BRB No. 06-0285 BLA

MACEO R. FORTE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: 09/22/2006
	)	
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 William S. Colwell, Administrative Law Judge, United States Department of Labor.

Joseph Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits (04-BLA-5736) of Administrative Law Judge William S. Colwell in a miner's subsequent claim filed

[1]Claimant filed his present claim for benefits on January 29, 2002. Director's Exhibit 5. The miner's first claim for benefits, filed on November 29, 1990, was finally denied on August 13, 1993 by Administrative Law Judge Edward J. Murty, Jr. Director's Exhibit 1. The miner's second claim for benefits, filed on December 12, 1995, was finally denied on July 30, 1999 by Administrative Law Judge Richard T. Stansell-Gamm. Director's Exhibit 2. The miner's third claim for benefits, filed on August 1, 2000, was

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). Initially, the administrative law judge credited the miner with twenty-seven years of coal mine employment pursuant to the parties' stipulation, 1997 Hearing Transcript at 16. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the new evidence sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge, therefore, found that claimant demonstrated that one of the applicable conditions of entitlement has changed since the denial of his last claim pursuant to 20 C.F.R. §725.309. Considering the claim on the merits, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

Pursuant to Section 718.202(a)(1), the administrative law judge considered the new x-ray evidence, consisting of seven readings, three positive and four negative for the

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finally denied by a Department of Labor claims examiner on January 26, 2001. Director's Exhibit 3.

The administrative law judge rendered a decision on the record pursuant to the parties' request. *See* 20 C.F.R. §725.461(a).

[2]We affirm the administrative law judge's finding that claimant demonstrated that one of the applicable conditions of entitlement has changed since the denial of his last claim pursuant to 20 C.F.R. §725.309 because it is unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We also affirm, as unchallenged on appeal, the administrative law judge's finding, on the merits, that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(a)(3). *Id.*

existence of pneumoconiosis, of three x-rays taken on July 29, 2002, April 14, 2004, and July 1, 2004. The administrative law judge noted that all of the x-ray interpretations were rendered by physicians who are both B readers[3] and Board-certified radiologists. Drs. Patel and Alexander read the July 29, 2002 x-ray as positive for the existence of pneumoconiosis and Dr. Scatarige read this x-ray as negative for the existence of pneumoconiosis.[4] Drs. Scott and Scatarige both interpreted the April 14, 2004 x-ray as negative for the existence of pneumoconiosis. Dr. Patel read the July 1, 2004 x-ray as positive for the existence of pneumoconiosis, whereas Dr. Wheeler interpreted this x-ray to be negative. The administrative law judge stated that the "equally credible readings by the highly qualified physicians reach opposite results." 2005 Decision and Order at 13. Therefore, the administrative law judge found that the "x-ray evidence is evenly balanced" and that "claimant has not met his burden of persuasion" of establishing the existence of pneumoconiosis based on the new x-ray evidence. *Id.* Additionally, the administrative law judge considered the previously submitted x-ray evidence, submitted in conjunction with claimant's previous claims, and determined that this evidence was insufficient to establish the existence of pneumoconiosis. In doing so, the administrative law judge adopted "the reasoning and conclusions" of the previous administrative law judges who considered the prior x-ray evidence.[5] *Id.* at 16. After considering "the prior x-ray evidence in conjunction with the newly submitted evidence," the administrative law judge concluded that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *Id.* at 17.

Claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis pursuant to Section 718.202(a)(1) based on the new x-ray readings rendered by Drs. Patel and Alexander. We reject claimant's contention. As discussed above, the administrative law judge permissibly found, based on the number of positive and negative readings and the radiological qualifications of the x-ray readers, that claimant has failed to meet his burden to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Director, OWCP v. Greenwich Collieries*

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[3]A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

[4]The administrative law judge also noted that Dr. Binns read the July 29, 2002 x-ray for film quality only.

[5]The administrative law judge noted that the majority of the prior x-ray readings were negative for the existence of pneumoconiosis.

