BRB No. 01-0207 BLA

BONNIE SPANGLER (Widow of BURL SPANGLER)	)	
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 - Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Joseph J. Reiswerg, Indianapolis, Indiana, for claimant.

Helen H. Cox (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (99-BLA-1256) of Administrative Law Judge Rudolf L. Jansen on a claim filed pursuant to the

[1] The instant case is a miner's claim filed by Burl Spangler. The miner died on October 22, 1999. Decision and Order at 2. The claim is being pursued by Bonnie Spangler, the miner's widow.

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 the miner with 7.75 years of coal mine employment, based on a stipulation of the parties, and noted that the instant case involves a duplicate claim. Finding the newly submitted evidence sufficient to establish that the miner was totally disabled from a respiratory standpoint, one of the elements of entitlement not previously established, the administrative law judge found that claimant established a material change in conditions. The administrative law judge found that the record does not contain any biopsy evidence, that none of the presumptions contained in 20 C.F.R. §718.202(a)(3)(2000) are applicable, and that the x-ray and medical opinion evidence are insufficient to establish the existence of pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant asserts that the evidence is sufficient to establish the existence of pneumoconiosis. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's Decision and Order.

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[2] 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 47 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). 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*, 160 F.Supp.2d 47 (D.D.C. 2001).

[3] The miner filed an application for benefits on August 20, 1973 and again on June 5, 1980. On November 4, 1985, Administrative Law Judge Bernard J. Gilday, Jr., issued a Decision and Order - Denying Benefits. Director's Exhibit 29. The miner took no further action until February 25, 1998 when he filed a new application for benefits. Director's Exhibit 1.

[4] We affirm the administrative law judge's length of coal mine employment finding and his finding that claimant has established a material change in conditions, as these finding are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 x-ray evidence is sufficient to establish the existence of pneumoconiosis, stating that the record has "four readings of parenchymal abnormalities consistent with pneumoconiosis." Claimant's Brief at 2. The administrative law judge detailed the newly submitted x-ray evidence, and indicated that he assigned heightened weight to interpretations of physicians who are dually qualified as B-readers and Board-certified radiologists. Based on the preponderance of the negative readings and his finding that these negative readings are "verified by more, highly qualified physicians," Decision and Order at 9, the administrative law judge found the newly submitted x-ray evidence insufficient to support a finding of pneumoconiosis. Decision and Order at 9. In considering all of the x-ray evidence, the administrative law judge stated:

> As Judge Gilday noted in his November 4, 1985 Decision and Order, the x-ray evidence existing at that time was overwhelmingly negative for pneumoconiosis. In weighing the previously submitted x-ray evidence also with the newly submitted x-ray evidence, I find no reason to credit the positive readings over the negative readings.

Decision and Order at 11.

As the administrative law judge properly noted, the newly submitted evidence contains seventeen interpretations of thirteen films. Director's Exhibits 7, 8, 11-16, 18, 24. Only one of these interpretations is positive for pneumoconiosis. Director's Exhibit 13. The previously submitted x-ray evidence contains sixteen interpretations of thirteen x-rays, Director's Exhibit 29, of which only two interpretations of the August 1, 1980 film are positive for pneumoconiosis, Director's Exhibit 29.

Claimant asserts that the evidence contains four interpretations of parenchymal abnormalities. The newly submitted evidence contains four 0/1 interpretations by B-readers. Director's Exhibits 11, 12, 14, 24. However, the regulations state that an interpretation of 0/1 does not constitute evidence of pneumoconiosis. 20 C.F.R. §718.102(b). Accordingly, we reject claimant's assertion that these interpretations are sufficient to establish the existence of pneumoconiosis. Because the administrative law judge has properly considered both the quality and the quantity of the x-ray evidence of record in finding it insufficient to establish the existence of pneumoconiosis, *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 114 S.Ct. 2251, 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); *Dixon v. Director, OWCP*, 8 BLR 1-150 (1985)*; Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985), we affirm this finding as it is supported by substantial evidence.

We also affirm the administrative law judge's finding that the existence of pneumoconiosis is not established pursuant to 20 C.F.R. §718.202(a)(2)-(3) (2000). As the administrative law judge properly found, the record does not contain any biopsy evidence, nor does it contain any autopsy evidence, and therefore, the existence of pneumoconiosis cannot be established pursuant to Section 718.202(a)(2) (2000). In addition, we affirm the administrative law judge's finding that the existence of pneumoconiosis is not established pursuant to Section 718.202(a)(3) (2000), since the administrative law judge properly found that, in this case where the application for benefits was filed in 1998, the record does not contain evidence of complicated pneumoconiosis. *See* 20 C.F.R.§§718.202(a)(3), 718.304, 718.305, 718.306.

In finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis, the administrative law judge considered the previously submitted medical opinions as well as the newly submitted medical opinions. The administrative law judge found Dr. Daly's opinion, that the miner's lung disease "may be due to pneumoconiosis," Director's Exhibit 29, to be equivocal and entitled to little weight, and found Dr. Cook's diagnosis of no pneumoconiosis to be adequately documented and reasoned. Decision and Order at 11. The administrative law judge accorded less weight to Dr. Marder's diagnosis of pneumoconiosis because he "underestimated the miner's smoking history and dramatically overestimated his coal mining history." Decision and Order at 9. The administrative law judge found that the opinions of Drs. Hart and Farber, which found that claimant did not suffer from pneumoconiosis, are adequately reasoned and documented. The administrative law judge noted that Drs. Hart and Farber also relied upon an overestimated history of coal mine employment, but stated that "their opinions are not entitled to reduced weight since they overestimated his exposure to coal dust and found that he did not have pneumoconiosis, regardless." Decision and Order at 9. Further, the administrative law judge found that the note on Clarian Health letterhead does not constitute a positive or a negative opinion for pneumoconiosis. Decision and Order at 9.

Dr. Daly examined the miner in 1980 and diagnosed arteriosclerotic heart disease and chronic obstructive lung disease and checked the box on the medical examination report form indicating that the diagnosed conditions were related to dust exposure in the miner's coal mine employment. Dr. Daly noted that the miner had moderately severe obstructive lung disease which "may be due to pneumoconiosis." Director's Exhibit 29. Dr. Cook examined the miner in 1981 and opined that there was no evidence of pulmonary incapacitation nor coal workers' pneumoconiosis. Director's Exhibit 29. Dr. Hart examined the miner in 1997. Dr. Hart noted a history of seventeen years of coal mine employment and indicated that the miner had smoked intermittently for most of his life,

and quit three months prior to his examination of the miner. Dr. Hart listed as his impressions a history of coronary artery disease, a history of chronic obstructive pulmonary disease, and a "questionable history" of coal workers' pneumoconiosis, noting that the miner's chest x-rays were not available. Several weeks later, Dr. Hart examined the miner and considered the miner's x-ray and stated that the miner had no evidence of coal workers' pneumoconiosis on x-ray and listed his impressions as moderately severe chronic obstructive pulmonary disease and elevated carboxyhemoglobin. Director's Exhibit 8. Dr. Farber examined the miner in 1998 and noted a smoking history of one pack per day for forty years from the 1940s through 1997. Dr. Farber also noted that the miner had worked in coal mine employment for thirteen years. Dr. Farber diagnosed chronic obstructive pulmonary disease and coronary artery disease due to smoking. Director's Exhibit 9. The record also contains a 1999 report from Dr. Marder. Dr. Marder noted a history of thirty-three years of coal mine employment and a smoking history of six or seven cigarettes per day for twenty-seven years "on and off," and indicated that the miner stopped smoking twenty years earlier. Dr. Marder examined the miner on February 9, 1999, and, under his signature, identified himself as "Attending Physician, Division of Occupational Medicine." Dr. Marder stated that the miner had a "very significant history of coal dust exposure" and further stated:

> He presents with a history of shortness of breath which is more likely than not secondary to his history of coal dust exposure. He also has a history of cardiac disease (CAD & CHF) which may contribute to some of his symptoms. He has moderately reduced pulmonary function and abnormal limit to exercise due to obstructive lung disease. This impairment severely limits his ability to do coal mine work. He has limited coal workers' pneumoconiosis on the basis of chest x-ray, but has significant COPD/chronic bronchitis from coal dust exposure.

Director's Exhibit 24. The record also contains an unsigned, handwritten note on Clarian Health letterhead apparently written on January 7, 1998. This note states "COPD" and "? CWP." Director's Exhibit 8.

We hold that the administrative law judge, who is charged with evaluating the evidence and determining the credibility of the medical opinions, *see Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), permissibly determined that Dr. Daly's opinion regarding the existence of pneumoconiosis is too equivocal to support a finding of pneumoconiosis, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Worrell v. Consolidation Coal Co.*, 8 BLR 1-158 (1985). In addition, we affirm the administrative law judge's finding that Dr. Marder's opinion is not entitled to determinative weight in this case. The administrative law judge permissibly questioned Dr. Marder's diagnosis of pneumoconiosis in view of the exaggerated length of coal mine employment the physician considered, *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Hall v. Director,*

OWCP, 8 BLR 1-193 (1985); *Robel v. Director, OWCP*, 7 BLR 1-775 (1985); *Rickey v. Director, OWCP*, 7 BLR 1-106, 1-108 (1984), and the underestimated smoking history he considered, *see Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Spradlin v. Island Creek Coal Co.*, 6 BLR 1-716 (1984). Further, we note that although Dr. Marder identified himself as an "attending physician," the record contains only one report he authored, and at the hearing claimant identified the miner's physicians as cardiologist Dr. Ziperman and lung specialist Dr. Tushan. Hearing Transcript at 16-17. When claimant was asked whether the miner ever saw Dr. Marder, she responded "I can't remember anything about" him. Hearing Transcript at 34. *See generally Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). Finally, we affirm the administrative law judge's determination that the unsigned note on Clarian Health letterhead does not constitute a positive or a negative diagnosis of pneumoconiosis. This is a reasonable inference drawn by the administrative law judge, as the trier-of-fact. *See Lafferty, supra*; *Fagg, supra*. Inasmuch as we affirm the administrative law judge's finding that the opinions supportive of claimant's burden of establishing the existence of pneumoconiosis are not entitled to determinative weight, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000). *See* 20 C.F.R.§718.202(a)(4).

Because claimant has failed to establish the existence of pneumoconiosis, one of the essential elements of entitlement at Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm the administrative law judge's denial of benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[5] The record also contains Dr. Popplewell's 1980 report. Dr. Popplewell opined that the miner did not have pneumoconiosis. Director's Exhibit 29. The administrative law judge did not consider Dr. Popplewell's opinion. Although the administrative law judge must consider all of the evidence of record, inasmuch as Dr. Popplewell's opinion would only provide further support for the administrative law judge's finding that the evidence does not establish the existence of pneumoconiosis, which we affirm, we hold that the administrative law judge's failure to consider Dr. Popplewell's opinion is, in this instance, harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge