BRB No. 01-0177 BLA

ROBERT G. SIZEMORE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:_____
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Respondent	)	

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Edward Waldman (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order (98-BLA-0917) of Administrative Law Judge Joseph E. Kane denying benefits on a miner's 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).[2] Initially, the administrative law judge found the Director, Office of

[1]Claimant is Robert G. Sizemore, the miner, who filed his claim for benefits on July 29, 1994. Director's Exhibit 1.

[2]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,

Workers' Compensation Programs (the Director), to be liable for the payment of any benefits payable in this case.[3] Decision and Order at 8. The administrative law judge credited the

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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. 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). While the Director, Office of Workers' Compensation Programs (the Director), submitted a supplemental brief in response to the Board's order, the court's decision renders moot those arguments made by the Director regarding the impact of the challenged regulations.

[3]The Director requested reconsideration of the administrative law judge's decision

miner with nine months of coal mine employment. Decision and Order at 7, 16. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) and total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000). Decision and Order at 15-18. Accordingly, benefits were denied.

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regarding the responsible operator issue, which the administrative law judge denied. Order Denying Director's Motion for Reconsideration at 3.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to Section 718.202(a)(1) (2000) and Section 718.202(a)(4) (2000). Claimant's Brief at 3-5. Additionally, claimant contends that the administrative law judge erred in failing to find that claimant has established total respiratory disability based on the medical opinion evidence. Claimant's Brief at 5-7. The Director responds,[4] urging affirmance of the denial of benefits.[5]

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to Section 718.202(a)(1) (2000), the administrative law judge noted that the record contains fifty-two interpretations of eleven x-rays. Decision and Order at 15. Of

[4]The Director also filed a cross-appeal of the administrative law judge's Decision and Order denying benefits and the administrative law judge's Order Denying the Director's Motion for Reconsideration. The Director, subsequently, filed a motion to withdraw his cross-appeal, which the Board granted by Order dated May 23, 2001.

[5]We affirm the administrative law judge's findings regarding the responsible operator issue, claimant's length of coal mine employment, and pursuant to 20 C.F.R. §718.202(a)(2)-(a)(3) (2000) as they are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

these interpretations, the administrative law judge noted that one was positive for the existence of pneumoconiosis, forty-one were negative or not supportive of the existence of pneumoconiosis, and ten did not address the existence of the disease. *Id.* Dr. Clarke, who is neither a B-reader[6] nor a Board-certified radiologist, read the March 11, 1991 x-ray as positive for pneumoconiosis. Director's Exhibit 44. The majority of the negative readings were rendered by physicians who are both B-readers and Board-certified radiologists. The administrative law judge found that "the x-ray evidence is negative for pneumoconiosis" "[b]ecause the negative readings constitute the majority of interpretations and are verified by more, highly-qualified physicians." Decision and Order at 15.

Claimant contends that the administrative law judge erred in relying on the qualifications of the physicians in weighing the x-ray evidence, in placing substantial weight on the numerical superiority of the x-ray readings, and in selectively analyzing the x-ray evidence. Claimant's Brief at 3-4. Contrary to claimant's assertion, it was permissible for the administrative law judge to consider the radiological qualifications of the x-ray readers. *See Johnson v. Island Creek Coal Co.*, 846 F.2d 364, 11 BLR 2-161 (6th Cir. 1988); *Creech v. Benefits Review Board*, 841 F.2d 706, 11 BLR 2-86 (6th Cir. 1988); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Similarly, because the administrative law judge also considered the x-ray readers' qualifications, he did not rely solely on the numerical superiority of the negative readings in rendering his finding. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995). Additionally, claimant's bald assertion that the administrative law judge selectively analyzed the x-ray evidence is without merit inasmuch as he considered all the x-ray evidence in the record. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984); *see generally Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Inasmuch as the administrative law

[6]A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-16 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

judge properly concluded that claimant failed to establish the existence of pneumoconiosis based on the x-ray evidence, we affirm the administrative law judge's finding. *See* 20 C.F.R. §718.202(a)(1); *Staton, supra*; *Johnson, supra*; *Creech, supra.*

Pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge erred in rejecting the opinions of Drs. Clarke and Baker. Claimant's Brief at 4-5. The administrative law judge considered Dr. Clarke's medical report in which this physician found coal workers' pneumoconiosis. The administrative law judge found that the smoking and coal mine employment histories relied upon by Dr. Clarke are "extremely inaccurate."[7] Decision and Order at 16. The administrative law judge noted that Dr. Clarke relied on a coal mine employment history of sixteen years, Director's Exhibit 44, but the evidence of record documents less than one year of qualifying coal mine employment. Furthermore, the administrative law judge noted that "Dr. Clarke relied upon a smoking history which was much less than the histories reported by claimant since 1991.[8] Dr. Clarke noted a smoking history of one-half of a pack per day for thirty-five years. Director's Exhibit 44. At his March 9, 1993 deposition, claimant testified that he smoked two packs per day for about twenty-two years. Director's Exhibit 42 at 16. At the February 8, 2000 hearing, claimant testified that he started smoking at age seventeen or eighteen (claimant was 54 years old at the hearing), that he smoked around one-half of a pack per day when he was working, and that he currently smokes one and one-half packs per day. 2000 Hearing Transcript at 19. Therefore, we affirm the administrative law judge's finding that Dr. Clarke's opinion is insufficient to establish pneumoconiosis because the administrative law judge permissibly

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[7]The administrative law judge additionally found that claimant's hospital records and Dr. Varghese's 1993 opinion noted in claimant's Statement of Borrower's Total and Permanent Disability "do not constitute well-reasoned and well-documented medical opinions." Decision and Order at 16. In rendering his finding, the administrative law judge noted that these records "contain only conclusory diagnoses" and that the physicians who made these diagnoses "failed to state the objective medical evidence upon which they relied" and "failed to explain how the evidence supported their conclusions." *Id*. Accordingly, the administrative law judge permissibly accorded "little evidentiary weight" to claimant's hospital records and Dr. Varghese's 1993 statement. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *see also Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Crosson v. Director, OWCP*, 6 BLR 1-809 (1984); *Duke v. Director, OWCP*, 6 BLR 1-673, 1-675 (1983).

[8]The administrative law judge did not render a specific finding regarding claimant's smoking history, but outlined claimant's 1995 deposition testimony and his 2000 hearing testimony. Decision and Order at 3, 15, 16-17.

found it to be based on inaccurate employment and smoking histories.[9] *See Sellards v. Director, OWCP*, 17 BLR 1-77 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986).

Regarding Dr. Baker's first report dated October 4, 1994, the administrative law judge found this opinion of Dr. Baker's to be "equivocal" on the existence of pneumoconiosis because this physician did not "clearly specify the causes of the diagnosed conditions." Decision and Order at 17. In his first report, Dr. Baker attributed claimant's chronic obstructive pulmonary disease and bronchitis to "cigarette smoking and ? dust exposure." Director's Exhibit 10. Therefore, because Dr. Baker did not definitively find claimant's chronic obstructive pulmonary disease and bronchitis to be due to his coal mine employment, the administrative law judge properly accorded Dr. Baker's October 4, 1994 report little weight. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *see also Griffith v. Director, OWCP* [*Myrtle*], 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995).

[9]Claimant contends that the administrative law judge erred in rejecting Dr. Clarke's report because it was based on a positive x-ray reading. Claimant's Brief at 4-5. While the administrative law judge noted that Dr. Clarke's diagnosis of pneumoconiosis was based on claimant's x-ray and history, the administrative law judge specifically accorded less weight to this opinion because Dr. Clarke relied on inaccurate smoking and employment histories. *See* discussion, *supra*. Therefore, contrary to claimant's contention, the administrative law judge did not discredit Dr. Clarke's opinion because it was based on a positive x-ray reading.

Additionally, the record contains a supplemental report by Dr. Baker dated November 28, 1994. Director's Exhibit 11. As the administrative law judge noted, in his supplemental report Dr. Baker opined that claimant does not have pneumoconiosis, "although a small portion of his obstructive airway disease could be due to his dust exposure, although with the 11 years of surface mining, I feel that this is less likely," Director's Exhibit 11. Decision and Order at 13, 17. Accordingly, the administrative law judge found Dr. Baker's November 1994 report to be unsupportive of a finding of clinical or statutory pneumoconiosis as defined in the Act and the regulations.[10] We affirm the administrative law judge's finding regarding Dr. Baker's supplemental report inasmuch as this report is insufficient to satisfy claimant's burden of establishing the existence of pneumoconiosis. *See* 20 C.F.R. §718.201; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); *see also Myrtle*, *supra*; *Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984); *Justice*, *supra*.

Because an administrative law judge has broad discretion in assessing the evidence of record to determine whether a party has met its burden of proof, *see Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *see Markus v. Old Ben Coal Co.*, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983)(administrative law judge is not bound to accept opinion or theory of any given medical officer, but weighs evidence and draws his own inferences); *Anderson*, *supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we hold that the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis based on the medical opinion evidence. *See* 20 C.F.R. §718.202(a)(4); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 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); *Perry*, *supra*.

[10]The revised regulations define pneumoconiosis as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment" and the regulations further define "a disease 'arising out of coal mine employment'" to be one that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b).

Since we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, *see* 20 C.F.R. §718.202(a), a requisite element of entitlement under Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry, supra*, we also affirm his denial of benefits.

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

NANCY S. DOLDER
Administrative Appeals Judge