BRB No. 02-0381 BLA

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

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Rita A. Roppolo (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order (01-BLA-0491) of Administrative Law Judge Ralph A. Romano denying 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).[1] In this duplicate claim, the administrative law judge found the newly submitted evidence insufficient to establish a material change in conditions and on the merits

[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 20 C.F.R. Parts 718, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

found the evidence of record established eight years of coal mine employment,[2] but was insufficient to establish the existence of pneumoconiosis and insufficient to demonstrate the presence of a totally disabling respiratory impairment. Accordingly, benefits were denied.

On appeal, claimant contends that a material change in conditions and entitlement on the merits have been established because the x-ray and medical opinion evidence establish the existence of pneumoconiosis and the pulmonary function study and medical opinion evidence establish a totally disabling respiratory impairment. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence.

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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[2] This finding is affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant first argues that the administrative law judge violated claimant's due process right to have his claim fully and fairly considered when the judge allowed the parties to submit only two interpretations of each x-ray taken, and then determined that claimant failed to establish the existence of pneumoconiosis because the x-ray readings of record were in equipoise. Claimant further contends that the administrative law judge's reasoning on this issue violates 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). The Director contends, however, that claimant's argument is without merit because the Order concerning the submission of x-ray evidence issued by Administrative Law Judge Ainsworth H. Brown, prior to Judge Romano's assignment of the case, specifically allowed submission of additional x-ray readings if necessary,[3] and claimant did not take advantage of that opportunity; claimant never asked that additional readings be admitted nor did he express any dissatisfaction with the limitations, on the submission of evidence set forth in the Order. Hearing Transcript at 5-8. Thus, the Director contends, because claimant never proffered additional evidence and no evidence was ever excluded, claimant's right to due process was not violated.

We agree with the Director. Claimant has not shown that the limitations placed on the submission of evidence in this case violated his due process right to a full and fair hearing; nor has he shown that the administrative law judge erred in finding that the x-ray evidence failed to establish the existence of pneumoconiosis. *See 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). Furthermore, because claimant did not raise this argument before the administrative law judge, he has waived his right to raise it before the Board. *See Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73 (1986); *Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199 (1984).

Claimant next contends that the administrative law judge erred in crediting Dr. Rashid's opinion regarding the existence of pneumoconiosis over the opinion of Dr. R. Kraynak, claimant's treating physician for 15 years, based on the administrative law judge's finding that Dr. R. Kraynak's opinion was not supported by pulmonary function studies and

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[3] The Order concerning x-rays issued by Administrative Law Judge Ainsworth H. Brown specifically stated:

> A maximum of two (2) interpretations of each x-ray will be received in the record from each party, except if fairness requires additional readings.

Notice of Hearing dated April 11, 2001 (emphasis added).

blood gas studies, when, in fact, Dr. R. Kraynak was the only physician to have reviewed all of the evidence.

In finding that the medical opinion evidence did not establish the existence of pneumoconiosis, the administrative law judge accorded greater weight to Dr. Rashid's opinion of no pneumoconiosis, than to the contrary opinion of Dr. R. Kraynak, because he found it well-supported by objective laboratory data including pulmonary function and blood gas study evidence. The administrative law judge found that even though Dr. R. Kraynak was claimant's treating physician, his opinion was not supported by underlying documentation because two of the pulmonary function studies conducted by Dr. R. Kraynak were subsequently found to be invalid by a pulmonary specialist, and Dr. R. Kraynak did not have the benefit of blood gas testing. The administrative law judge also found, citing *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), that on reviewing all the relevant medical evidence together at Section 718.202(a)(1)-(4), claimant failed to establish the existence of pneumoconiosis.

Regarding claimant's argument as to the relevance of pulmonary function studies at Section 718.202(a)(4), Section 718.202(a)(4) clearly states that a medical opinion offered to establish the existence of pneumoconiosis shall be based on objective medical evidence, such as pulmonary function studies. Hence the administrative law judge did not err in considering whether the pulmonary function studies supported Dr. R. Kraynak's conclusions. 20 C.F.R. §718.202(a)(4). *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Minnich Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 (1986).

Likewise, we reject claimant's argument that the administrative law judge erred in discrediting Dr. R. Kraynak's opinion without sufficiently discussing the reasons for doing so. Contrary to claimant's argument, the administrative law judge accorded less weight to Dr. Kraynak's opinion because the pulmonary function studies he relied on in making his determination were invalidated by a pulmonary specialist, and Dr. R. Kraynak was only Board-eligible in family medicine. This was rational. *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 310 n.3, 20 BLR 2-76, 2-81 n.3 (3d Cir. 1995); *Director, OWCP v. Siwiec*, 894 F.3d 635, 639, 13 BLR 2-259, 2-267 (3d Cir. 1990); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Additionally, contrary to claimant's argument, the administrative law judge did acknowledge that one of the pulmonary function studies invalidated by Dr. Sherman, the pulmonary specialist, was found valid by Dr. M. Kraynak, but the administrative law judge noted that Dr. M. Kraynak was only Board-certified in family medicine. Further, contrary to claimant's argument, the administrative law judge did discuss his reasons for not crediting Dr. Kraynak's analysis of Dr. Rashid's November 2000 non-qualifying pulmonary function study. Decision and Order at 10; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *see also Lango v. Director, OWCP*, 104 F.3d 537, 21 BLR 2-12 (3d Cir. 1997). Claimant correctly contends, however, that the administrative

law judge erred in rejecting Dr. R. Kraynak's opinion based on the fact that Dr. Kraynak did not have the benefit of blood gas testing, when, in fact, Dr. Kraynak reviewed and discussed the results of the blood gas testing performed by Dr. Rashid. Decision and Order at 6; Claimant's Exhibit 9. This error is harmless, however, because the blood gas studies as discussed by Dr. Kraynak are not supportive of his opinion. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Accordingly, we affirm the administrative law judge's finding that the medical opinion evidence, when considered along with the x-ray evidence in this case, did not establish the existence of pneumoconiosis at Section 718.202(a)(4). *See Williams, supra*. Because we affirm the administrative law judge's finding that the existence of pneumoconiosis, an essential element of entitlement, was not established, we need not address claimant's argument on disability. *See Trent*, *supra*; *Perry*, *supra*.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge