BRB No. 98-0267 BLA

HOWARD D. WOLF, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SKY HAVEN COAL, INC.	)	DATE ISSUED:
	)	
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 George P. Morin, Administrative Law Judge, United States Department of Labor.

Ronald E. Archer, Houtzdale, Pennsylvania, for claimant.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-300) of Administrative Law Judge George P. Morin denying benefits on a duplicate 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). In his Decision and Order, the administrative law judge found that the present claim was a duplicate claim pursuant to 20 C.F.R. §725.309; that claimant's prior claim had been finally denied in December 1979 after claimant failed to submit proof of his years of coal mine employment, of the existence of pneumoconiosis and of the presence of a totally disabling respiratory impairment due to pneumoconiosis; and that the newly submitted evidence established a material change in conditions based on forty years of coal mine employment.[1] As this claim was filed after March 31, 1980, the

[1] Claimant filed his initial claim with the Social Security Administration (SSA) in 1973. Director's Exhibit 40. SSA denied the claim in 1973, after reconsideration in

administrative law judge considered entitlement pursuant to 20 C.F.R. Part 718. Based on the stipulations of the parties, the administrative law judge found that claimant was a miner under the Act; that the claim was timely filed; that claimant had worked forty years in coal mine employment; that claimant would have been exposed to coal dust during his forty years of coal mine employment; and that claimant suffered from a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). At 20 C.F.R. §718.202(a)(1)-(4), the administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis. Accordingly, benefits were denied. On appeal, claimant challenges the findings of the administrative law judge at Section 718.202(a)(4). Although employer filed a cross-appeal, employer has not responded to claimant's arguments on appeal.[2] The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond in this appeal.[3]

1974, after review under the 1972 Amendments to Act in 1975, and after review under the 1977 Amendments to the Act in 1979. *Id.* The Department of Labor denied the claim in December 1979 on the grounds of abandonment as claimant did not submit additional evidence as requested. *Id.* Claimant took no further action until he filed the present claim in April 1996. Director's Exhibit 1.

[2] Employer filed a cross-appeal on November 18, 1997. Employer's cross-appeal was dismissed as abandoned by the Board in an Order dated February 5, 1998. *Wolf v. Sky Haven Coal Co.*, BRB No. 98-0267 BLA/A (Feb. 5, 1998)(unpub.).

[3] We affirm the findings of the administrative law judge at 20 C.F.R. §§725.309 and 718.202(a)(1)-(3) as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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*).

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 that there is no reversible error contained therein. At Section 718.202(a)(4), claimant meets his burden of proof if he establishes the existence of legal pneumoconiosis by a preponderance of the credible medical opinion evidence. *See* 20 C.F.R. §§718.202(a)(4), 718.201; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 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). In the instant case, the administrative law judge acted within his discretion when he accorded greater weight to the medical opinion of Dr. Strother, who did not diagnose coal workers' pneumoconiosis and related claimant's chronic obstructive lung disease to cigarette smoking, on the basis of his qualifications.[4] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Likewise, since the administrative law judge credited the opinion of Dr. Strother, he implicitly found this report reasoned and documented even though Dr. Strother's finding of no pneumoconiosis was based on his rereading of the positive interpretation of the February 17, 1997 x-ray by Dr. Wolfe, a board-certified radiologist and B-reader.[5] *See Pulliam v. Drummond Coal Company*, 7 BLR 1-229

[4] Dr. Strother is board-certified in internal medicine, pulmonary disease and critical care and serves as the Director of the Intensive Care Unit at Lee Hospital in Johnstown, Pennsylvania. Employer's Exhibit 7. The credentials of Dr. Illuzzi are not in the record.

[5] While the February 17, 1997 x-ray is the most recent, the administrative law

(1984); *see also Fields v. Island Creek Coal Company*, 10 BLR 1-19 (1987). In finding the report of Dr. Strother reasoned, the administrative law judge permissibly concluded that since Dr. Strother considered the prior negative x-ray interpretations of board-certified radiologists and the negative CT-scan interpretation, his finding of no pneumoconiosis was supported by the objective evidence of record. *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Although Dr. Illuzzi's status as treating physician is a factor for the administrative law judge to consider when weighing the medical opinion evidence, the administrative law judge is not required to accord additional weight to the opinion of Dr. Illuzzi because he is claimant's treating physician, and thus, did not err when he declined to confer weight to the opinion of Dr. Illuzzi on this basis. *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994). Finally, contrary to claimant's assertion, the Board has not held that medical opinions which can distinguish between smoking and coal mine employment as the cause of a totally respiratory impairment are not credible; rather the Board has held that it is not feasible for the administrative law judge to make this distinction as the determination is for a physician. *See Gorzalka v. Big Horn Cal Co.*, 16 BLR 1-48 (1990). 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). Consequently, the findings of the administrative law judge that the evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4) are affirmed as supported by substantial evidence and in accordance with law. We note that the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that although 20 C.F.R. §718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of evidence must be weighed together to determine if the miner suffers from the disease. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). The failure of the administrative law judge to expressly consider all four subsections at Section 718.202(a) as required by *Williams* is harmless however, as the administrative law judge did not find the evidence of record sufficient to establish pneumoconiosis at any subsection. *Williams*, *supra*; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

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judge is not required to accord more weight to this reading on the basis of recency. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge