BRB No. 97-1680 BLA

ARGLE J. MARSHALL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MIDLAND COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order on Remand of George P. Morin, Administrative Law Judge, United States Department of Labor.

Argle J. Marshall, Boonville, Indiana, *pro se*.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Supplemental

[1] Claimant is the miner, Argle J. Marshall, who filed for benefits on January 10, 1980. Director's Exhibit 1. Although the district director initially awarded claimant benefits, employer requested a formal hearing which was held on February 11, 1987 before Administrative Law Judge T. Eugene Burts. The administrative law judge credited claimant with thirty-two years and four months of coal mine employment, but denied benefits after finding that the evidence of record was sufficient to rebut invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), (b)(2). The administrative law judge also found that the evidence was insufficient to establish entitlement pursuant to 20 C.F.R. Part 410, Subpart D, or total disability at

Decision and Order on Remand (85-BLA-6403) of Administrative Law Judge George P. Morin 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*

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20 C.F.R. §718.204(c), although the x-ray evidence of record was found sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Claimant's petition for modification was denied on August 2, 1993 by Administrative Law Judge Bernard J. Gilday, Jr. On appeal, the Board affirmed Judge Gilday's denial of claimant's petition for modification, and also affirmed Judge Burt's findings regarding the length of coal mine employment, and that the objective tests of record were insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2)-(3), and noted that the objective tests submitted on modification were non-qualifying. However, the Board vacated and remanded Judge Burt's finding that the x-ray readings of record established invocation of the interim presumption, as well as his rebuttal findings. The Board further vacated Judge Gilday's finding of rebuttal of the interim presumption at Section 727.203(b)(3), and ordered the administrative law judge on remand to consider rebuttal pursuant to 20 C.F.R. §727.203(b)(4), if necessary. If on remand, entitlement was not established pursuant to 20 C.F.R. Part 727, the administrative law judge was directed to consider entitlement pursuant to 20 C.F.R. Part 718. *Marshall v. Midland Coal Co.*, BRB Nos. 87-2802 BLA and 93-2365 BLA (April 30, 1996)(unpub.). On remand, the case was transferred to Administrative Law Judge George P. Morin.

seq. (the Act). The administrative law judge found that the evidence of record was insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), (4), or to establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied. On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the Decision and Order as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). If the findings of fact and conclusions of law of the administrative law judge 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 under 20 C.F.R. Part 718, 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; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Failure to prove any one of these elements precludes entitlement. *Id*.

After consideration of the administrative law judge's Supplemental Decision and Order on Remand, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. In the instant case, the administrative law judge rationally found that claimant was unable to establish invocation of the interim presumption under 20 C.F.R. §727.203(a)(1), (4). The administrative law judge considered the x-ray readings of record pursuant to Section 727.203(a)(1), and rationally credited the negative readings based on their numerical superiority, and by according more weight to the opinions of those physicians with superior qualifications.[2] *See Sahara Coal Co. v. Fitts*, 39 F.3d 781,

[2] Although the Decision and Order fails to reflect consideration of the negative x-ray readings by Drs. Morgan and Carven of a film dated July 8, 1980. Director's Exhibit 18, this omission is not reversible error however, since it supports the administrative law judge's finding on this issue. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

18 BLR 2-385 (7th Cir. 1994); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-3 (1991); *Parulis v. Director, OWCP*, 15 BLR 1-28 (1991); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Director's Exhibits 13, 18, 28, 37; Employer's Exhibits 1, 2. Pursuant to Section 727.203(a)(4), the Decision and Order reflects thorough consideration of the medical reports of Drs. Getty, Calhoun, Anderson, Selby and Combs. It was within the administrative law judge's discretion to credit the opinions of Drs. Anderson and Selby, based on their superior qualifications and because the administrative law judge found that their opinions were better supported by the underlying documentation. *Fitts*, *supra*; *Melnick*, *supra*; *Minnich v. Pagnotti Enterprises Inc.*, 9 BLR 1-89 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Dr. Calhoun's diagnosis of totally disabling pneumoconiosis was rationally accorded less weight based on Dr. Anderson's finding of defects in this physician's analysis of his objective test results. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Dillon*, *supra*; *Wetzel*, *supra*; Director's Exhibits 9-12, 23, 28, 29, 37; Employer's Exhibit 1. Consequently, we affirm the administrative law judge's findings pursuant to 20 C.F.R. §727.203(a)(1), (4) as supported by substantial evidence.

We also find no error in the administrative law judge's consideration of the evidence relevant to 20 C.F.R. §718.202(a). The administrative law judge rationally determined that his weighing of the x-ray evidence of record pursuant to 20 C.F.R. §727.203(a)(1), precluded a finding that this evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *Fitts*, *supra*; *Melnick*, *supra*; *Parulis*, *supra*; *Dillon*, *supra*; *Wetzel*, *supra*. The administrative law judge also properly found that the record contained no biopsy evidence, and that none of the presumptions contained at 20 C.F.R. §§718.304, 718.305, 718.306 are applicable to the present claim. *See* 20 C.F.R. §718.202(a)(2)-(3). Moreover, the administrative law judge considered all the relevant medical reports pursuant to 20 C.F.R. §718.202(a)(4), and again rationally credited the opinions of Drs. Selby and Anderson based on their superior qualifications, and more thorough evaluations, as supported by Dr. Getty's opinion. *See Trumbo*, *supra*; *Clark*, *supra*; *Dillon*, *supra*; *Wetzel*, *supra*. These findings are rational, supported by applicable law, and are affirmed.

The administrative law judge is empowered to weigh the medical evidence and draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its inferences on appeal. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Clark*, *supra*. Consequently, we affirm the administrative law judge's findings pursuant to Sections 727.203(a), and 718.202(a) as they are supported by substantial evidence and are in accordance with law. As claimant has failed to

establish invocation of the interim presumption, or the existence of pneumoconiosis, an essential element of entitlement under Part 718, benefits are precluded. *See Trent*, *supra*; *Perry*, *supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge