

BRB No. 03-0326 BLA

FRANKLIN J. COLEMAN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
PIKEVILLE COAL COMPANY)	
)	DATE ISSUED: 09/29/2003
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 on Modification – Denying Benefits of Thomas J. Phelan, Jr., Administrative Law Judge, United States Department of Labor.

Billy J. Moseley (Webster Law Offices), Pikeville, Kentucky, for claimant.

Lois A. Kitts (Baird & Bair, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant, a living miner, appeals the Decision and Order on Modification – Denial of Benefits (2001-BLA-715) of Administrative Law Judge Thomas F. Phelan, Jr., with respect to 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). Claimant filed his application for benefits on August 29, 1995. Director’s Exhibit 1. In a Decision and Order issued on March 30, 2000, Administrative Law Judge Daniel J. Roketenetz determined that claimant established twenty-six years of coal mine employment, but did not establish the existence of pneumoconiosis, total disability, or total disability due to pneumoconiosis. Accordingly, benefits were denied.

Claimant appealed to the Board, but while his appeal was pending, claimant submitted additional evidence and, subsequently, notified the Board that he had filed a request for modification with the district director. Director's Exhibits 69, 71, 72. The Board remanded the case to the district director. *Coleman v. Pikeville Coal Co.*, BRB No. 00-0702 BLA (Dec. 1, 2000)(unpub. Order); Director's Exhibit 73. The district director issued a Proposed Decision and Order denying benefits. Director's Exhibit 53. Following the receipt of claimant's request for a hearing, the district director transferred the case to the Office of Administrative Law Judges. The case was assigned to Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge).

In the Decision and Order that is the subject of this appeal, the administrative law judge found that the newly submitted evidence was sufficient to establish that claimant is suffering from a totally disabling pulmonary impairment pursuant to 20 C.F.R. 718.204(b)(2).¹ The administrative law judge concluded, therefore, that claimant established a change in conditions under 20 C.F.R. §725.310 (2000). The administrative law judge proceeded to consider the merits of entitlement and found that claimant did not prove the existence of pneumoconiosis under 20 C.F.R. §718.202(a) or that pneumoconiosis was a contributing cause of his total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

Claimant argues on appeal that the administrative law judge did not properly weigh the evidence relevant to Sections 718.202(a)(1), (a)(4), and 718.204(c). Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has also responded and urges the Board to reject claimant's arguments concerning the applicability of 20 C.F.R. §718.104(d) and the administrative law judge's consideration of claimant's smoking history.²

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, 722, 725 and 726 (2002). The amendments to the regulation pertaining to requests for modification, set forth in 20 C.F.R. §725.310, do not apply to requests for modification of claims filed before January 19, 2001. 20 C.F.R. §725.2.

² We affirm the administrative law judge's findings under 20 C.F.R. §718.202(a)(2) and (a)(3) and his findings under 20 C.F.R. §718.204(b)(2)(i)-(iv), as these determinations have not been challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

In order to establish entitlement to benefits in the miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis was totally disabling. See 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 prove any of these elements compels a denial of benefits. See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

With respect to the administrative law judge's finding that the x-ray evidence did not support a finding of pneumoconiosis under Section 718.202(a)(1), claimant argues that the administrative law judge erred in resolving the conflict in the x-ray evidence by merely counting heads. Claimant also asserts that the positive reading by Dr. Brandon, a dually qualified physician, is sufficient to establish the existence of pneumoconiosis. These contentions of error are without merit. The administrative law judge rationally determined, based upon the great weight of the negative readings by B readers and Board-certified radiologists, that the x-ray evidence of record was insufficient to establish the presence of pneumoconiosis pursuant to Section 718.202(a)(1).³ Decision and Order at 15; *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

Regarding the administrative law judge's determination that the medical opinions of record do not support a finding of pneumoconiosis pursuant to Section 718.202(a)(4), claimant argues that the administrative law judge erred in failing to accord greatest weight to the medical opinions in which Drs. Younes and Tzouanakis diagnosed chronic obstructive pulmonary disease (COPD) related to coal dust exposure, based upon their

³ The record contains forty-four readings of nineteen x-rays. Director's Exhibits 22-33, 37, 46-48, 50, 53; Employer's Exhibits 1-5. Of the forty-four interpretations, forty were negative for pneumoconiosis and four were positive for the disease. The positive readings were of films taken in August and December of 1992. Director's Exhibits 36; 53. The subsequent films of record were uniformly determined to be negative for pneumoconiosis. With the exception of one positive B reader interpretation of a 1992 film, all of the interpretations by physicians qualified as B readers and/or Board-certified radiologists were negative for pneumoconiosis.

credentials and their status as treating physicians. Claimant also asserts that the administrative law judge erred in considering smoking as a source of claimant's COPD.

These contentions are also without merit. Contrary to claimant's assertion, 20 C.F.R. §718.104(d), which sets forth the manner in which an administrative law judge is to consider a treating physician's opinion, does not apply to the medical reports at issue, as both of them were developed prior to January 19, 2001. 20 C.F.R. §§718.104(d), 725.2; Director's Exhibits 19, 71. In addition, the case law of the Sixth Circuit, within whose jurisdiction this case arises, does not mandate an automatic preference for a treating physician's opinion.⁴ Rather, a treating physician's diagnoses and conclusions are entitled to "the deference they deserve based upon their power to persuade." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, BLR , (6th Cir. 2003); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Griffith v. Director, OWCP*, 868 F.2d 847, 12 BLR 2-185 (6th Cir. 1989).

In the present case, the administrative law judge rationally determined that although Dr. Tzouanakis is claimant's treating physician, his opinion was entitled to little weight because it was based, in part, upon the doctor's inaccurate understanding of the length of claimant's smoking history. Decision and Order at 11; Director's Exhibit 71; *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Dr. Tzouanakis indicated in his report dated May 30, 2000, that claimant smoked half of a package of cigarettes per day for twenty-five years and that claimant quit smoking "20 years ago." Director's Exhibit 71. Claimant testified at the administrative hearing that he began smoking in 1957 or 1958 and did not quit until approximately 1999.⁵ Hearing Transcript at 19.

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in the Commonwealth of Kentucky. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

⁵ At the administrative hearing, claimant indicated that he began smoking at age 16 or 17. Hearing Transcript at 19. Because claimant was born on December 31, 1941, his statement supports the inference that he began to use cigarettes in 1957 or 1958. Director's Exhibit 1. Claimant further testified that he quit smoking "more than three years ago." Hearing Transcript at 19. The administrative hearing took place on February 6, 2002.

The administrative law judge also acted within his discretion in determining that Dr. Younes's opinion was "not sufficient to establish the existence of pneumoconiosis by a preponderance of the evidence." Decision and Order at 17; Director's Exhibit 19. The administrative law judge rationally found that Dr. Younes's opinion was outweighed by the contrary opinions of Drs. Broudy, Vuskovich, Fino, Branscomb, and Rosenberg; particularly in light of the fact that Dr. Broudy had examined claimant on numerous occasions and had consistently found that claimant did not have pneumoconiosis and that his COPD was not related to coal dust exposure.⁶ Decision and Order at 11-12; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Finally, claimant alleges that the administrative law judge erred in crediting the opinions of physicians who attributed his pulmonary impairment to cigarette smoking rather than coal dust exposure. Although claimant initially raised this argument in the context of the administrative law judge's findings under Section 718.204(c), he also stated that "the administrative law judge is prohibited from considering the effects of cigarette smoke...and will determine whether or not pneumoconiosis is present..." Brief in Support of Petition for Review at 7. Claimant's argument is without merit. Pursuant to 20 C.F.R. §718.201, claimant bears the burden of proving that his obstructive lung disease arose out of his coal mine employment. 20 C.F.R. §718.201(a)(2), (b). The administrative law judge acted properly, therefore, in addressing all of the medical opinions that addressed the source of claimant's COPD in order to determine whether it arose out dust exposure in claimant's coal mine employment. Thus, we affirm the administrative law judge's finding that claimant did not prove that he is suffering from pneumoconiosis under Section 718.202(a)(4). *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

Because we have affirmed the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement, we must also affirm the denial of benefits. In light of our affirmance of the denial of benefits, we need not address claimant's contentions regarding the administrative law judge's findings pursuant to Section 718.204(c). See *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order on Modification – Denying Benefits is affirmed.

⁶ The record does not appear to contain evidence establishing that Dr. Younes was a treating physician.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, JR.
Administrative Appeals Judge