BRB No. 04-0168 BLA

L.C. CAMPBELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TENNESSEE COAL COMPANY	)	
	)	DATE ISSUED: 10/19/2004
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Glen B. Rutherford (Slovis, Rutherford & Weinstein, P.L.L.C.), Knoxville, Tennessee, for claimant.

James M. Kennedy and Lois Kitts (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order – Denial of Benefits (02-BLA-0316) of Administrative Law Judge Richard T. Stansell-Gamm on modification in a miner's 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).[2] The administrative law judge noted that the parties stipulated to "at least" fourteen years of coal mine employment, 2003 Hearing Transcript at 8-9. Decision and Order at 4. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge, considering all of the evidence, found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Id.* at 7, 12-14. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to Section 718.202(a)(1) and Section 718.202(a)(4). Claimant's Brief at 3-5. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence,

---

[1]Claimant is L.C. Campbell, the miner, who filed his claim for benefits on May 4, 1998. Director's Exhibit 1. At the initial hearing, Administrative Law Judge Edward Terhune Miller allowed claimant until August 1, 2000 to submit additional evidence. *Id.* at 32. Claimant submitted additional evidence on September 14, 2000, and employer moved to strike the additional evidence. *Id.* at 33, 34. On October 5, 2000, Judge Miller issued an Order of Remand, ruling that claimant's late submission of evidence was tantamount to a request for modification. *Id.* at 35. Therefore, Judger Miller remanded the case to the district director for appropriate action. *Id.* The district director denied claimant's claim because he failed to establish a change in conditions or a mistake in a determination of fact, and claimant requested a hearing before the Office of Administrative Law Judges. *Id.* at 50, 51.

[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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]We affirm the administrative law judge's findings that claimant failed to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(a)(3) because these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and 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).

Pursuant to Section 718.202(a)(1), the administrative law judge stated that the record contains various physicians' readings of eleven x-rays. Decision and Order at 7. The administrative law judge noted that the physicians who reviewed ten of the x-rays found no evidence of pneumoconiosis. *Id.* The administrative law judge further stated that the remaining x-ray, dated October 15, 2002, was read as positive by Dr. Ahmed and negative by Dr. West, noting that both of these physicians are B readers[4] and Board-certified radiologists. *Id*. The administrative law judge found that "[d]ue to this evidentiary standoff," the October 15, 2002 x-ray "neither establishes nor disproves the presence of pneumoconiosis." *Id*. Therefore, the administrative law judge found that claimant failed to prove the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *Id.*

Claimant contends that the administrative law judge erred in placing substantial weight on the numerical superiority of the x-ray readings. Claimant's Brief at 5. Contrary to claimant's assertion, the administrative law judge did not find that claimant failed to establish the presence of pneumoconiosis based on the x-ray evidence by relying solely on the numerical superiority of the negative readings. Rather, the administrative law judge permissibly found that claimant failed to prove the existence of pneumoconiosis pursuant to Section 718.202(a)(1) by determining that each of the x-rays of record was either negative or insufficient to establish the existence of pneumoconiosis. *See* discussion, *supra*. Therefore, we affirm the administrative law judge's Section 718.202(a)(1) finding. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 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); *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Seargeant, Isber, Dahhan, Rosenberg, and Kabir. Decision and Order at 12-14. Drs. Seargeant, Isber, Dahhan, and Rosenberg did not find the existence of pneumoconiosis. Director's Exhibits 10, 28; Employer's Exhibits 3, 4. Dr. Kabir

[4]A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

diagnosed clinical pneumoconiosis and stated that claimant may have legal pneumoconiosis.[5] Director's Exhibit 33. The administrative law judge found that Dr. Kabir's conclusion that claimant has pneumoconiosis "carries relatively less probative weight than the documented and reasoned contrary conclusions of Dr. Seargeant, Dr. Isber, and Dr. Dahhan, and the exceptionally well documented and reasoned opposing opinion of Dr. Rosenberg."[6] Decision and Order at 14. Specifically, the administrative law judge found that Drs. Seargeant, Isber, Dahhan, and Rosenberg "unequivocally and reasonably relied on specific findings from laboratory studies and examinations including negative x-ray reports, negative CT scan reports, non-qualifying[7] pulmonary function test results with good effort and non-qualifying blood gas studies." *Id.* at 13. Additionally, the administrative law judge stated that "even if all the physicians stood on equal footing in terms of documentation and reasoning," he would find the consensus among the pulmonary experts of Drs. Isber, Dahhan, and Rosenberg to be "more persuasive" than the conclusion of Dr. Kabir.[8] *Id.* at 14. Accordingly, the administrative law judge concluded that claimant failed to establish the existence of pneumoconiosis based on the medical opinion evidence. *Id.*

[5]Dr. Kabir stated that considering claimant's significant coal dust exposure, his chronic bronchitis may represent coal workers' pneumoconiosis. Director's Exhibit 33.

[6]The administrative law judge permissibly found that "Dr. Kabir's status as treating physician adds little to the probative value of his opinion." Decision and Order at 13. The administrative law judge reasoned that "other than a couple of pulmonary visits in the summer of 2000, no other information has been provided concerning the nature, duration, frequency, and extent of Dr. Kabir's medical relationship with [claimant]." *Id.*; 20 C.F.R. §718.104(d); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002).

[7]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values, *i.e.*, Appendices B, C to 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values.

[8]The record reveals that Dr. Rosenberg is Board-certified in internal medicine and pulmonary disease. Employer's Exhibit 4. Dr. Dahhan is a B reader and is Board-certified in internal medicine and pulmonary disease. *Id.* at 3. Dr. Isber is Board-certified in internal medicine, pulmonary disease, and critical care. Director's Exhibit 28. The qualifications of Drs. Kabir and Seargeant are not in the record.

Claimant contends that the administrative law judge erred in discounting Dr. Kabir's opinion. Claimant's Brief at 4-5. Contrary to claimant's contention,[9] the administrative law judge, within his discretion as trier-of-fact, found that the opinions of Drs. Seargeant, Isber, Dahhan, and Rosenberg are entitled to greater weight because he found these physicians' opinions to be better reasoned and documented than the opinion of Dr. Kabir. *Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Moreover, the administrative law judge permissibly found the opinions of Drs. Isber, Dahhan, and Rosenberg to be "more persuasive" because these physicians possess qualifications that are superior to Dr. Kabir's qualifications. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Therefore, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis based on the medical opinion evidence. *Ondecko*, 512 U.S. at 280, 18 BLR at 2A-12.

Because we affirm the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a), a requisite element of entitlement under Part 718, we also affirm the administrative law judge's denial of benefits.[10] *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

---

[9]We reject claimant's assertion that the administrative law judge erred in not finding pneumoconiosis established in light of the progressive and irreversible nature of this disease. Claimant has the burden of submitting evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).

[10]The administrative law judge noted that although claimant's case was returned to the Office of Administrative Law Judges as a denial of a modification request, his "case has never been fully adjudicated by an administrative law judge." Decision and Order at 3 n.3. Therefore, the administrative law judge stated that he would "adjudicate this claim as an initial claim based on all the testimony and evidence admitted into the record," noting that this approach was not objected to by either party at the 2003 hearing. *Id.* Consequently, the administrative law judge did not make a threshold determination as to whether claimant has established a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310(a) (2000). *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). We deem any error the administrative law judge may have made in this regard to be harmless, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), because he considered all the evidence to determine whether claimant is

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

entitled to benefits on the merits of his case. *See Worrell*, 27 F.3d at 231, 18 BLR at 2-298-99; *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992).