kane after claimant requested a hearing on modification because Administrative Law Judge Stuart A. Levin was unavailable. Judge Kane held a hearing on April 21, 1999.

In challenging the administrative law judge's weighing of the x-ray evidence of record under Section 718.202(a)(1), claimant argues that the administrative law judge erred in crediting the negative x-ray readings of record over the positive x-ray readings of record by relying on the qualifications of the physicians reading the films and the numerical superiority of the negative readings. Claimant's contention is without merit. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises, has held that these factors must be considered by a fact-finder when weighing the x-ray evidence. See *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). As accurately summarized by the administrative law judge, the x-ray evidence of record includes thirteen interpretations of five x-ray films. Decision and Order at 5-6, 11. The administrative law judge correctly found that ten of the interpretations were negative for pneumoconiosis, while the remaining three readings were positive. *Id.*; Director's Exhibits 14, 15, 28, 32, 34, 53, 55, 56, 57, 59, 60, 62. As the administrative law judge stated, eight of the negative readings were submitted by physicians dually-qualified as B reader/Board-certified radiologists, and two were submitted by B readers. *Id.* The administrative law judge also correctly determined that none of the three positive readings was submitted by a radiologist who is both a B reader and a Board-certified radiologist. The administrative law judge thus properly found that, because the negative readings constituted the majority of interpretations and are verified by more highly-qualified physicians, the x-ray evidence was insufficient to establish, by a preponderance of the evidence, a finding of pneumoconiosis. See *Staton, supra*; *Woodward, supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 7-8. Inasmuch as it is supported by substantial evidence and is in accordance with law, we affirm the administrative law judge's finding that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *Staton, supra*; *Woodward, supra*; *Edmiston v. F & R Coal Co.*, 14

²Contrary to claimant's contention, the administrative law judge duly noted that Dr. Myers, who read the September 14, 1993 x-ray, is a B reader. Decision and Order at 11; Director's Exhibit 28. The administrative law judge also properly found that Dr. Baker, who read the June 29, 1994 film as positive, is likewise a B reader, and that Dr. Clarke, who read the October 26, 1993 film as positive, is neither a B reader nor a Board-certified radiologist. *Id.*

³Claimant generally suggests that the administrative law judge may have selectively analyzed the x-ray evidence, thereby committing error. Claimant provides no support for his contention, however, and the administrative law judge's Decision and Order reflects that the administrative law judge properly considered all of the x-ray evidence, as discussed *supra*, without engaging in a selective analysis. Decision and Order at 5-6, 11. Thus, we reject claimant's suggestion. Moreover, there is no merit to claimant's assertion that the administrative law judge erred in "fail[ing] to discuss the validity of the x-ray interpretations of Dr. Sargent" in light of the fact that the readings pre-dated Judge Levin's prior Decision and Order but were not made a part of the record at that time. Petitioner's Brief at 5. The interpretations to which claimant refers were admitted at the hearing before the administrative law judge on April 21, 1999, Director's Exhibits 32, 34, 60, without any objection by claimant's counsel. Hearing Tr. at 5-6. Furthermore, the readings were included in the joint stipulation of medical evidence in this case, which claimant's counsel signed. Joint Exhibit 1.

BLR 1-65 (1990); Decision and Order at 11; Director's Exhibits 14, 15, 28, 32, 34, 53, 55, 56, 57, 59, 60, 62.

In challenging the administrative law judge's findings with regard to the medical opinion evidence under Section 718.202(a)(4), claimant argues that the administrative law judge erred in crediting Dr. Broudy's opinion that claimant does not suffer from pneumoconiosis, over the contrary opinions of Drs. Baker, Myers and Clarke. Specifically claimant contends that the administrative law judge improperly relied upon Dr. Broudy's superior qualifications and failed to consider the quality of reasoning and documentation in the reports of the other three doctors. Claimant's contentions lack merit. Claimant's argument amounts to a request to reweigh the evidence, which the Board is not empowered to do. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). In the instant case, the administrative law judge properly credited Dr. Broudy's opinion over the opinions of Drs. Myers and Clarke because the record indicates that Dr. Broudy is Board-certified in internal medicine with a subspecialty in pulmonary diseases, while the record does not reflect that Drs. Myers and Clarke are similarly well-qualified. See *Woodward, supra*; *Roberts, supra*; Decision and Order at 12; Director's Exhibit 53. In addition, the administrative law judge properly found that although Dr. Baker is, like Dr. Broudy, a Board-certified pulmonologist, Director's Exhibit 28, Dr. Broudy's opinion was entitled to greater weight because it was the opinion of record best supported by the objective evidence. See *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); Decision and Order at 12; Director's Exhibit 53. In this regard, the administrative law judge correctly found that Dr. Broudy based his opinion that claimant has chronic bronchitis due to cigarette smoking on his examination of claimant, a non-qualifying pulmonary function study, normal arterial blood gas study, and a negative x-ray. Decision and Order at 12; Director's Exhibit 53. Moreover, the administrative law judge properly accorded greater weight to Dr. Broudy's report on the basis that it was likely to contain the most accurate evaluation of claimant's condition inasmuch as Dr. Broudy's examination was the most recent of record by three to four years. See *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Gillespie v. Badger Coal Co.*, 7 BLR 1-839 (1985), Decision and Order at 12; Director's Exhibits 12, 28, 53. Accordingly, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

⁴In light of the foregoing, we also hold that the administrative law judge properly found a mistake in a determination of fact at 20 C.F.R. §718.202(a)(1). See *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

⁵Dr. Broudy examined claimant on December 19, 1997. Director's Exhibit 53. Dr. Baker examined claimant on March 15, 1994 and June 29, 1994. Director's Exhibits 12, 28. Drs. Myers and Clarke examined claimant on September 21, 1993, and October 26, 1993, respectively. Director's Exhibit 28.

⁶We further affirm, as unchallenged on appeal, the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order

Inasmuch as claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement, the administrative law judge properly denied benefits. See *Trent, supra*; *Gee, supra*; *Perry, supra*. In light of the foregoing, we need not address claimant's arguments with respect to the administrative law judge's weighing of the evidence at Section 718.204(c)(4).

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