[*Ondecko*], 512 U.S. 267, 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); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the newly submitted opinions of Drs. Rasmussen, Zaldivar, and Tuteur. Dr. Rasmussen found the existence of coal workers' pneumoconiosis and found chronic obstructive pulmonary disease due to coal dust exposure and smoking. Director's Exhibit 11; Claimant's Exhibit 2. Dr. Zaldivar found no coal workers' pneumoconiosis and found that claimant does not suffer from a coal dust induced lung disease and Dr. Tuteur found no radiographic evidence of coal workers' pneumoconiosis and found that claimant does not suffer from a lung disease process caused by coal dust exposure. Employer's Exhibits 5, 6 at 16-20, 22-23, 7 at 21-22. After considering this new medical opinion evidence, the administrative law judge found the opinions of Drs. Zaldivar and Tuteur to be "better supported than the contrary opinion of Dr. Rasmussen since [Drs. Zaldivar and Tuteur] considered the CT lung scan findings as well as the other evidence of record." 2005 Decision and Order at 14. In doing so, the administrative law judge noted that Drs. Zaldivar and Tuteur concluded that claimant did not suffer from pneumoconiosis "based on chest x-ray reports, the CT lung scan findings, and the physiological changes present on pulmonary testing." *Id.* The administrative law judge added that the findings of Drs. Zaldivar and Tuteur on the "lung scan are well supported by the report of Dr. Scott based on his review of the April 14, 2004 CT lung scan." *Id.* Moreover, the administrative law judge stated that "[a]lso to consider, Drs. Zaldivar and Tuteur are Board-certified in pulmonary diseases, and Dr. Rasmussen is not."[6] *Id.* Accordingly, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis based on the "better supported" opinions of Drs. Zaldivar and Tuteur.[7] *Id.* The administrative law judge additionally considered the prior opinions of Drs. Zaldivar, Tuteur, and Rasmussen and the opinions of Drs. Krishnan and Vasudevan contained in claimant's previous claims.[8] The administrative law judge stated that his consideration of this old medical

[6]The record reveals that Dr. Zaldivar is a B reader and is Board-certified in internal medicine, pulmonary diseases, and critical care; that Dr. Tuteur is Board-certified in internal medicine and pulmonary diseases; and that Dr. Rasmussen is Board-certified in internal medicine and forensic medicine. Employer's Exhibits 5, 6; Claimant's Exhibit 2.

[7]The administrative law judge than weighed all of the new evidence together and found claimant had not established the existence of pneumoconiosis.

opinion evidence does not affect his finding that claimant failed to establish the existence of pneumoconiosis.[9]

Claimant asserts that the administrative law judge erred in assigning less weight to Dr. Rasmussen's opinion because this physician did not consider the CT scan results. Claimant additionally contends that the administrative law judge's finding that Dr. Rasmussen is a "lesser qualified physician of record is a gross misstatement of fact." Claimant's Brief at 10. Specifically, claimant relies on the curriculum vitae of Dr. Rasmussen and on a statement made by Associate Chief Administrative Law Judge Thomas Burke in a case issued on April 13, 2006. Claimant quotes Associate Chief Administrative Law Judge Thomas Burke as stating, in a recent decision, that Dr. Rasmussen is Board-certified in internal medicine and pulmonary diseases. However, the curriculum vitae of Dr. Rasmussen contained in the record reflects that this physician is Board-certified in internal medicine and forensic medicine. Claimant's Exhibit 2. Because the administrative law judge must base his decision on the record developed before him, the administrative law judge did not err in stating that Dr. Rasmussen is not Board-certified in pulmonary diseases.[10] 20 C.F.R. §725.477(b).

An administrative law judge has broad discretion in assessing the evidence of record to determine whether a party has met his burden of proof, *see Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *see Markus v. Old Ben Coal Co.*, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983)(administrative law judge is not bound to accept opinion or theory of any given medical officer, but weighs evidence and draws his own inferences); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because the administrative law

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[8]With regard to the prior opinions of Drs. Zaldivar and Tuteur and the previously submitted opinions of Drs. Krishnan and Vasudevan, the administrative law judge adopted the reasoning of the previous administrative law judges because he found their reasoning "to be sound and without error." 2005 Decision and Order at 17.

[9]The administrative law judge also considered all of the evidence under Section 718.202(a) and concluded that it failed to establish the existence of pneumoconiosis. *Id.*

[10]Moreover, because the administrative law judge permissibly found Dr. Rasmussen's opinion to be less documented than the opinions of Drs. Zaldivar and Tuteur, *see* discussion, *supra*; *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), we deem harmless any error in the administrative law judge's consideration of the relative credentials of Drs. Rasmussen, Zaldivar, and Tuteur, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

judge permissibly found the opinions of Drs. Zaldivar and Tuteur to be "better supported" than the contrary opinion of Dr. Rasmussen, we hold that the administrative law judge permissibly found that claimant failed to establish the existence of pneumoconiosis. *See Maddaleni*, 14 BLR at 1-140; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Based on the foregoing, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(a)(4). Because we affirm the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(a)(4), we also affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis based on all of the relevant evidence at Section 718.202(a), in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Because claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), a requisite element of entitlement under Part 718, we affirm the administrative law judge's denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge