BRB No. 07-0166 BLA

C.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INCOAL, INCORPORATED	)	DATE ISSUED: 09/25/2007
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand – Denial of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (2006-BLA-6003) of Administrative Law Judge Larry S. Merck 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). The administrative law judge credited claimant with twenty-three years of coal mine employment, based upon the parties'

stipulation, and noted that the claim before him was a subsequent claim under 20 C.F.R. §725.309(d).[1] The administrative law judge determined that the claim was timely filed pursuant to 20 C.F.R. §725.308. The administrative law judge further found that claimant established a change in an applicable condition of entitlement, but upon considering entitlement on the merits, the administrative law judge determined that claimant failed to prove that he has pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or that pneumoconiosis is a contributing cause of his total disability under 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge did not properly weigh the evidence relevant to Sections 718.202(a)(1), (4) and 718.204(b)(2)(iv), (c). Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a response brief 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 supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the

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[1] Claimant filed an application for benefits on June 27, 1977. Director's Exhibit 1. In a Decision and Order issued on April 23, 1985, Administrative Law Judge Ben T. DeBerry denied benefits on the ground that employer established rebuttal of the presumption, set forth in 20 C.F.R. §727.203(a), that claimant was totally disabled due to pneumoconiosis. *Id.* The Board vacated the denial of benefits and remanded the case for reconsideration. *[C.B.] v. Incoal, Inc.*, BRB No. 85-1143 BLA (June 23, 1988)(unpub.). On remand, the case was reassigned to Administrative Law Judge G. Marvin Bober, who denied benefits in a Decision and Order dated July 17, 1989, as claimant failed to establish that he had pneumoconiosis or was totally disabled due to pneumoconiosis. Director's Exhibit 1. The Board affirmed Judge Bober's Decision and Order. *[C.B.] v. Incoal, Inc.*, BRB No. 89-2794 BLA (October 19, 1992)(unpub.). Upon consideration of claimant's appeal, the United States Court of Appeals for the Sixth Circuit, affirmed the denial of benefits in a decision issued on October 25, 1993. *[C.B.] v. Incoal, Inc.*, No. 94-4329 (6th Cir. Oct. 25, 1993). Claimant filed a subsequent claim on July 8, 2004. Director's Exhibit 2.

[2] We affirm the administrative law judge's findings that claimant worked for twenty-three years as a coal miner, that his subsequent claim was timely filed, and that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2), (3) or total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii), as they are unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Act 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 establish 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; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant initially argues that the administrative law judge erred in failing to find that Dr. Baker's positive reading of the x-ray obtained on August 23, 2005, was sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1). This contention is without merit. The administrative law judge acted within his discretion as fact-finder in determining that Dr. Wiot's negative interpretation of this film was entitled to greater weight based upon Dr. Wiot's superior qualifications. Decision and Order at 9; *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). The administrative law judge correctly found that in addition to sharing Dr. Baker's status as a B reader, Dr. Wiot is a Board-certified radiologist. Decision and Order at 9; Claimant's Exhibit 1; Employer's Exhibit 6.

With respect to the administrative law judge's findings under Section 718.202(a)(4), claimant contends that the administrative law judge did not properly weigh the medical opinions in which Drs. Mettu, Baker, and Martin diagnosed pneumoconiosis. We disagree. The administrative law judge rationally determined that Dr. Mettu's opinion was entitled to little weight on the grounds that the physician did not address the validity of the pulmonary function studies upon which he relied in diagnosing legal pneumoconiosis and he did not explain how the physical examination findings and claimant's reported symptoms were supportive of his diagnosis.[3] Decision and Order at

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[3] The regulations provide separate definitions of clinical and legal pneumoconiosis. Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

12; Director's Exhibits 12, 15, 21; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

The administrative law judge also acted within his discretion as fact-finder in determining that Dr. Baker's diagnosis of clinical pneumoconiosis was not well-documented or well-reasoned, as Dr. Baker cited no supporting evidence, other than his own positive x-ray reading, which the administrative law judge found was outweighed by Dr. Wiot's negative interpretation, and claimant's history of coal dust exposure. *Cornett v. Benham Coal,* 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Similarly, the administrative law judge rationally found that Dr. Baker's determination that claimant has legal pneumoconiosis was entitled to no probative weight, as Dr. Baker was unable to state unequivocally that claimant's chronic obstructive pulmonary disease was related to coal dust exposure.[4] Decision and Order at 15; Claimant's Exhibit 1; *see Justice v. Island Creek Coal Co*., 11 BLR 1-91 (1988).

With respect to the opinion of Dr. Martin, contrary to claimant's contention, the administrative law judge was not required to give Dr. Martin's diagnosis of pneumoconiosis determinative weight under Section 718.202(a)(4), based upon his status as claimant's treating physician. Although an administrative law judge may accord a treating physician's opinion controlling weight pursuant to 20 C.F.R. §718.104(d) based upon the nature and extent of the physician's relationship with the miner and the frequency and extent of treatment, the probative value of a treating physician's opinion must be assessed in light of its reasoning and documentation. 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams,* 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Tedesco v. Director,* OWCP, 18

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[4] Dr. Baker examined claimant on August 23, 2005, at the request of the Department of Labor (DOL). On the standard DOL form, Dr. Baker indicated that the cause of claimant's chronic obstructive pulmonary disease was "question cigarette smoking/question coal dust exposure/question effort [on pulmonary function study]." Claimant's Exhibit 1. In an addendum to the form, Dr. Baker stated that:

> It is difficult to ascribe any or all of his symptoms to coal dust as some may be due to rheumatoid arthritis, some may be related to his crush injury on [his] left chest, and the majority are probably due to cigarette smoking. Some, however, could be due to coal dust exposure but it is difficult to state this with any degree of certainty.

Id.

BLR 1-103 (1994); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). In this case, the administrative law judge acted within his discretion as fact-finder in determining that Dr. Martin's opinion, that claimant has pneumoconiosis, was not adequately documented or reasoned, as Dr. Martin did not identify any objective evidence in support of his diagnosis or set forth the underlying rationale. Decision and Order at 16; Director's Exhibit 18; Claimant's Exhibit 2; *Fields*, 10 BLR at 1-22. The administrative law judge did not err, therefore, in declining to give additional weight to Dr. Martin's opinion under Section 718.202(a)(4).

Because claimant has not raised any meritorious allegations of error with respect to the administrative law judge's finding that the evidence of record, when considered in its entirety, is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), this finding is affirmed. In light of the fact that claimant has failed to establish the existence of pneumoconiosis, an essential element of entitlement, we must also affirm the denial of benefits. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Thus, we need not address the administrative law judge's finding that claimant established a change in an applicable condition of entitlement under Section 725.309(d) or his finding that claimant failed to establish total disability due to pneumoconiosis pursuant to Section 718.204(b)(2)(iv), (c), as error, if any, in these findings, is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge