BRB No. 00-0260 BLA

| | | |
|---|---|---|
| EDWARD J. HRUTKAY | ) | |
| | ) | |
| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| BETHENERGY MINES, INCORPORATED | ) | |
| | ) | Date Issued: |
| Employer-Respondent | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order - Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Elizabeth M. Tarasi (The Tarasi Law Firm), Pittsburgh, Pennsylvania, for claimant.

Carl J. Smith (Richman & Smith), Washington, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (99-BLA-0467) of Administrative Law Judge Michael P. Lesniak 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). Based on the date of filing of this claim, February 21, 1998, the administrative law judge found that the claim must be adjudicated pursuant to 20 C.F.R. Part 718. After considering the evidence, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge's decision fails to comply with the Administrative Procedure Act, that the administrative law judge erred by failing to find that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.203(b) and

by finding that claimant's smoking history is responsible for his respiratory impairment.[1] The Director, Office of Workers' Compensation Programs, has indicated that he will not participate in this 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out 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 anyone of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

[1]The administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1) - (3) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

On appeal, claimant contends that the administrative law judge erred in determining that claimant's respiratory impairment is due to smoking instead of coal mine employment, and thus erred in his determination that claimant did not establish legal pneumoconiosis as defined in 20 C.F.R. §718.201 at Section 718.202(a)(4). We disagree. In considering the issue of whether pneumoconiosis is established at Section 718.202(a)(4), the administrative law judge correctly determined that neither claimant's hospital records nor a letter from his treating physician, Dr. Gosai, causally linked claimant's pulmonary impairment to his forty-year coal mine employment history. Decision and Order at 3. The administrative law judge then considered the medical opinions submitted, by Drs. Cho, Altmeyer and Fino. Dr. Cho diagnosed severe chronic obstructive pulmonary disease due to both cigarette smoking and coal dust exposure, while Drs. Altmeyer and Fino attributed claimant's pulmonary condition to his cigarette smoking alone. Director's Exhibits 9-11, 24; Employer's Exhibit B. The administrative law judge found that Dr. Cho did not possess special credentials in pulmonary medicine, based his opinion on only one examination of claimant, and relied on a smoking history significantly less than claimant reported in his hospital records.[2] Decision and Order at 4. The administrative law judge then found that both Drs. Altmeyer and Fino are board-certified pulmonary specialists, and had reviewed other evidence developed in the record, including hospital records which indicated a significantly greater smoking history than claimant reported to either Drs. Altmeyer or Cho. *Id*. The administrative law judge also found that Dr. Altmeyer's report included the results of after-bronchodilator pulmonary function testing which Dr. Cho did not have.

The administrative law judge acted within his discretion in crediting the better supported medical opinions by pulmonary specialists, and rationally found that the opinions of Drs. Altmeyer and Fino are entitled to greater weight than Dr. Cho's opinion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Moreover, contrary to claimant's contention, the administrative law judge is not required to accord greater weight to Dr. Cho's opinion on the basis of his status as an examining physician. *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *King v. Cannelton Industries, Inc.*, 8 BLR 1-146 (1985). We also reject

[2]Dr. Cho relied on a smoking history of one-half pack per day for fifty-three years ending in 1993. Director's Exhibits 9 - 11. The administrative law judge found that the hospital records indicated a smoking history of two packs per day for anywhere between forty to fifty years, and that claimant testified that he smoked about one pack per day for twenty-five to thirty years. Decision and Order at 4; Director's Exhibit 26; Claimant's Exhibits 12 - 15, 18; Employer's Exhibit A; Hearing Transcript at 15 - 16.

claimant's contention that Dr. Gosai's opinion that claimant suffers from chronic obstructive pulmonary disease is sufficient to establish the existence of legal pneumoconiosis at Section 718.201. Contrary to claimant's assertion, Dr. Gosai did not indicate that claimant's severe chronic obstructive pulmonary disease arose out of coal employment, as required by Section 718.201, and thus, the administrative law judge properly found that Dr. Gosai's opinion was insufficient to establish legal pneumoconiosis. *See* 20 C.F.R. §718.201; Decision and Order at 3; Claimant's Exhibit 10. Thus, as the administrative law judge properly considered the evidence, we affirm his finding that the medical opinions of record fail to establish that claimant suffers from pneumoconiosis pursuant to Section 718.202(a)(4).[3]

Claimant next contends that Dr. Fino's opinion that claimant's impairment is due to cigarette smoking is antithetical to the Act because "the Act presumes that if the miner has been employed as a miner, such as is the case here for (40) years, that if he has a respiratory or pulmonary impairment it is a result of coal mine employment. Claimant's Brief at 6 citing. 20 C.F.R. 718.203(b)." Claimant also contends that the administrative law judge erred by failing to find that he established the rebuttable presumption of pneumonoconiosis arising out of coal mine employment pursuant to Section 718.203(b). Claimant's Brief at 4-5. Section 718.203(b), in conjunction with Section 718.302 which implements Section 411(c)(1) of the Act, provides a rebuttable presumption that the miner's pneumoconiosis arose out of coal mine employment if the presence of pneumoconiosis is established and the miner had at least ten years of coal mine employment. *See Adams v. Director, OWCP*, 816 F.2d 1116, 10 BLR 2-69 (6th Cir. 1989). Before Section 718.203 is applicable, however, a finding must first be made that the miner has pneumoconiosis. *See Adams, supra*. Contrary to claimant's argument, Section 718.203(b) does not provide a presumption that a significant coal mine employment history establishes the existence of pneumoconiosis. As the administrative law judge properly considered the evidence at Section 718.202(a) and determined that claimant did not establish the existence of pneumoconiosis, he committed no error in failing to make a finding at Section 718.203, which initially requires a determination that claimant suffers from pneumoconiosis before addressing the issue of causality.

Claimant lastly contends that the administrative law judge's Decision and Order fails

[3]Inasmuch as the Administrative Law Judge properly determined that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4), the holding of the United States Court of Appeals for the Third Circuit in Williams does not apply in this case.

to comply with the Administrative Procedure Act, 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). Claimant contends that the administrative law judge did not discuss evidence that claimant's pulmonary condition is deteriorating, and failed to discuss objective tests and claimant's testimony that he was employed in a very dusty environment. The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In the instant case, the administrative law judge properly discussed the relevant evidence regarding the existence of pneumoconiosis, namely, the x-rays and medical opinions of record. Contrary to claimant's assertion, evidence of claimant's worsening pulmonary condition and the pulmonary function and blood gas studies would only addresses the issue of total disability at Section 718.204(c). *See* 20 C.F.R. 718.204(c). Moreover, claimant's lay testimony regarding the dusty conditions in which he worked does not establish that his pulmonary condition was due to coal mine employment, and thus, is insufficient to establish the existence of pneumoconiosis. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *see generally Madden v. Gopher Mining Co.*, 21 BLR 1-122 (1999)(lay evidence insufficient to establish total respiratory disability unless corroborated by a quantum of medical evidence). Therefore, we reject claimant's contention and hold that the administrative law judge's Decision and Order complies with the Administrative Procedure Act. The administrative law judge is empowered to weigh the medical evidence and to 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 own inferences on appeal. *See Clark*, *supra*; *Anderson v. Valley of Utah, Inc.*, 12 BLR 1-111 (1989). As the administrative law judge properly considered the evidence, we affirm his finding that claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement, and thus, affirm his denial of benefits. *See Anderson, supra.*

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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge