BRB No. 04-0207 BLA

JOSEPH PALUMBO	)	
	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED: 11/10/2004
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Rocco V. Valvano, Jr., Scranton, Pennsylvania, for claimant.

Michelle S. Gerdano (Howard M. Radzely, 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 the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (03-BLA-5578) of Administrative Law Judge Robert D. Kaplan 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). This case involves a subsequent claim filed on February 25, 2002.[1] Director's Exhibit 3. The administrative law judge found that claimant

[1] Claimant filed his first claim with the Department of Labor (DOL) on August 8, 1995. Director's Exhibit 1. The district director denied this claim on August 18, 1995 because claimant did not submit sufficient information to establish that he worked as a coal miner. *Id*.

established fourteen years of coal mine employment, and therefore, that the newly submitted evidence establishes a change in a condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge found, however, that the evidence fails to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and fails to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied the claim.

On appeal, claimant challenges the administrative law judge's finding that the medical opinion evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Claimant relies upon Dr. Levinson's opinion to establish the existence of pneumoconiosis at Section 718.202(a)(4). In addition, claimant challenges the administrative law judge's finding that the medical opinion evidence is insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). The Director, Office of Workers' Compensation Programs (the Director), in response, urges affirmance of the administrative law judge's denial of benefits.[2]

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).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Claimant asserts that Dr. Levinson's opinion establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(4). There are two opinions relevant to a determination at Section 718.202(a)(4). Dr. Levinson issued an opinion dated February 12, 2002, wherein he found that the miner suffered from pneumoconiosis. Director's Exhibit 17.[3] The administrative law judge correctly noted that Dr. Levinson is Board-

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[2] Inasmuch as no party challenges the administrative law judge's findings that the evidence fails to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), we affirm these findings. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] Claimant challenges the administrative law judge's determination to discount Dr. Levinson's opinion based upon invalid pulmonary function studies. Claimant's contention is misplaced. The administrative law judge did not discount Dr. Levinson's opinion at 20 C.F.R. §718.202(a)(4) based upon invalid pulmonary function studies.

certified in internal medicine and pulmonary disease. *Id.;* Decision and Order at 9. Dr. Cali submitted an opinion dated July 9, 2002, wherein he opined that claimant did not have pneumoconiosis. Director's Exhibit 18. The administrative law judge noted that Dr. Cali is Board-certified in internal medicine, pulmonary medicine and critical care medicine. *Id.;* Decision and Order at 10. The administrative law judge permissibly concluded that both the opinions of Drs. Levinson and Cali were well-documented and reasoned. Decision and Order at 10. The administrative law judge found further that each doctor relied upon the same coal mine employment history and the same smoking history. Moreover, the administrative law judge found that both Dr. Levinson and Dr. Cali were well-qualified. *Id.* The administrative law judge, thus, ultimately concluded that the medical opinion evidence was in equipoise at Section 718.202(a)(4). *Id.* It is the administrative law judge's responsibility to determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *Abshire v. D & L Coal Co.*, 22 BLR 1-202, 1-212 (2002)(*en banc).* We hold that the administrative law judge thoroughly considered both the quality and the quantity of the medical opinion evidence, including the respective qualifications of the physicians, in determining that the medical opinion evidence was in equipoise pursuant to Section 718.202(a)(4) in the instant case. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). We therefore affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), as supported by substantial evidence and in accordance with law.

Because the evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), we further affirm the administrative law judge's denial of benefits in the instant subsequent claim. *See Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). [4]

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

Decision and Order at 9-10. Rather, the administrative law judge discounted Dr. Levinson's opinion based upon invalid pulmonary function studies at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 12.

[4] In light of our disposition of the case, we need not address claimant's arguments with respect to the administrative law judge's findings that the evidence fails to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), as any error committed therein would be harmless. *Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984).

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge