BRB No. 02-0282 BLA

ALEXANDER FILOHOSKI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
READING ANTHRACITE COMPANY	)	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 Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Tab Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (01-BLA-0427) of Administrative Law Judge Robert D. Kaplan 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 this request for modification of the denial of a duplicate claim, the administrative law judge credited claimant with thirty-seven years of coal mine employment and considering the newly submitted evidence, in light of the earlier evidence, found it insufficient to establish the existence of pneumoconiosis, the element of entitlement

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

previously adjudicated against claimant, and therefore insufficient to establish a change in conditions. Accordingly, benefits were denied.

On appeal, claimant contends that the x-ray and medical opinion evidence establish the existence of pneumoconiosis.[2] Employer responds, urging that the administrative law judge's Decision and Order Denying Benefits be affirmed as claimant failed to identify any specific error by the administrative law judge, and in the alternative, that the Decision and Order be affirmed as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), is not participating in this appeal.

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*).

Claimant contends that the administrative law judge erred in relying on the positive x-ray readings by highly credentialed physicians, including positive readings of the most recent x-rays of record, instead of relying on the numerical superiority of the negative x-ray readings of record, especially in light of claimant's thirty-seven years of coal mine employment, to which the parties stipulated. Contrary to claimant's contention, after the administrative law judge noted that the November 10, 1999 and June 30, 2000 x-rays were all read by dually qualified Board-certified, B-readers, he rationally relied on the greater number of the negative x-ray readings (fourteen to six) of the November 10, 1999 and June 30, 2000 x-rays in finding that the x-ray evidence failed to establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-

[2] The administrative law judge's finding at Section 718.202(a)(2), (3) is affirmed as unchallenged on appeal. 20 C.F.R. §718.202(a)(2), (3); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

271 (6th Cir. 1995). Accordingly, we affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(1). 20 C.F.R. §718.202(a)(1).

Claimant also argues that the administrative law judge erred in finding that the existence of pneumoconiosis was not established by medical opinion evidence at Section 718.202(a)(4). Specifically, claimant contends that the administrative law judge should have accorded greater weight to the opinion of Dr. Kraynak, who was claimant's treating physician for over ten years, and who provided a reasoned and documented opinion, and he should have accorded less weight to the opinions of Drs. Dittman and Fino, despite their superior qualifications, because Dr. Dittman saw claimant only three times in ten years,[3] and Dr. Fino never examined claimant.

In finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge found that the opinions of Drs. Fino and Dittman, who found that claimant does not suffer from pneumoconiosis, were reasoned and documented, and that the contrary opinion of Dr. Kraynak was problematic because he relied on three pulmonary function studies which were invalidated by physicians with superior qualifications and one pulmonary function study, obtained by Dr. Dittman, which resulted in values substantially higher than those obtained by Dr. Kraynak. Decision and Order at 8; Director's Exhibits 126, 131; Employer's Exhibits 27, 28; Claimant's Exhibit 11. For these reasons and because the qualifications of Drs. Dittman and Fino were superior to those of Dr. Kraynak,[4] the administrative law judge accorded greater weight to the opinions of Drs. Dittman and Fino. Further, citing Section 718.104(d)

[3] On deposition, Dr. Dittman testified to four examinations of claimant. Employer's Exhibit 27 at 23-24.

[4] The administrative law judge noted that Dr. Kraynak was Board-eligible in family medicine, while Dr. Dittman was Board-eligible in internal medicine and pulmonary disease, and Dr. Fino was Board-certified in internal medicine and pulmonary disease. Decision and Order at 7-8; Employer's Exhibits 27, 28. Dr. Dittman testified on deposition that he was Board-certified in internal medicine. Employer's Exhibit 27 at 4.

which "states that a treating physician's opinion shall be accepted 'in the absence of contrary probative evidence' and may be given controlling weight if it is credible 'in light of its reasoning and documentation, other relevant evidence and the record as a whole[,]'" the administrative law judge stated that he did not "accept" the opinion of Dr. Kraynak, nor give it "controlling weight," in light of the contrary probative evidence in this case. Decision and Order at 8.

After reviewing the record in this case and the applicable law, we conclude that the administrative law judge erred in crediting the opinions of Drs. Dittman and Fino over the opinion of Dr. Kraynak for the reasons given, *i.e.*, their superior credentials and the fact that the pulmonary function studies relied on by Dr. Kraynak were subsequently invalidated. *Balsavage v. Director, OWCP*, 295 F.3d 390, BLR (3d Cir. 2002)(credentials alone do not determine the credibility of a medical opinion); *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997)(pulmonary function studies used to assess the degree of disability, not the existence of pneumoconiosis). Further, in light of the length of the time Dr. Kraynak treated claimant and the numerous examinations and testing he performed on claimant, the administrative law judge must, in evaluating his opinion and the medical opinion evidence as a whole, consider the nature of his relationship with claimant, the duration of the relationship, the frequency of treatment, and the extent of the treatment. 20 C.F.R. §718.104(d)(1)-(5); *see Balsavage*, *supra*; *Mancia*, *supra*; *see also Revnak v. Director, OWCP*, 7 BLR 1-771, 1-774 (1985); *but see Lango v. Director, OWCP*, 104 F.3d 537, 21 BLR 2-12 (3d Cir. 1997). Additionally, if reached, the administrative law judge must weigh together both the x-ray evidence and the medical opinion evidence in determining whether claimant has established the existence of pneumoconiosis. *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge