BRB No. 03-0147 BLA

EDGAR MARTIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LIGON PREPARATION COMPANY	)	
	)	DATE ISSUED: 10/28/2003
and	)	
	)	
OLD REPUBLIC INSURANCE 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 on Remand of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Prestonsburg, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer/carrier.

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

SMITH, Administrative Appeals Judge:

Claimant appeals the Decision and Order on Remand (98-BLA-1166) of Administrative Law Judge Daniel J. Roketenetz 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] In the initial decision, Administrative Law Judge Mollie W. Neal credited claimant with sixteen years of coal mine employment and found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). Director's Exhibit 116. Accordingly, Judge Neal denied benefits. *Id.* By Decision and Order dated March 10, 1995, the Board affirmed Judge Neal's length of coal mine employment finding and her findings pursuant to 20 C.F.R. §§718.202(a)(1), (a)(2) and (a)(3) (2000). *Martin v. Ligon Preparation Co.*, BRB No. 94-2594 BLA (Mar. 10, 1995) (unpublished). The Board vacated, however, Judge's Neal's finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000) and remanded the case for further consideration. *Id.*

On remand, Judge Neal again found that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000) and denied benefits. Director's Exhibit 129. By Decision and Order dated February 25, 1997, the Board affirmed Judge Neal's finding pursuant to 20 C.F.R. §718.202(a)(4) (2000) and her denial of benefits. *Martin v. Ligon Preparation Co.*, BRB No. 96-0853 BLA (Feb. 25, 1997) (unpublished).

Claimant filed a timely request for modification of his denied claim. Director's Exhibit 141. Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000)[2] and was, therefore, sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000).[3] However, the administrative law judge further found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000) or to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)

[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, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

[3]Although Section 725.310 has been revised, these revisions apply only to claims filed after January 19, 2001.

(2000). Accordingly, the administrative law judge denied benefits and subsequently denied claimant's motion for reconsideration.

By Decision and Order dated August 30, 2001, the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1)-(3) and 718.204(c)(1)-(4) (2000). *Martin v. Ligon Preparation Co.*, BRB No. 00-0959 BLA (Aug. 30, 2001) (unpublished). The Board, however, vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(b) (2000) and remanded the case for further consideration. *Id.*

On remand, the administrative law judge found that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response to claimant's brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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).

After consideration of the administrative law judge's Decision and Order on Remand, the issues on appeal, and the evidence of record, we conclude that substantial evidence supports the administrative law judge's denial of benefits under 20 C.F.R. Part 718. The Board previously held that the administrative law judge permissibly discredited the opinions of Drs. Potter and Sundaram that claimant suffered from pneumoconiosis. *Martin v. Ligon Preparation Co.*, BRB No. 00-0959 BLA (Aug. 30, 2001) (unpublished). The Board remanded the case, however, for the administrative law judge to reconsider whether the medical opinions of Drs. Rasmussen, Broudy and Fino were sufficient to

establish the existence of pneumoconiosis.[4] While Dr. Rasmussen opined that claimant suffered from coal workers' pneumoconiosis,[5] Claimant's Exhibit 1, Drs. Broudy and Fino opined that claimant did not suffer from coal workers' pneumoconiosis or any other disease arising out of coal mine employment. Employer's Exhibits 1, 9, 11, 12, 14. On remand, the administrative law judge properly credited Dr. Fino's opinion that claimant did not suffer from pneumoconiosis because it was based upon more comprehensive documentation.[6] *See Sabett v. Director, OWCP*, 7 BLR 1-299 (1984); Decision and Order on Remand at 6. The administrative law judge also properly credited Dr. Fino's

[4] Because it was potentially pertinent to the issue of "legal" pneumoconiosis, the Board instructed Administrative Law Judge Daniel J. Roketenetz (the administrative law judge), on remand, to specifically address the comments made by Drs. Fino and Broudy concerning the significance of Dr. Rasmussen's exercise blood gas study results and lung diffusing capacity tests. *Martin v. Ligon Preparation Co.*, BRB No. 00-0959 BLA (Aug. 30, 2001) (unpublished). However, on remand, the administrative law judge recognized that, in diagnosing coal workers' pneumoconiosis, Dr. Rasmussen relied upon claimant's coal mine employment history and x-ray changes consistent with pneumoconiosis, not upon the results of claimant's exercise blood gas study results and lung diffusing capacity tests. *See* Claimant's Exhibit 1.

[5] Dr. Rasmussen's diagnosis of coal workers' pneumoconiosis constitutes a diagnosis of "clinical" pneumoconiosis, not "legal" pneumoconiosis. *See* 20 C.F.R. §718.201. We reject claimant's contention that Dr. Rasmussen's subsequent finding that claimant's coal dust exposure was one of three risk factors for his impaired respiratory function is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.201. Dr. Rasmussen, having already diagnosed coal workers' pneumoconiosis arising out of claimant's coal mine employment, was addressing the etiology of claimant's pulmonary disability, a finding relevant to 20 C.F.R. §718.204(b), not 20 C.F.R. §§718.201 and 718.202(a)(4).

[6] Dr. Rasmussen's diagnosis of coal workers' pneumoconiosis was based upon Dr. Patel's positive interpretation of a January 22, 1999 x-ray. Claimant's Exhibit 1. Dr. Patel is dually qualified as a B reader and a Board-certified radiologist. *See* Claimant's Exhibit 2. Dr. Fino, a B reader, rendered the only other interpretation of this x-ray, finding it negative for pneumoconiosis. Employer's Exhibit 14. Although claimant's January 22, 1999 x-ray is the most recent x-ray of record, the administrative law judge previously found that the x-ray evidence, as a whole, was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), *see* 2000 Decision and Order at 4-5, a finding affirmed by the Board as unchallenged on appeal. *Martin v. Ligon Preparation Co.*, BRB No. 00-0959 BLA (Aug. 30, 2001) (unpublished).

opinion over that of Dr. Rasmussen based upon Dr. Fino's superior qualifications.[7] *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Because it is supported by substantial evidence,[8] we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

[7] The administrative law judge noted that Dr. Fino possessed excellent qualifications and was a pulmonary specialist. Decision and Order on Remand at 6. While Dr. Rasmussen is Board-certified in Internal Medicine, Claimant's Exhibit 2, Dr. Fino is Board-certified in both Internal Medicine and Pulmonary Disease. Employer's Exhibit 6.

[8] The administrative law judge found that Dr. Broudy's opinion was not sufficiently reasoned. *See* Decision and Order on Remand at 6. Because Dr. Broudy's opinion does not support a finding of pneumoconiosis, we need not address the administrative law judge's consideration of Dr. Broudy's opinion. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

I concur.

_____
BETTY JEAN HALL
Administrative Appeals Judge

I concur in the result only.

_____
REGINA C. McGRANERY
Administrative Appeals Judge