BRB No. 04-0429 BLA

WALTER THOMAS HICKS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORP.	)	DATE ISSUED: 10/13/2004
	)	
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 of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Walter Thomas Hicks, Falls Mills, Virginia, *pro se*.

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

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2002-BLA-05288) of Administrative Law Judge Pamela Lakes Wood 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). The administrative law judge found seventeen years of qualifying coal mine employment and that employer was the proper responsible operator. Decision and Order at 5. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] Decision and Order at 5-6.

[1]Claimant filed his claim for benefits with the Department of Labor on February 16,

After considering all of the evidence of record, the administrative law judge determined that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 6-10. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs has filed a letter indicating that he will not respond to the instant appeal, however noting that the administrative law judge's analysis pursuant to 20 C.F.R. §725.414 is flawed.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider 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 Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). If the findings of fact and conclusions of law of the administrative law judge 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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 Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.[2] The administrative law judge rationally found that the evidence of record

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2001, which was denied by the district director on March 27, 2002. Director's Exhibits 1, 25. Claimant subsequently requested a formal hearing before the Office of Administrative Law Judges. Director's Exhibit 28.

[2]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was last employed in the coal mine industry in the State of West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit

was insufficient to establish the existence of pneumoconiosis. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

The administrative law judge, in the instant case, considered the x-ray evidence of record and properly noted that the x-ray interpretations dated September 16, 1985, June 15, 2001, February 26, 2002 and July 10, 2002 were negative for the existence of pneumoconiosis. Decision and Order at 7-8; Employer's Exhibits 3, 4, 8; Claimant's Exhibits 3, 6. The administrative law judge further found that the May 16, 2001 x-ray was read as positive by Dr. Alexander, a B-reader and board-certified radiologist, and negative by Dr. Forehand, a B reader, and by Dr. Scatarige, a B-reader and board-certified radiologist. Decision and Order at 7-8; Director's Exhibit 12; Employer's Exhibit 1; Claimant's Exhibit 1. The administrative law judge concluded that of the four dually qualified readers whose credentials are in the record, one found claimant to suffer from pneumoconiosis and three did not and at best the x-ray evidence was in equipoise and therefore insufficient to meet claimant's burden of proof. Decision and Order at 8.

The administrative law judge, within her discretion as fact-finder, rationally determined that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) as the conflicting x-ray interpretations by readers with superior qualifications were in equipoise. Decision and Order at 8; *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); *Worhach v. Director,* OWCP, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Kuchwara*, 7 BLR 1-167. Consequently, the administrative law judge permissibly concluded that the claimant failed to carry his burden of proof to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) by a preponderance of the x-rays.[3] *Ondecko*, 512 U.S. 267, 18 BLR 2A-1.

The administrative law judge also correctly found that the claimant failed to establish

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[3]The administrative law judge incorrectly found that certain x-ray readings, pulmonary function studies and blood gas studies contained within the treatment records exceed the evidentary limitations of 20 C.F.R. §725.414. *See Dempsey v. Sewell Coal Co.*, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004)(*en banc*)(published); Decision and Order at 4. Any error, however, is harmless as the x-ray reading by Dr. Ward does not diagnose pneumoconiosis and the administrative law judge never reached the issue of total disability. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Claimant's Exhibit 6; Decision and Order at 5-10.

the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2)-(3) since the record does not contain any biopsy or autopsy results demonstrating the presence of pneumoconiosis and the presumptions set forth at 20 C.F.R. §§718.304, 718.305, 718.306 are not applicable to this claim.[4] *See* 20 C.F.R. §§718.202(a)(2)-(3); Decision and Order at 8; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

With respect to 20 C.F.R. §718.202(a)(4), the administrative law judge rationally considered the quality of the evidence in determining whether the opinions of record are supported by the underlying documentation and adequately explained. *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Worhach*, 17 BLR 1-105; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark*, 12 BLR 1-149; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Kuchwara*, 7 BLR 1-167; Decision and Order at 9-10. The administrative law judge acted within her discretion, as fact-finder, in according greater weight to the opinion of Dr. Fino, as supported by the reasoned and documented opinion of Dr. Forehand, than to the remaining evidence of record, as the physician offered a better reasoned and documented opinion and in light of his superior qualifications.[5] *See Collins*, 21 BLR 1-181; *Worhach*, 17 BLR 1-105; *Trumbo*, 17 BLR 1-85; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark*, 12 BLR 1-149; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Perry*, 9 BLR 1-1; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens*, 8 BLR 1-16; Decision and Order at 10; Director's Exhibit 11, 12; Employer's Exhibits 2, 9.

Moreover, the administrative law judge rationally concluded that the statements indicating coal workers' pneumoconiosis in the discharge summaries by Drs. Agarwal and Meshel were unreliable and thus insufficient to establish the existence of pneumoconiosis since the statements were conclusory and merely related a history and not a diagnosis.[6] *See*

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[4]The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 because this claim was filed after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, this claim is not a survivor's claim or filed prior to June 30, 1982; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

[5]The record indicates that Dr. Forehand is board-certified in allergy, immunology and pediatrics. Director's Exhibit 12. Dr. Fino is board certified in internal medicine with a subspecialty in pulmonary disease. Employer's Exhibits 2, 9. The credentials of Drs. Previll, Agarwal and Meshel are not in the record. Claimant's Exhibit 3; Employer's Exhibit 4.

[6]The administrative law judge properly accorded the opinion of Dr. Previll, that there was no definite evidence of occupational pneumoconiosis, little weight as it was devoid of analysis and remote in time. Decision and Order at 10; Employer's Exhibit 4; *Collins v. J &*

Lafferty, 12 BLR 1-190; *Clark*, 12 BLR 1-149*; Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Lucostic*, 8 BLR 1-46; *Hutchens*, 8 BLR 1-16; Decision and Order at 10; Claimant's Exhibit 3. Although, as the administrative law judge found and the record indicates, Drs. Agarwal and Meshel are treating physicians, the administrative law judge has provided valid reasons for finding their statements, indicating that claimant suffers from coal workers' pneumoconiosis, entitled to less weight. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *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); *Tedesco v. Director*, OWCP, 18 BLR 1-103 (1994); Grizzle *v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Wetzel*, 8 BLR 1-139; Decision and Order at 10; Claimant's Exhibit 3. We therefore affirm the administrative law judge's credibility determinations with respect to the medical opinion evidence as they are supported by substantial evidence and are in accordance with law.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Ondecko*, 512 U.S. 267, 18 BLR 2A-1; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge permissibly concluded that the evidence of record does not establish the existence of pneumoconiosis, claimant has not met his burden of proof on all the elements of entitlement. *Clark*, 12 BLR 1-149; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1. 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*, 12 BLR 1-149; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis as it is supported by substantial evidence and is in accordance with law. *See Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

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

SO ORDERED.

L Steel, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *see also Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988).

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge