BRB No. 01-0217 BLA

WILLIAM H. BENTLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TORIE MINING, INCORPORATED	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order (00-BLA-0467) of Administrative Law Judge Thomas F. Phalen, Jr. awarding 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 seq.* (the Act). Based on the filing date of June 29, 1998, the administrative law

[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 47 of the regulations implementing the

judge adjudicated this claim pursuant to 20 C.F.R Part 718. The administrative law judge accepted the parties' stipulation of thirty-two years of coal mine employment and found employer to be the responsible operator. On the merits, the administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment and sufficient to demonstrate the presence of a totally disabling respiratory impairment due to pneumoconiosis. Accordingly, benefits were awarded.

On appeal, employer challenges the findings of the administrative law judge at Section 718.202 (a)(1) and (4), and at Section 718.204(c)(4)(2000). Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating 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 prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of 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 any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer first contends that the administrative law judge erred in finding the existence of pneumoconiosis established based on the x-ray evidence. In finding that the x-

---

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*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001).

[2] We affirm the findings of the administrative law judge on the length of coal mine employment, on the designation of employer as the responsible operator, and at 20 C.F.R. §§718.202(a)(2)-(3), 718.203(b), and 718.204(c)(1)-(3)(2000), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

ray evidence established the existence of pneumoconiosis, the administrative law judge, noted that pneumoconiosis was a progressive and irreversible disease and accorded very little wight to the five x-rays dated before 1981 and interpreted negative by B-readers, because he found them separated from the most recent x-rays by over seventeen years and therefore too old to be probative of claimant's current condition. This was rational. *See Mullins Coal Co. Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *rehg denied*, 484 U.S. 1047 (1988); *Back v. Director, OWCP*, 796 F.2d 169, 9 BLR 2-93 (6th Cir. 1986); *Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192, 2-197 (6th Cir. 1986); *Couch v. Secretary of Health and Human Services*, 774 F.2d 163, 168 (6th Cir. 1985).

Giving more weight to interpretations by readers who were either Board-certified radiologists or B-readers, and greatest weight to interpretations by dually qualified readers, the administrative law judge found that three x-rays were interpreted positive for the existence of pneumoconiosis and four were interpreted negative. The administrative law judge gave determinative weight to the positive x-ray interpretations by Dr. Mathur, however, as he was the only dually qualified reader to interpret x-rays during a two year period, *i.e.*, he interpreted both the August 4, 1999 x-ray and the July 15, 2000 x-ray. This was rational. 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *see Perry, supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Tokarcik v. Consolidation Coal Co.*, 6 BLR 1-6 (1983). Decision and Order at 12. Inasmuch as we affirm the administrative law judge's finding of pneumoconiosis based on the x-ray evidence, 20 C.F.R. §718.202(a)(1), we need not address employer's argument with respect to the doctors' opinions, 20 C.F.R. §718.202(a)(4). *See Cornett v. Benham Coal Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Accordingly, the administrative law judge's finding that the x-ray evidence established the existence of pneumoconiosis is affirmed.

Employer next contends that the administrative law judge erred in finding that claimant established a totally disabling respiratory impairment on the basis of the physician opinion evidence. Specifically, employer contends that the administrative law judge erred in giving less weight to the opinions of Drs. Broudy and Fino, who were pulmonary specialists, and less weight to the opinion of Dr. Fino, because he had not personally examined claimant. In finding that the physician opinion evidence established a totally disabling respiratory impairment, the administrative law judge credited the opinions of Drs. Younes, Baker, and

[3] We will not address employer's argument, that the administrative law judge erred in finding causality established at 20 C.F.R. §718.203(a), as it is not sufficiently briefed. Employer's Brief at 12; *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986).

Potter as they were reasoned opinions and as Dr. Potter was claimant's treating physician. Decision and Order at 16. The administrative law judge accorded little weight to the opinion of Dr. Broudy, that disability was not established, because he found that Dr. Broudy's diagnosis of a mild to moderate impairment was sufficient to render claimant unable to perform the heavy work he was performing at the time he left the mines. This was rational. *Cornett* at 2-124. Further, although as employer contends, the administrative law judge erred in giving less weight to Dr. Fino's opinion merely because he had not personally examined claimant, *see Newland v. Consolidation Coal Co.*, 6 BLR 1-1286, 1-1289 (1984), the administrative law judge could accord less weight to Dr. Fino's non-disability opinion because it was outweighed by the disability opinions of Drs. Younes, Baker and Potter. Decision and Order at 16; *Clark, supra*; *see Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161, 1-164 n.5 (1988); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Accordingly, we affirm the administrative law judge's finding that the medical opinion evidence established a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2)(iv).

Finally, employer argues that the administrative law judge erred in finding that claimant established that his total disability was due to pneumoconiosis. Employer contends that the administrative law judge improperly rejected the opinions on causation of Drs. Broudy and Fino, who are pulmonary specialists. We disagree. The administrative law judge stated that Drs. Broudy and Fino failed to explain how claimant's thirty years of coal mine employment could not have caused or aggravated claimant's respiratory impairment. This was reasonable. Decision and Order at 3; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR , (4th Cir. 2000).

Noting that the Sixth Circuit requires that total disability be "due at least in part" to pneumoconiosis, *Adams v. Director, OWCP*, 886 F.3d 818, 13 BLR 2-52 (6th Cir. 1989), the administrative law judge found that the medical opinion evidence established the requisite nexus between total disability and coal workers' pneumoconiosis. Decision and Order at 16-17. Subsequent to the issuance of the administrative law judge's Decision and Order, however, the regulations concerning total disability causation were amended and became applicable to all pending claims. *See* note 1, *supra*. Pursuant to 20 C.F.R. §718.204(c)(2001):

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in 20 C.F.R. §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or

(ii) Materially worsens a totally disabling respiratory or pulmonary impairment which was caused by a disease or exposure that is unrelated to coal mine employment.

Accordingly, this case must be remanded for the administrative law judge to consider the evidence under the amended standard.

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed in part, vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge