BRB No. 96-0853 BLA

EDGAR MARTIN Claimant-Petitioner v. LIGON PREPARATION COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order on Remand of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

John Earl Hunt (Sturgill & Hunt Law Offices), Prestonburg, Kentucky, for claimant.

Bryan A. Sims (Arter & Hadden), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order On Remand (92-BLA-1801) of

Administrative Law Judge Mollie W. Neal 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). This case is before the Board for the second time. Initially, the administrative law judge credited claimant with sixteen years of coal mine employment but found that the medical evidence failed to establish the existence of

pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, she denied benefits. Pursuant to claimant's appeal, the Board vacated the administrative law judge's finding pursuant to Section 718.202(a)(4) because she failed to consider all of the relevant evidence, substituted her medical judgment for that of a physician, and discredited certain medical opinions because they were based on positive x-ray readings, when she had found the weight of the x-ray evidence to be negative for pneumoconiosis. *Martin v. Ligon Preparation Co*., BRB No. 94-2594 BLA (Mar. 10, 1995)(unpub.). Accordingly, the Board remanded the case for further consideration.

On remand, the administrative law judge again concluded that the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Accordingly, she denied benefits. On appeal, claimant contends that the administrative law judge erred in her weighing of the evidence pursuant to Section 718.202(a)(4). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

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).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order on Remand of the administrative law judge is supported by substantial evidence and contains no reversible error. In finding that claimant failed to establish his entitlement to benefits, the administrative law judge permissibly concluded that the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Dr. Potter, who is claimant's treating physician, and Drs. Wright, Sundaram, and Leslie diagnosed pneumoconiosis. Director's Exhibits 17, 49, 63, 74, 75, 76, 83; Claimant's Exhibit 1. Dr. Anderson diagnosed pneumoconiosis in two 1987 examination reports, Director's Exhibit 49, but after reviewing additional medical data in 1990 concluded that claimant does not have pneumoconiosis. Director's Exhibit 70. Drs. Dahhan, Vuskovich, Sutherland, and Broudy examined and tested claimant and concluded that he suffers from pulmonary impairments related to smoking, but does not have pneumoconiosis. Director's Exhibits 19, 48, 65, 71, 82; Employer's Exhibit 3. Drs. Chandler and Fino reviewed the medical evidence and reached the same conclusion. Employer's Exhibits 13, 14.

Contrary to claimant's contention, the administrative law judge permissibly accorded diminished weight to the affirmative opinions of Drs. Potter, Wright, and Sundaram because the x-rays they relied on in rendering their diagnoses were later reread by more qualified readers.[2] Decision and Order on Remand at 2-3; Claimant's Brief at 13; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). Substantial evidence supports this determination. *Compare* Director's Exhibits 49, 77, 83 *with* Director's Exhibits 21, 62, 77, 80-82, 87, and Employer's Exhibits 5, 6, 11, 12. In addition, the administrative law judge acknowledged Dr. Potter's status as claimant's treating physician, Decision and Order on Remand at 3-4; *see Tussey v. Island Creek Coal Co*., 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993), but permissibly concluded that his opinion did not merit determinative weight because he failed to explain how he considered claimant's forty-year smoking history in diagnosing pneumoconiosis.[3] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). We therefore reject claimant's contention that the administrative law judge failed to accord proper deference to the treating physician's opinion. Claimant's Brief at 13. The administrative law judge also considered each of Dr. Anderson's reports and permissibly accorded greater weight to his 1990 opinion, which found no pneumoconiosis, than to his two earlier opinions, because the administrative law judge found that the 1990 opinion was based on "a more complete medical record relating to the miner's lung condition." Decision and Order on Remand at 9; *see Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The record supports this finding, as Dr. Anderson based his 1990 opinion on a review of twenty-seven x-ray readings, eight sets of pulmonary function studies, and six sets of blood gas studies. Director's Exhibits 49, 70. We therefore reject claimant's arguments that the administrative law judge failed to consider the entirety of Dr. Anderson's opinion and erred in finding that he did not diagnose pneumoconiosis. Claimant's Brief at 14.

Having considered the foregoing opinions, the administrative law judge permissibly credited as persuasive and well-reasoned the opinions of Drs. Vuskovich, Broudy, Dahhan, and Sutherland finding no pneumoconiosis, *see Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Clark*, *supra*, and, contrary to claimant's contention, Claimant's Brief at 14-15, permissibly concluded that their opinions were supported by the reports of Drs. Chandler and Fino, who had reviewed the medical evidence.

In sum, the administrative law judge on remand explained the relative weight she assigned to the relevant evidence and provided valid reasons for her weighing.

Inasmuch as the Board is not empowered to reweigh the evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), we reject the remainder of claimant's contentions, Claimant's Brief at 13-14, and affirm the administrative law judge's finding pursuant to Section 718.202(a)(4).

Because claimant has failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a necessary element of entitlement under Part 718, we affirm the 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 on Remand denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge