BRB No. 02-0377 BLA

ROBERT H. SHUMAN Claimant-Petitioner v. CONSOLIDATION COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

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

Robert H. Shuman, Fairmont, West Virginia, *pro se*.

Ashley M. Harman (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (96-BLA-1028) of Administrative Law Judge Michael P. Lesniak 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 seq*. (the Act).[1] This case is before the Board for a third time.[2] In its most recent Decision and Order, the Board vacated 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 20 C.F.R. Parts 718, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The full history of this case is set forth in the Board's prior decision. *Shuman v.*

judge's finding that the existence of pneumoconiosis was established at 20 C.F.R. §718.202 (a)(1) and remanded the case to the administrative law judge to weigh all evidence relevant to the existence of pneumoconiosis together, rather than distinctly pursuant to each subsection set forth at Section 718.202(a) in light of *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), and, in addition, to reweigh the medical opinion evidence of record in light of errors he had previously made in analyzing that evidence. *Shuman v. Consolidation Coal Company*, BRB No. 99-1254 BLA (Nov. 17, 2000)(unpub). On remand, the administrative law judge weighed the x-ray and medical opinion evidence together and found the evidence insufficient to establish the existence of pneumoconiosis. Accordingly, benefits were denied.

On appeal, in a letter submitted on claimant's behalf by his wife, claimant contends that the administrative law judge erred in denying benefits. Specifically, claimant contends that it appears that the administrative law judge erred in denying benefits because claimant was a heavy smoker. Claimant's wife acknowledges that he smoked, but contends that he never smoked nearly as much as the one and one-half pack of cigarettes a day found by the physicians in this case. Claimant also contends that although the administrative law judge found that the x-rays were not consistent with coal workers' pneumoconiosis, every time claimant had an x-ray taken at Fairmont General Hospital he was asked "if he knows he has black lung." Claimant also alleges that he has 35 years of coal mine employment with heavy exposure to coal dust and that he is unable "to walk outside of his house and spends most of his time in bed and has to wear oxygen 24 hours a day[.]" Additionally, claimant requests waiver of any overpayment made because "there is no way we can pay it back [because] we used the money to live on." Handwritten letter dated February 12, 2002.[3] Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), is not participating in

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Consolidation Coal Company, BRB No. 99-1254 BLA (Nov. 17, 2000)(unpub.).

[3] Claimant's wife, Velva M. Shuman, states that she wrote the letter to the Board on claimant's behalf as he was not able to write. She has signed her name under his. By letter addressed to claimant, Robert H. Shuman, the Board acknowledged the February 12, 2002, letter written by claimant's wife as his appeal and stated that it would review the case under the general standard of review pursuant to 20 C.F.R. §§802.211, 802.220.

this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 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*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. In finding that the evidence did not establish the existence of pneumoconiosis, the administrative law judge properly weighed all of the relevant evidence together in accordance with *Compton*, *supra*. Although the administrative law judge found that the x-ray evidence could establish the existence of pneumoconiosis, and that Dr. Devabhaktuni's opinion was consistent with such a finding, Decision and Order on Remand at 6, he found that the better reasoned opinions of Drs. Altmeyer and Fino called into question the validity of the positive x-ray evidence; hence, when all the relevant evidence was weighed together it did not establish the existence of pneumoconiosis. This was rational. Decision and Order on Remand at 6; *Compton*, *supra*; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1-1294 (1984).

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 Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Thus, because the administrative law judge properly found that the existence of pneumoconiosis, an essential element of

entitlement, was not established, the administrative law judge's Decision and Order denying benefits must be affirmed. *Trent*, *supra*; *Perry*, *supra*.

Further, contrary to claimant's wife's allegation that he did not smoke nearly as much as one and one-half packs of cigarettes a day, the physicians in this case, including Dr. Devabhaktuni who found the existence of pneumoconiosis, found a one and one-half pack a day cigarette smoking habit, noting that claimant had, in fact, reported such a history. Director's Exhibits 10, 26; Employer's Exhibits 6, 7, 9. We cannot say, therefore, that the administrative law judge erred in relying on their opinions. *See Anderson*, *supra*; *Worley*, *supra*; *Maypray*, *supra*. Regarding claimant's argument that every time he had an x-ray taken at Fairmont General Hospital he was asked if he knew he had black lung, we note that the administrative law judge credited the positive x-ray evidence of pneumoconiosis, as showing the existence of pneumoconiosis, but properly found its validity doubtful in light of the better reasoned opinions of Drs. Altmeyer and Fino. We cannot reweigh the evidence in this case. *Anderson*, *supra*; *Maypray*, *supra*. As to claimant's argument that he had 35 years of coal mine employment and was totally disabled, we note that the administrative law judge found a coal mine employment history of 30 years, and that a totally disabling respiratory impairment had been established. These findings alone do not, however, mandate a finding of pneumoconiosis or entitlement to benefits. *See Hicks*, *supra*; *Trent*, *supra*; *Perry*, *supra*.

Finally, regarding claimant's request of waiver for any overpayment made, we cannot address this issue because the administrative law judge did not make any findings regarding overpayment. We note, however, that should claimant be found to have received an overpayment, he may appeal that finding at the appropriate time and provide evidence to support a request for waiver.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge