BRB No. 04-0391 BLA

LEROY BLACKBURN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ANDALEX RESOURCES INCORPORATED	)	DATE ISSUED: 10/27/2004
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2003-BLA-5263) of Administrative Law Judge Daniel J. Roketenetz 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 found, and the parties stipulated to, fifteen years of qualifying coal mine employment and further that employer did not contest that it was the proper responsible operator. Decision and Order at 2, 4-5; Hearing Transcript

at 7-8, 10. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] Decision and Order at 5. After considering all of the evidence of record, the administrative law judge determined that claimant failed to establish the existence of pneumoconiosis or total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.204. Decision and Order at 6-16. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1) and (4) and in failing to find total disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs has filed a letter indicating that he will not respond to the instant appeal.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one 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*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and

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[1]Claimant filed his claim for benefits with the Department of Labor on February 12, 2001, which was denied by the district director on August 28, 2002. Director's Exhibits 2, 26. Claimant subsequently requested a formal hearing before the Office of Administrative Law Judges. Director's Exhibit 27.

[2]The administrative law judge's length of coal mine employment and responsible operator determinations as well as his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Order of the administrative law judge is supported by substantial evidence and contains no reversible error.[3] Claimant's assertion that the administrative law judge erred in failing to find the existence of pneumoconiosis established lacks merit. The administrative law judge rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). He permissibly found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) as the preponderance of x-ray readings by physicians with superior qualifications was negative. Director's Exhibits 8-10; Employer's Exhibits 1-3; Decision and Order at 6-8; *Staton v. Norfolk & