BRB Nos. 99-1093 BLA
and 99-1093 BLA-A

TOMMY R. McCLANAHAN)
)
Claimant-Respondent)
Cross-Petitioner)
)
v.)
)
CHISHOLM MINE/PIKEVILLE) DATE ISSUED:
COAL COMPANY)
)
Employer-Petitioner)
Cross-Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Michael Fleet Johnson (Clark & Johnson), Pikeville, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen, Chartered), Washington, D.C., for employer.

Jennifer U. Toth (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order (97-BLA-1569) of Administrative Law Judge Daniel J. Roketenetz awarding 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, and the parties stipulated to, twenty-seven years of qualifying coal mine employment. Decision and Order at 3; Hearing Transcript at 9. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge concluded that the evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b) and that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c)(4), (b).[1] Decision and Order at 2-6, 9-12. Accordingly, benefits were awarded beginning September 1, 1995, the month in which the claim was filed. On appeal, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(4) and that claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204(c)(4),(b). Claimant responds, asserting that the finding of entitlement is supported by substantial evidence and cross-appeals contending that the administrative law judge erred in finding that the federal award of benefits should be offset by the state workers' compensation award. Employer responds on cross-appeal asserting that the administrative law judge properly found offset. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond to the merits of this appeal but asserts that the administrative law judge properly found benefits to be offset in this case.[2]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[1]Claimant filed his application for benefits on September 25, 1995. Director's Exhibit 1.

[2]The administrative law judge's length of coal mine employment and onset of disability determinations as well as his findings pursuant to 20 C.F.R. §§718.202(a)(1)-(3), 718.203 and 718.204(c)(1)-(3) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. Initially, employer's and claimant's contention that the administrative law judge's Decision and Order fails to comport with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), is without merit.[3] The administrative law judge fully discussed the relevant evidence of record and his reasoning is readily ascertainable from his discussion of the evidence.

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[3]The Administrative Procedure Act requires each adjudicatory decision to include a statement of "findings and conclusions, and the reasons or basis therefore, on all material issues of fact, law or discretion presented on the record...." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

Employer further contends that the administrative law judge erred in finding the presence of pneumoconiosis established pursuant to Section 718.202(a)(4) as he impermissibly accorded less weight to the opinions of Drs. Broudy, Branscomb and Fino and greater weight to the opinions of Drs. Myers, Baker and Younes. We do not find merit in employer's argument. Employer's contention constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988). The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). In the instant case, the administrative law judge considered the relevant medical opinions of record and rationally found the opinions of Drs. Myers, Baker and Younes sufficient to support a finding of pneumoconiosis. *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983); Decision and Order at 9-10; Director's Exhibits 15, 16, 20; Claimant's Exhibits 1, 2; Employer's Exhibits 2, 3, 4. The administrative law judge, in performance of his duty as fact-finder, permissibly accorded determinative weight to the opinions of Drs. Myers, Baker and Younes as he found them to be better reasoned and documented and as they diagnosed a pulmonary impairment due to claimant's coal dust exposure independent of their x-ray findings.[4] *See Trumbo v. Reading Anthracite Co.,* 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *Tanner v. Freeman United Coal Co.*, 10

[4]Dr. Myers, board-certified in internal medicine, examined claimant and concluded that claimant suffers from coal workers' pneumoconiosis and also has an impairment due to coal dust exposure and that from a pulmonary stand point he was unable to do his usual coal mine work. Director's Exhibit 5; Claimant's Exhibit 1. Dr. Baker, board-certified in internal medicine and pulmonary disease, examined claimant and opined that claimant has coal workers' pneumoconiosis and chronic obstructive airways disease due to coal dust exposure and that he was disabled from his usual coal mine employment due to his severe respiratory impairment. Director's Exhibit 16; Claimant's Exhibit 2. Dr. Younes examined claimant and opined that claimant suffered from chronic obstructive lung disease and chronic bronchitis due to occupational dust exposure and that his severe obstructive ventilatory impairment would interfere with claimant performing his last coal mining job. Director's Exhibit 20. Dr. Broudy, board-certified in internal medicine and pulmonary disease, opined that claimant does not have coal workers' pneumoconiosis but most likely bronchial asthma unrelated to coal mine employment. Director's Exhibit 19. Dr. Fino, board-certified in internal medicine and pulmonary disease, and Dr. Branscomb, board-certified in internal medicine, reviewed the medical records and opined that claimant did not suffer from any coal dust induced pulmonary condition. Employer's Exhibits 2, 3, 4. Dr. Fino opined that there was no respiratory impairment present while Dr. Branscomb found claimant's pulmonary function insufficient to perform his previous coal mine employment. Employer's Exhibits 2, 3, 4.

