BRB No. 96-0588 BLA

STANLEY W. MATTRAS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Andrew C. Onwudinjo (Krasno, Krasno & Quinn), Pottsville, Pennsylvania, for claimant.

Rita Roppolo, (J. Davitt McAteer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order (95-BLA-1173) of Administrative Law Judge Robert D. Kaplan denying benefits on a claim filed pursuant to the

[1] Claimant is Stanley W. Mattras, the miner, whose initial application for benefits filed on March 1, 1976 was finally denied on May 3, 1982. Director's Exhibit 41. Claimant filed the present claim on March 16, 1994. Director's Exhibit 1.

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 acknowledged the concession of the Director, Office of Workers' Compensation Programs (the Director) that claimant has become totally disabled since the denial of his previous claim pursuant to 20 C.F.R. §718.204(c) and that therefore a material change in conditions has been established under Section 725.309(d), accepted the parties'

stipulation to eight years of coal mine employment, and found that claimant has one dependent for purposes of benefits augmentation. The administrative law judge concluded, however, that the evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) and, accordingly, denied benefits.

On appeal, claimant challenges the administrative law judge's weighing of the evidence pursuant to Section 718.202(a)(1) and (3). The Director responds, urging affirmance.[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 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).

The record contains thirty readings of thirteen x-rays. Claimant challenges only the administrative law judge's weighing of the three most recent x-rays.[3]

[2] We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment, dependency, and pursuant to 20 C.F.R. §§725.309(d), 718.204(c), and 718.202(a)(2), (4). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

[3] The ten x-rays taken between 1976 and 1993 were read negative with the exception of the May 25, 1976 film, which received one positive and one negative reading. Director's Exhibit 41. The administrative law judge found the weight of these early x-rays to be negative for pneumoconiosis. Decision and Order at 5.

Pursuant to Section 718.202(a)(1), the administrative law judge considered all nineteen readings of the April 4, 1994, April 20, 1994, and May 10, 1995 x-rays. Decision and Order at 5-6. We therefore reject claimant's erroneous assertion that the administrative law judge ignored the April 4, 1994 x-ray. Claimant's Brief at 3. The administrative law judge weighed the conflicting readings of each individual x-ray in light of the readers' qualifications[4] to determine whether the x-ray was positive or negative. Decision and Order at 6. Using this method, the administrative law judge found the April 4, 1994 film to be positive because it was read as such by a preponderance of the expert readers, while he found the April 20, 1994 and May 10, 1995 films to be negative because the positive expert readings failed to preponderate.[5] Decision and Order at 6. In view of his finding that only one out of the three most recent x-rays was positive for pneumoconiosis, the administrative law judge concluded that the x-ray evidence failed to establish the existence of simple pneumoconiosis.

We hold that the administrative law judge acted within his discretion as fact-finder by resolving the conflicting readings of each individual x-ray before weighing the x-rays against each other, *see Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), and therefore reject claimant's contention that the administrative law judge was bound to merely count the total number of readings without distinguishing between the x-rays.[6] Claimant's Brief at 4; *see Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992)(merely "counting heads" discouraged). We also reject claimant's argument that the administrative law judge was required to accord greater weight to the interpretations by physicians who are both board-certified radiologists and B-readers, inasmuch as the administrative law judge may, but is not required to accord greater weight to the interpretations of physicians who possess dual radiological credentials. *See Trent v. Director, OWCP*, 11 BLR 1-26

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[4] The administrative law judge found all the readers to be "highly qualified." Decision and Order at 5. He correctly noted that all were either board-certified radiologists, B-readers, or both. *Id*.; *see* 20 C.F.R. §718.202(a)(1)(ii)(C), (E).

[5] The April 4, 1994 x-ray was read as positive by four expert readers, and as negative by three. Director's Exhibits 20-23, 33, 34; Claimant's Exhibit 1. The April 20, 1994 x-ray was read as positive by four expert readers, and as negative by four. Director's Exhibits 25, 26, 36, 48; Claimant's Exhibits 3, 5, 8, 9. The May 10, 1995 x-ray was read as positive by two expert readers, and as negative by two. Director's Exhibits 43, 45; Claimant's Exhibits 10, 11.

[6] Claimant points to the ten positive readings and nine negative readings and concludes that therefore pneumoconiosis was established. Claimant's Brief at 4.

(1987). Since the administrative law judge properly weighed the x-ray evidence and substantial evidence supports his finding, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(3), claimant contends that the x-ray evidence establishes the existence of complicated pneumoconiosis and that, therefore, the administrative law judge erred in failing to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304. Claimant's Brief at 4-5. Section 718.304 provides in part that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which "when diagnosed by chest X-ray . . . yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C," under the applicable x-ray classification system. 20 C.F.R. §718.304(a).[7] Drs. Smith and Bassali classified the three most recent x-rays as category "A." Director's Exhibits 20, 33; Claimant's Exhibits 5, 8, 10, 11.

Pursuant to Section 718.304, the administrative law judge must weigh all the relevant evidence on the question of whether complicated pneumoconiosis is present. *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33 (1991). Therefore, contrary to claimant's contention, the administrative law judge permissibly weighed these complicated pneumoconiosis readings against all the x-ray readings and found that, of the ten physicians who read the three most recent x-rays, only Drs. Smith and Bassali found complicated pneumoconiosis. Decision and Order at 6. The administrative law judge therefore rationally concluded that the weight of the x-ray evidence failed to establish the existence of complicated pneumoconiosis. *See Edmiston v. F & R Coal Co*., 14 BLR 1-65 (1990).

We also reject claimant's argument that the administrative law judge erred by considering Dr. Spagnolo's opinion in determining that complicated pneumoconiosis was not established. Claimant's Brief at 6. The administrative law judge noted that Dr. Spagnolo, "who is board-certified in internal medicine and pulmonary diseases," reviewed the medical evidence, opined that claimant does not have pneumoconiosis, and explained that his prior tuberculosis left him with "several densities of sufficient size in his left lung to be confused with a pneumoconiosis. This explains the large

[7] Sections 718.304(b) and (c), which provide for the diagnosis of complicated pneumoconiosis by biopsy, autopsy, or by other means yielding equivalent results are inapplicable because the record contains no other evidence of complicated pneumoconiosis.

opacities 'A' noted by Drs. Bassali and Smith." Decision and Order at 6; Director's Exhibit 38. The administrative law judge permissibly found that, in addition to the fact that the weight of the x-ray evidence was negative for complicated pneumoconiosis, Dr. Spagnolo's opinion "casts significant doubt" on the "opinions of Drs. Bassali and Smith that the last three films indicate complicated pneumoconiosis (category 'A')" because "the lung densities caused by claimant's TB infection appear to have been mistakenly interpreted as a pneumoconiosis by some of the experts." Decision and Order at 6; *see Kuchwara*, *supra*. The record documents claimant's tuberculosis, Director's Exhibit 41, and the administrative law judge properly weighed all the relevant evidence regarding the existence of complicated pneumoconiosis. *See Melnick*, *supra*. Therefore, we reject claimant's contention and affirm the administrative law judge's finding pursuant to Section 718.202(a)(3).

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*, *supra*; *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

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge