BRB No. 96-0770 BLA

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| HOMER SMITH | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | DATE ISSUED: |
| INTERSTATE COAL, INCORPORATED | ) | |
| | ) | |
| 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 Frank D. Marden, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order (95-BLA-1490) of Administrative

[1] Claimant is Homer Smith, the miner, whose application for benefits filed on July 9, 1993 was finally denied by the district director on December 27, 1993. Director's Exhibits 1, 14. Approximately five months later, claimant's counsel submitted correspondence which the Department treated as a request for modification of the district director's denial pursuant to 20 C.F.R. §725.310. Director's Exhibits 15, 16.

Law Judge Frank D. Marden 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). The administrative law judge credited claimant with "fifteen years of employment in or around one or more coal mines, and [found] that the [c]laimant's most recent period of cumulative employment of not less that one year was with Interstate Coal," but noted that the parties disagreed as to whether claimant

"was a miner within that employment."[2] Decision and Order at 3. The administrative law judge found that claimant has one dependent for purposes of benefits augmentation, determined that employer is the responsible operator, and concluded that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, he denied benefits.

On appeal, claimant asserts that the administrative law judge erred in his consideration of the x-ray and medical opinion evidence. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[3]

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 law. 33 U.S.C. § 921(b)(3), as incorporated into the Act 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), claimant contends that the administrative

[2] The administrative law judge did not resolve this issue and the parties do not raise it on appeal.

[3] We affirm as unchallenged on appeal the administrative law judge's findings regarding dependency, responsible operator status, and pursuant to 20 C.F.R. §718.202(a)(2), (3). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

law judge erred by failing to exclude certain x-ray readings pursuant to the rereading prohibition of Section 413(b), 30 U.S.C. §923(b).[4] Claimant's Brief at 4. The rereading prohibition, implemented at Section 718.202(a)(1)(i), applies only to claims filed before January 1, 1982. *See Tobias v. Republic Steel Corp*., 2 BLR 1-1277 (1981). Since this claim was filed on July 9, 1993, Director's Exhibit 1, Section 413(b) is inapplicable. Therefore, we reject claimant's allegation of error.

Claimant further asserts that the administrative law judge failed to consider both the quantity and quality of the x-ray evidence. Claimant's Brief at 4. We reject this argument, as the administrative law judge expressly considered these factors in his Decision and Order. Specifically, the administrative law judge discussed all fifteen readings of the seven x-rays of record, noting the radiological qualifications of all readers. Decision and Order at 5-6. There were twelve negative and three positive readings. The administrative law judge properly found that "the overwhelming number of readings by 'B' readers [were] negative." Decision and Order at 6; *see 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). In addition, the administrative law judge rationally concluded that the three positive readings were "outweighed by the negative readings made of the same x-rays by equally or more highly qualified physicians." *Id*.; *see Woodward*, *supra*. Because the administrative law judge properly weighed all the x-ray evidence and the record supports his finding, we reject claimant's contention and affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), claimant argues that the administrative law judge substituted his own medical judgment for that of Drs. Baker and Clarke when

[4] For claims filed before January 1, 1982, Section 413(b), 30 U.S.C. §923(b), prohibits the rereading by the Director of an x-ray where (1) the initial reader is a board-certified or board-eligible radiologist; (2) there is other evidence of a significant and measurable pulmonary or respiratory impairment; (3) the x-ray complies with the applicable quality standards and was taken by a radiologist or qualified technologist or technician; and (4) there is no evidence that the claim was fraudulently represented. 30 U.S.C. §923(b); 20 C.F.R. §718.202(a)(1)(i).

he accorded diminished weight to their opinions diagnosing pneumoconiosis. Claimant's Brief at 5. Five physicians examined and tested claimant. Dr. Baker diagnosed "[c]oal [w]orkers' [p]neumoconiosis 1/0" as well as "bronchitis and possibly airway disease secondary to his coal dust exposure." Director's Exhibits 8, 9, 27. Dr. Clarke diagnosed "1/1 P, coal workers[']pneumoconiosis." Director's Exhibit 27. In contrast, Dr. Wright declared claimant's pulmonary examination "normal," and concluded that claimant does not have "[c]oal [w]orkers' [p]neumoconiosis or any other occupational lung injury." Director's Exhibit 24. Dr. Broudy likewise found no "significant pulmonary disease or respiratory impairment which has arisen from this man's occupation as a coal worker." Director's Exhibit 24. Lastly, Dr. Vuskovich concluded that claimant "does not have an occupational pulmonary disease." Director's Exhibit 24.

The administrative law judge found the opinions of Drs. Wright, Broudy, and Vuskovich to be "well-reasoned and well-documented" and concluded that they "outweigh[ed] the opinions of Drs. Baker and Clarke." Decision and Order at 10. In so doing, the administrative law judge permissibly questioned the reliability of the opinions of Drs. Baker and Clarke because both physicians based their opinions in part on their own positive readings of x-ray films which were subsequently read negative by other physicians. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). The record supports the administrative law judge's analysis of this issue. Director's Exhibits 11-13, 24, 27, 29, 31, 32. Furthermore, the administrative law judge permissibly questioned the conviction of Dr. Baker's opinion after the physician acknowledged that B-readers had subsequently read his x-ray film negative, causing him to conclude that the opacities he classified as "1/0" were "possibly simply crowded vessels from the lower lobes" and that the "x-ray was borderline." Director's Exhibit 9; *see Justice v. Island Creek Coal Co*., 11 BLR 1-91 (1988). The administrative law judge also found equivocal Dr. Baker's statement that claimant "possibly" had "airway disease secondary to his coal dust exposure." Director's Exhibit 9; *see Justice*, *supra*. Inasmuch as the administrative law judge offered valid reasons for according diminished weight to the opinions of Drs. Baker and Wright, we reject claimant's contention and affirm the administrative law judge's finding that the weight of the medical opinion evidence was negative for the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Because claimant has failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a), a necessary element of entitlement under Part 718, the denial of benefits is affirmed. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *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.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge