BRB No. 04-0211 BLA

CHARLES GORDON CECIL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 09/15/2004
	)	
QUARTO MINING COMPANY	)	
	)	
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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Charles Gordon Cecil, Edgewater, Florida, for claimant, *pro se*.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (2002-BLA-0439) of Administrative Law Judge Robert L. Hillyard 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). Based on the date of filing, the

administrative law judge adjudicated this claim pursuant to 20 C.F.R Part 718.[1] The administrative law judge credited claimant with "at least seven years of coal mine employment," Decision and Order at 3, and found employer to be the responsible operator. On the merits, the administrative law judge found that claimant established the presence of a totally disabling respiratory impairment pursuant to Section 718.204(b). However, the administrative law judge found the evidence of record was insufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1)-(4), 718.203(b), and was insufficient to demonstrate claimant's totally disabling respiratory impairment was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence, and also asserts that the administrative law judge erred by failing to admit the medical report of Dr. Fino. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that Dr. Fino's report was properly excluded from the record, but has not otherwise participated in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers 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). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a).

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, and the evidence of record, we conclude that the Decision and Order is supported by substantial

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[1]Claimant filed an application for benefits on April 30, 2001. Director's Exhibit 1. The district director issued an Initial Determination in which benefits were awarded on August 6, 2002, and employer subsequently requested a formal hearing. Director's Exhibits 23-25. The case was transferred to the Office of Administrative Law Judges.

evidence and contains no reversible error. Pursuant to Section 718.202(a)(1), the administrative law judge considered the x-ray readings of record, none of which was interpreted as revealing the presence of pneumoconiosis, hence, the administrative law judge rationally determined that the existence of the disease was not established at subsection (a)(1). Decision and Order at 4, 9; Employer's Exhibits 1, 8; Director's Exhibit 7; *Director, OWCP v. Greenwich Collieries [Ondecko],* 512 U.S. 267, 18 BLR 2A-1 (1994); *Skukan v. Consolidation Coal Co.,* 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995);[2] *Marra v. Consolidation Coal Co.,* 7 BLR 1-216 (1984). As the record supports the administrative law judge's weighing of the x-ray evidence of record, his determination is affirmed. *Ondecko,* 512 U.S. 267, 18 BLR 2A-1. We also affirm the administrative law judge's findings that the requirements of Section 718.202(a)(2)-(3) were not met since the record contains no biopsy evidence, and the regulatory presumptions contained at 20 C.F.R. §§718.304, 718.305, 718.306, are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. Decision and Order at 9; Director's Exhibit 1; *Langerud v. Director, OWCP,* 9 BLR 1-101 (1986).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical reports and accorded little weight to Dr. Podnos's report dated January 17, 2002 and his deposition on July 15, 2002, diagnosing chronic obstructive lung disease related to coal dust exposure. Decision and Order at 10-11. The administrative law judge found that Dr. Podnos had stated that in reaching this diagnosis, he had little experience in diagnosing pneumoconiosis and had given claimant the "benefit of the doubt," Employer's Exhibit 9, but because it was possible that claimant's condition was not coal dust-related, he would defer to the opinions of physicians with greater expertise in this area. Decision and Order at 10-11; Employer's Exhibit 9; Director's Exhibit 14. Thus, the administrative law judge rationally determined that this opinion was equivocal and insufficiently reasoned. Decision and Order at 10-11; Employer's Exhibit 9; Director's Exhibit 14; *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Trumbo v. Reading Anthracite Co.,* 17 BLR 1-85 (1993); *Justice v. Island Creek Coal Co.,* 11 BLR 1-91 (1988); *Campbell v. Director, OWCP,* 11 BLR 1-16 (1987).[3]

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

[3]Contrary to claimant's contention, the entire transcript of Dr. Podnos's deposition was admitted into the record and considered by the administrative law judge. Employer's Exhibit 9; Decision and Order at 6, 10, 11. Moreover, claimant's counsel was free to submit additional evidence, subject to the requirements of 20 C.F.R. §725.414. *Cochran v. Consolidation Coal Co.,* 12 BLR 1-137 (1989); *White v. Director, OWCP,* 6 BLR 1-368

The administrative law judge credited the opinions of Drs. Branscomb and Morgan, that claimant suffered from severe asthma, but did not have coal workers' pneumoconiosis. Decision and Order at 7, 10; Employer's Exhibits 4, 6, 10. The administrative law judge rationally accorded these opinions determinative weight on the basis that the reports were well-documented, reasoned, supported by the record evidence as a whole, and because these physicians possessed superior credentials in the field of occupational diseases. Decision and Order at 10; Employer's Exhibits 4, 6, 10; *Trumbo,* 17 BLR 1-85; *Dillon v. Peabody Coal Co.,* 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.,* 10 BLR 1-24 (1987); *Dockins v. McWane Coal Co.,* 9 BLR 1-57 (1986); *Stanford v. Valley Camp Coal Co.,* 7 BLR 1-906 (1985). Because Drs. Kucker, Flasterstein and Prakash failed to indicate that claimant's condition was related to coal dust exposure, the administrative law judge properly held that the medical evidence containing their diagnoses was not probative. In their treatment notes, Drs. Kucker and Flasterstein diagnosed asthma and chronic obstructive pulmonary disease and in his report, Dr. Prakash diagnosed chronic obstructive pulmonary disease. Thus, this evidence was insufficient to satisfy claimant's burden of establishing the presence of pneumoconiosis. Decision and Order at 6, 10; Employer's Exhibit 7; Director's Exhibit 7; *Ondecko,* 512 U.S. 267, 18 BLR 2A-1.[4] As the administrative law judge's findings pursuant to Section 718.202(a)(4), are supported by substantial evidence, they are affirmed.

The administrative law judge is empowered to weigh and draw inferences from the medical evidence, *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. *Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989) (*en banc*). As we have affirmed the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement, we must also affirm the denial of benefits.[5] *See Trent,* 11 BLR 1-26; *Perry,* 9

(1983).

[4]The administrative law judge's failure to specifically state the weight he accorded to Dr. Diamond's report diagnosing chronic obstructive pulmonary disease and asthma, and Dr. Dearmas's reading of claimant's November 14, 2001 CT scan, which he interpreted as revealing the presence of emphysema and chronic obstructive pulmonary disease, is harmless error, as these reports do not attribute claimant's condition to coal dust exposure, and thus do not diagnose the presence of pneumoconiosis pursuant to the definitions set forth in 20 C.F.R. §718.201. Decision and Order at 6; Employer's Exhibits 3, 7; *Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984).

[5]If claimant believes that additional evidence would prove that he has pneumoconiosis and is totally disabled by it, he can file a request for modification with the district director

BLR 1-1. We need not therefore, address either the sufficiency of the evidence to establish any other element of entitlement, or employer's argument regarding the admissibility of Dr. Fino's medical report.

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

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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within one year of this Decision and Order and submit any new evidence that he has developed. 20 C.F.R. §725.310. Claimant is not required to submit new evidence, however, in support of his request for modification of the denial of his claim.