BRB No. 01-0141 BLA

JAMES D. SHEPHERD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAIN CLAY, INCORPORATED	)	
	)	
	)	DATE ISSUED:
and	)	
	)	
TRANSCO ENERGY 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 - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Lois A. Kitts (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer and carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (99-BLA-1339) of Administrative Law Judge Robert L. Hillyard 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).[1] Administrative Law Judge Daniel J. Roketenetz originally

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No.

considered the claim in his November 18, 1997 Decision and Order, wherein he denied benefits. Director's Exhibit 40. In that Decision and Order, Judge Roketenetz credited claimant with seventeen years of coal mine employment. On the merits of the claim, he found that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a) (2000) or total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(c) (2000).[2] Accordingly, benefits were denied. *Id*. Claimant appealed from Judge Roketenetz's decision. Director's Exhibits 41, 42. The Board, in *Shepherd v. Mountain Clay, Inc.*, BRB No. 98-0486 BLA (Dec. 22, 1998)(unpublished), affirmed Judge Roketenetz's findings at 20 C.F.R. §718.202(a)(1)-(4) (2000) and at 20 C.F.R.

1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations. By Order dated August 10, 2001, the Board rescinded its order requesting supplemental briefing. We acknowledge employer's Response to Order filed with the Board on August 17, 2001. Employer's request, made therein, that the Board hold the instant case in abeyance pending the decision in *Chao, supra*, is moot.

[2]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

§718.204(c)(1)-(4) (2000). The Board thus affirmed the denial of benefits. Director's Exhibit 47.

On March 17, 1999, claimant requested modification and submitted new evidence. Director's Exhibit 48. The district director denied claimant's request for modification, Director's Exhibit 58, and transferred the case for a hearing pursuant to claimant's request. Director's Exhibits 59-61. A hearing was held on April 11, 2000 before Administrative Law Judge Robert L. Hillyard (the administrative law judge).

In his ensuing decision and order, which is the subject of the instant appeal, the administrative law judge found that the newly submitted evidence failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a) (2000) or total disability under 20 C.F.R. §718.204(c) (2000). The administrative law judge thus determined that claimant failed to establish a change in conditions or a mistake in a determination of fact since the prior denial pursuant to 20 C.F.R. §725.310 (2000).[3] The administrative law judge thus denied claimant's request for modification and further denied the claim.

On appeal, claimant contends that the administrative law judge erred in finding that the newly submitted x-ray evidence failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) (2000) and that the newly submitted medical opinions failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4) (2000) and total disability under 20 C.F.R. §718.204(c)(4) (2000). Employer responds, and seeks affirmance of the decision below. The Director, Office of Workers' Compensation Programs, has not filed a brief in the 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).

[3]While the regulation at 20 C.F.R. §725.310 (2000) was recently amended, the new regulation does not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2, 65 Fed. Reg. 80, 057.

Claimant argues that the administrative law judge erred in according less weight to Dr. Baker's interpretation of the x-ray dated March 3, 1999 based on the preponderance of the negative x-ray readings rendered by dually qualified physicians.[4] Claimant's contention lacks merit. The administrative law judge correctly noted that Dr. Baker's interpretation of the x-ray dated March 3, 1999 was the only positive reading submitted since the prior denial. *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *see* Director's Exhibit 48. The administrative law judge, within his discretion, properly credited the interpretations of Drs. Barrett and Sargent who were dually qualified as B readers and Board-certified radiologists and who read the March 3, 1999 x-ray as negative.[5] *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). We thus affirm the administrative law judge's finding that the newly submitted x-ray evidence fails to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) (2000). *See* 20 C.F.R. §718.202(a)(1).

Claimant next contends that the administrative law judge erred in according less weight to Dr. Baker's opinion that claimant has coal workers' pneumoconiosis because the diagnosis was based on an x-ray subsequently read as negative. Claimant further asserts that Dr. Baker's report is well reasoned and documented. Notwithstanding claimant's argument, we affirm the administrative law judge's weighing of the newly submitted medical opinions at 20 C.F.R. §718.202(a)(4) (2000) as it is rational, supported by substantial evidence and

[4]We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2), (3) (2000), *see* 20 C.F.R. §718.202(a)(2), (3), and total disability under 20 C.F.R. §718.204(c)(1)-(3) (2000), *see* 20 C.F.R. §718.204(b)(2)(i) - (iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5]The record reflects that Dr. Baker is a B reader and Drs. Barrett and Sargent are dually qualified as B readers and Board-certified radiologists. Director's Exhibits 48, 50, 51.

consistent with applicable law. The administrative law judge correctly noted that the x-ray underlying Dr. Baker's March 11, 1999 report had been reread as negative by dually qualified physicians. *Clark, supra*; Director's Exhibits 50, 51. The administrative law judge, within his discretion, further found that the contrary opinions of Drs. Rosenberg and Broudy, who opined that claimant did not have coal workers' pneumoconiosis, Director's Exhibit 52, Employer's Exhibits 3, 7, were better supported and explained[6] than the opinion of Dr. Baker, *see Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), and properly accorded Dr. Baker's opinion less weight on this basis. 20 C.F.R. §718.202(a)(4); *Clark, supra; Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

In light of claimant's failure to establish the existence of pneumoconiosis on modification based on the newly submitted evidence, and given Judge Roketenetz's prior finding that pneumoconiosis was not established, Director's Exhibit 40, a finding which was affirmed by the Board, Director's Exhibit 47, we affirm the administrative law judge's denial of benefits in the instant case as a finding of entitlement is precluded. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). We thus decline to address claimant's argument that the administrative law judge erred in weighing the medical opinion evidence on the issue of total respiratory disability.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[6]The administrative law judge found that the opinions of Drs. Rosenberg and Broudy were supported by the objective medical evidence of record. Decision and Order at 7.

NANCY S. DOLDER
Administrative Appeals Judge