BLR 1-85 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.,* 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Moreover, in concluding that the opinions of Drs. Fino, Branscomb and Broudy were outweighed by the preponderance of the medical opinions of record, the administrative law judge permissibly accorded less weight to the opinions of Drs. Fino and Branscomb on the basis that they did not examine the claimant. *Clark, supra*; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *Perry,* supra; *King, supra*; *King v. Cannelton Industries, Inc.*, 8 BLR 1-146 (1985); *Lucostic, supra*; *Wetzel, supra*; *Massey v. Eastern Associated Coal Corp.*, 7 BLR 1-37 (1984); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984); *Piccin, supra*; Decision and Order at 9-10. Contrary to employer's contention, the administrative law judge permissibly credited the opinions of Drs. Myers, Baker and Younes as they also diagnosed a pulmonary impairment due to coal mine employment based on other clinical data. *See* 20 C.F.R. §718.201; *Trumbo*, *supra*; *Perry*, *supra*; *Lucostic*, *supra*; *Piccin*, *supra*. We therefore affirm the administrative law judge's finding that the preponderance of the medical opinion evidence of record is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *Perry, supra*.

Employer next contends that the administrative law judge erred in finding that the medical opinion evidence established that claimant was totally disabled due to pneumoconiosis pursuant to Section 718.204. We disagree. The administrative law judge discussed the relevant medical opinions of record and rationally found that the opinions of Drs. Myers and Baker were sufficient to meet claimant's burden of proof.[5] Decision and Order at 12; Director's Exhibits 15, 16; Claimant's Exhibits 1, 2. Contrary to employer's contention, the administrative law judge properly considered the relevant evidence of record and permissibly accorded greater weight to the opinions of Drs. Myers and Baker as they were better reasoned and documented and less weight to the contrary opinion of Dr. Fino as he did not examine the miner and he is the only physician to find no pulmonary impairment. *Clark, supra*; *Thackett, supra*; *Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986); *Bogan, supra*; *Piccin, supra*; Decision and Order at 9-10, 12. Thus, the administrative law judge reasonably found that the medical opinion evidence was sufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204.[6] Decision and Order at 12; *Trumbo*,

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[5]The administrative law judge also properly noted that the opinion of Dr. Branscomb, although in conflict with the preponderance of medical evidence with respect to etiology, also buttressed the opinions of Drs. Myers and Baker concerning total disability as the physician opined that claimant's pulmonary function is insufficient for his previous coal mine work. Decision and Order at 12; Employer's Exhibit 2.

[6]An administrative law judge may also permissibly accord less weight to an opinion

supra; *Clark, supra*; *Perry, supra*; *Piccin, supra*. The administrative law judge is empowered to weigh the medical opinion evidence of record 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, supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). As employer makes no other specific challenge to the administrative law judge's findings on the merits, we affirm the administrative law judge's finding that the medical opinion evidence is sufficient to establish that claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Claimant contends, on cross-appeal, that the administrative law judge erred in offsetting his state award of benefits against his federal black lung award. We disagree. Claimant argues that the administrative law judge erred in offsetting the state award because the state award was not "due to pneumoconiosis" as defined in 20 C.F.R. §725.533(a)(1) since the state award was for physical injuries only. Contrary to claimant's contention, the administrative law judge properly determined that offset was proper in this case. The administrative law judge found that the parties in this case agreed to settle a claim for physical injuries sustained by the claimant as well as for a claim filed for injuries due to occupational disease. Decision and Order at 13; Claimant's Exhibit 3. Claimant's contention that, under Kentucky law, when a claimant is totally disabled from the effects of an injury, then any occupational disease will not be used in calculating the state award, is without merit based upon the circumstances of this case. The administrative law judge reasonably determined that the settlement agreement signed by the parties reflects no intent to disregard the contribution made by pneumoconiosis to the miner's total disability as the agreement indicates that the parties intended to settle both claims for occupational disease and injury. Decision and Order at 13; Claimant's Exhibit 3. Additionally, the administrative law judge properly rejected claimant's contention that as the state award was on the form for physical injury, offset was not proper. Although, claimant contends that there are different forms for occupational awards, the administrative law judge permissibly determined that this factor did not negate the agreement of the parties that the claim for the occupational injury was included in the settlement. Decision and Order at 13. Consequently, substantial evidence supports the administrative law judge's conclusion that claimant has received a state award of

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regarding causation where it is based on a faulty underlying premise regarding the presence or absence of pneumoconiosis. *Bobick v. Saginaw Mining Company*, 13 BLR 1-52 (1989); *Trujillo v. Kaiser Steel Corporation*, 8 BLR 1-472 (1986).

benefits partially due to pneumoconiosis and is subject to the offset provisions at 20 C.F.R. §725.535(a)(1). *See Burnette v. Director, OWCP*, 14 BLR 1-151 (1990); Claimant's Exhibit 3.

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge