BRB No. 03-0116 BLA

VIRGIL I. KENNEDY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SUGAR TREE COAL COMPANY	)	DATE ISSUED: 08/21/2003
	)	
Employer	)	
	)	
DIRECTOR, OFFICE OF WORKERS= COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle), Pineville, West Virginia, for claimant.

Sarah M. Hurley (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers= Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (01-BLA-0717) of Administrative Law Judge Richard A. Morgan rendered 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).[1] The administrative law judge found at

[1] The Department of Labor has amended the regulations implementing the

least twenty years of coal mine employment established and adjudicated the claim pursuant to 20 C.F.R. Part 718, based on the filing date. Decision and Order at 3. The administrative law judge further found that, although the evidence of record was sufficient to establish a totally disabling respiratory impairment, it was insufficient to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. Benefits were, accordingly, denied.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence failed to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. Employer is not participating in this appeal.[2] The Director, Office of Workers= Compensation Programs, responds, urging affirmance of the denial of benefits.

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. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant first contends that this claim was improperly denied on the basis of negative x-rays and that the administrative law judge erred in crediting the opinions of physicians who relied solely on negative x-rays rather than crediting the opinions of physicians who based their opinions on a complete review of the evidence. In finding that the existence of pneumoconiosis was not established by x-ray evidence, the administrative law judge credited the great weight of the negative x-ray readings which were by the better qualified readers, *i.e.*, dually-qualified readers. This was proper. 20 C.F.R. '718.202(a)(1); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff=d sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Adkins v. Director*,

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Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The administrative law judge found that Island Creek Coal Company was improperly named as the responsible operator. Instead, the administrative law judge found that Sugar Tree Coal Company, the last employer for whom claimant worked a cumulative period of at least one year, would likely be the properly designated responsible operator in this case. The administrative law judge went on to find, however, that liability, if any, would fall on the Black Lung Disability Trust Fund since the attempt by the Director, Office of Workers= Compensation Programs, to notify Sugar Tree of its potential liability was not successful. Decision and Order at 4-5.

OWCP, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995).

Claimant next contends that the finding of the West Virginia Occupational Pneumoconiosis Board and the opinion of Dr. Rasmussen are sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).[3] In considering the medical opinion evidence, the administrative law judge accorded more weight to the opinions of Drs. Zaldivar, Rosenberg, Castle and Branscomb, that claimant did not suffer from clinical or legal pneumoconiosis, based on their superior qualifications as pulmonologists (the administrative law judge noted that Dr. Rasmussen=s qualifications were not included in the record). The administrative law judge also accorded more weight to the opinions of Drs. Zaldivar, Rosenberg, Castle and Branscomb which he found to be consistent with the preponderance of the negative x-ray readings of record. This was rational. *See Island Creek Coal Corp. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *see Milburn Colliery Co., v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). Likewise, the administrative law judge properly accorded less weight to Dr. Rasmussen=s opinion as he relied on an inaccurate smoking history.[4] *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Further, the administrative law judge, within his discretion, determined that the finding by the West Virginia Occupational Pneumoconiosis Board while relevant, and entitled to some weight, was not binding. *See* 20 C.F.R. ' 718.206; *Schegan v. Waste Management & Processors, Inc.*, 18 BLR

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[3] In his 1999 opinion, Dr. Rasmussen found the existence of pneumoconiosis based on claimant=s twenty-two years of coal dust exposure and x-ray changes of pneumoconiosis, Director=s Exhibits 14, 15. In his 2000 opinion, Dr. Rasmussen diagnosed disabling chronic obstructive lung disease which was a consequence of cigarette smoking as well as coal mine dust exposure, Director=s Exhibit 31. The West Virginia Occupational Pneumoconiosis Board found the existence of occupational pneumoconiosis with a forty percent pulmonary functional impairment due to pneumoconiosis, Director=s Exhibit 4. Drs. Zaldivar, Rosenberg, Castle, Branscomb and Wiot, found that claimant did not suffer from coal workers= pneumoconiosis, or a respiratory impairment arising out of coal mine employment. Director=s Exhibits 11, 31; Employer=s Exhibits 11, 14, 15.

[4] Claimant, who was born on July 1, 1948, testified at the hearing on July 30, 2002, that he smoked one pack of cigarettes per day starting from the age of twenty-five or twenty-six, quit for three years in the 1980=s, and presently smokes four-six cigarettes daily. Hearing Transcript at 17-18. Dr. Rasmussen noted that claimant had a one-half pack per day smoking history which he started in 1993. Director=s Exhibit 14.

1-41, 1-46 (1994); *Miles v. Central Appalachian Coal Co.*, 7 BLR 1-744, 1-748 n.5 (1985); *Stanley v. Eastern Associated Coal Corp.*, 6 BLR 1-1157 (1984). We therefore affirm the administrative law judge=s finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *Compton*, 211 F.3d 203, 22 BLR 2-162.[5]

The administrative law judge is empowered to weigh the medical evidence of record and draw his own inferences therefrom. *See Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal if the administrative law judge=s findings are supported by substantial evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Consequently, we affirm the administrative law judge=s finding that the evidence of record is insufficient to establish the existence of pneumoconiosis, an essential element of entitlement, as it is supported by substantial evidence and is in accordance with law.[6]

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[5] The administrative law judge=s findings that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. 718.202(a)(2) and (3) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] We need not address claimant=s contentions with regard to disability causation as we affirm the administrative law judge=s finding that that claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

PETER A. GABAUER, Jr.
Administrative Appeals Judge