BRB No. 04-0440 BLA

CHARLES L. KEATHLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KILLOWATT COAL COMPANY,	)	
INCORPORATED	)	DATE ISSUED: 01/27/2005
	)	
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

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

John T. Chafin (Chafin & Davis), Prestonsburg, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-5502) of Administrative Law Judge Thomas M. Burke denying benefits on a subsequent 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] Claimant filed this claim on January 26,

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[1] The Department of Labor (DOL) has amended the regulations implementing the 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,

2001.[2] After crediting claimant with twenty-two years of coal mine employment, the administrative law judge considered all of the evidence of record and found that it was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Although the administrative law judge found that the evidence was sufficient to establish that claimant suffered from a totally disabling pulmonary impairment, he found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis. Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also argues that the administrative law judge erred in finding the evidence insufficient to establish that his total disability was due to

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and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant filed his first claim for benefits on September 3, 1991. The district director denied the claim on November 8, 1992. Pursuant to claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Prior to the hearing, claimant filed a motion to remand the case on the grounds that he was financially unable to develop evidence in support of his claim. The administrative law judge presiding over the hearing denied claimant's motion to remand the case. Claimant subsequently filed a motion to dismiss his case. The administrative law judge granted claimant's motion to dismiss his case without prejudice on December 7, 1993. *See* Director's Exhibit 1.

Claimant filed a second claim for benefits on December 8, 1998. In a Decision and Order dated April 19, 2000, Administrative Law Judge Joseph E. Kane found that the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). Director's Exhibit 1. Judge Kane, therefore, found that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* However, Judge Kane found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). *Id.* Judge Kane also found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, Judge Kane denied benefits. *Id.* Claimant subsequently requested that his claim be withdrawn. *Id.* In a Proposed Decision and Order dated January 26, 2001, the district director granted claimant's request to withdraw his 1998 claim. *Id.* The district director noted that the claim would be "considered not to have been filed." *Id.*

Claimant filed a third claim on January 26, 2001. Director's Exhibit 3.

pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[3]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant argues that the administrative law judge erred in finding the x-ray interpretations rendered by Drs. Vuskovich and Hussain insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). We disagree. The x-ray evidence consists of interpretations of five x-rays taken on November 12, 1991, February 21, 2001, March 17, 2001, January 25, 2002 and February 10, 2003. Director's Exhibits 8, 9, 11, 12; Claimant's Exhibit 1; Employer's Exhibits 1, 3. Although Dr. Vuskovich, a B reader, interpreted claimant's February 10, 2003 x-ray as positive for pneumoconiosis, Claimant's Exhibit 1, Dr. Poulos, a B reader and a Board-certified radiologist, interpreted this x-ray as negative for the disease. Employer's Exhibit 3. The administrative law judge acted within his discretion in crediting Dr. Poulos' negative interpretation of claimant's February 10, 2003 x-ray over Dr. Vuskovich's positive interpretation of this film based upon Dr. Poulos' superior qualifications. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 6. Although Dr. Anderson rendered a positive interpretation of a November 12, 1991 x-ray, Director's Exhibit 8, and Dr. Hussain rendered a positive interpretation of a February 21, 2002 x-ray, Director's Exhibit 11, the administrative law judge accurately noted that the record does not indicate that either of these physicians has any special radiological qualifications. Decision and Order at 6. The remaining x-ray interpretations of record are negative.[4] Because it is based upon substantial evidence, the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) is affirmed.

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[3]Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4]Dr. Broudy rendered a negative interpretation of claimant's February 21, 2001 x-ray. Employer's Exhibit 1. Dr. Dahhan rendered a negative interpretation of a March 17, 2001 x-ray. Director's Exhibit 9. Dr. Fino, a B reader, rendered a negative interpretation of a January 25, 2002 x-ray. Employer's Exhibit 1.

Claimant also argues that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). While Drs. Anderson, Hussain and Arnett opined that claimant suffered from pneumoconiosis, Director's Exhibits 8, 11; Claimant's Exhibits 2, 3, Drs. Dahhan and Fino opined that claimant did not suffer from the disease. Director's Exhibit 9; Employer's Exhibits 1, 2. After discrediting the opinions of Drs. Anderson and Dahhan, the administrative law judge found that Dr. Fino's opinion that claimant did not suffer from pneumoconiosis was entitled to greater weight than the contrary opinions of Drs. Hussain and Arnett. Decision and Order at 9-12. The administrative law judge, therefore, found that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Claimant contends that the administrative law judge erred in finding the opinions of Drs. Hussain and Arnett insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[5] Dr. Hussain diagnosed both clinical and legal pneumoconiosis. *See* 20 C.F.R. §718.201(a); Director's Exhibit 11. The administrative law judge discredited Dr. Hussain's diagnosis of clinical pneumoconiosis because it was based in part upon a positive x-ray interpretation that was called into question by the preponderance of the x-ray evidence of record. Decision and Order at 9. Because claimant does not challenge the administrative law judge's basis for discrediting Dr. Hussain's diagnosis of clinical pneumoconiosis, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge also discredited Dr. Hussain's diagnosis of COPD attributable in part to coal dust exposure, a diagnosis which, if credited, could support a finding of legal pneumoconiosis, because the doctor failed to adequately explain the basis for his finding.[6] Decision and Order at 9. Because claimant does not challenge the

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[5]The administrative law judge discredited Dr. Anderson's diagnosis of pneumoconiosis because it was "not supported by the preponderance of the objective x-ray data in the record." Decision and Order at 9; Director's Exhibit 8. Because no party challenges the administrative law judge's basis for discrediting Dr. Anderson's opinion, this finding is affirmed. *Skrack*, *supra*.

[6]Although Dr. Hussain indicated that he based his diagnosis of an occupational lung disease caused by coal mine employment on claimant's symptoms, physical examination findings, x-ray interpretation and arterial blood gas study results, he failed to explain how these findings supported his conclusion. *See* Director's Exhibit 11.

Claimant specifically argues that the administrative law judge should have taken judicial notice of Dr. Hussain's qualifications. However, the administrative law judge's

administrative law judge's basis for discrediting Dr. Hussain's diagnosis of legal pneumoconiosis, this finding is also affirmed. *Skrack*, *supra*.

The record contains Dr. Arnett's treatment notes from December 5, 2000 through March 6, 2003. Claimant's Exhibit 3. Dr. Arnett also submitted a report dated May 28, 2002 wherein he diagnosed coal workers' pneumoconiosis and COPD attributable to claimant's coal mine employment. Claimant's Exhibit 2.

Claimant argues that the administrative law judge erred in not according greater weight to Dr. Arnett's opinion based upon his status as claimant's treating physician. However, Section 718.104(d) provides that the weight given to the opinion of a treating physician shall "be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole."[7] 20 C.F.R. §718.104(d)(5). In this case, the administrative law judge properly discredited Dr. Arnett's diagnoses of clinical and legal pneumoconiosis because he found that they were not sufficiently reasoned.[8] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

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bases for discrediting Dr. Hussain's opinion regarding the existence of pneumoconiosis are not dependent upon Dr. Hussain's qualifications.

[7]The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). The Sixth Circuit has held that the opinions of treating physicians should be given the deference they deserve based upon their power to persuade. *Id.* The Sixth Circuit explained that the case law and applicable regulatory scheme clearly provide that the administrative law judge must evaluate treating physicians just as they consider other experts. *Id.*

[8]Although Dr. Arnett indicated that his diagnosis of clinical pneumoconiosis was based upon x-rays and clinical findings, he failed to identify the x-ray interpretation and clinical findings upon which he relied. *See* Claimant's Exhibit 2. The administrative law judge also properly found that Dr. Arnett provided no basis for his determination that claimant's chronic obstructive pulmonary disease was attributable to his coal mine employment. Decision and Order at 9-11.

Because claimant does not assert any additional error,[9] we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718.[10] *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Consequently, we need not address claimant's contentions regarding the administrative law judge's finding that the evidence is insufficient to establish that his total disability was due to pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[9]The remaining medical opinions of record do not support a finding of pneumoconiosis. Dr. Dahhan opined that claimant did not suffer from an occupational lung disease which was caused by his coal mine employment. Director's Exhibit 9; Employer's Exhibit 2. Dr. Fino opined that claimant's obstructive abnormality, in conjunction with his elevated lung volumes and a reduction in diffusing capacity, were consistent with cigarette smoking-related emphysema. Employer's Exhibit 1. Dr. Fino noted that he did not see "anything consistent with coal workers' pneumoconiosis." *Id.*

[10]In light of our affirmance of the administrative law judge's denial of benefits on the merits, we hold that the administrative law judge's error, if any, in not addressing whether the evidence was sufficient to establish that one of the applicable elements of entitlement had changed since the denial of prior claim is harmless. 20 C.F.R. §725.309; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge