BRB No. 01-0176 BLA

LOGAN BOWLING, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
TRANSCO ENERGY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

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

Lois A. Kitts (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (00-BLA-0358) of Administrative Law Judge Donald W. Mosser denying benefits in 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). The administrative law judge credited claimant with twenty-three years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 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)(1)-(4) (2000). The administrative law judge also found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4) (2000). Claimant also challenges the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4) (2000). Employer responds to claimant's appeal, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to respond to claimant's 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

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[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 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, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven 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*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2]Inasmuch as the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3) (2000) are not challenged on appeal, we affirm these findings. *See* 20 C.F.R. §718.202(a)(2) and (a)(3); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Initially, we reject claimant's contention that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). The administrative law judge properly found that all of the x-ray readings of record are negative for pneumoconiosis. Decision and Order at 7; Director's Exhibits 10-12, 16, 17; Employer's Exhibit 3. Thus, inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1).

Further, we reject claimant's contention that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). The administrative law judge considered the medical opinions of Drs. Baker, Broudy, Lockey and Rosenberg. In a report dated March 12, 1999, Dr. Baker diagnosed questionable chronic obstructive pulmonary disease and chronic bronchitis related to cigarette smoking and coal dust exposure. Director's Exhibit 10. However, in an attached form dated March 12, 1999, Dr. Baker responded "No" to the question, "does [claimant] have an occupational lung disease caused by his coal mine employment." *Id*. Drs. Broudy, Lockey and Rosenberg opined that claimant does not suffer from pneumoconiosis. Director's Exhibit 17; Employer's Exhibits 1-3. The administrative law judge permissibly discredited the opinion of Dr. Baker because he found Dr. Baker's opinion to be inconsistent with another opinion rendered simultaneously by Dr. Baker. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Surma v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-799 (1984). Thus, we reject claimant's assertion that the administrative law judge erred in discrediting Dr. Baker's opinion. Inasmuch as the administrative law judge permissibly discredited the only medical opinion of record that could support a finding of the existence of pneumoconiosis, we

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[3]The record consists of ten interpretations of six x-rays. The x-ray dated March 12, 1999 was interpreted by Drs. Baker, Sargent, Spitz and Wiot. Director's Exhibits 10, 11, 12, 16. The x-ray dated September 23, 1999 was interpreted by Drs. Broudy and Lockey. Director's Exhibit 17; Employer's Exhibit 3. Further, the x-rays dated February 10, 1992, May 23, 1997, June 12, 1998 and August 5, 1998 were interpreted by Dr. Lockey. Employer's Exhibit 3. The administrative law judge correctly stated that "there are no readings for the presence of pneumoconiosis." Decision and Order at 7.

[4]The administrative law judge stated, "I consider Dr. Baker's diagnosis equivocal because while he partially attributed the claimant's bronchitis to coal mine dust exposure, he simultaneously opined that [claimant] did not have an occupational lung disease." Decision and Order at 7-8.

affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(4).

Since claimant failed to establish the existence of pneumoconiosis, *see* 20 C.F.R. §718.202(a), an essential element of entitlement, we hold that the administrative law judge properly denied benefits under 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

[5]In view of our disposition of the case at 20 C.F.R. §718.202(a), we decline to address claimant's contentions with regard to 20 C.F.R. §718.204(c)(4) (2000). *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge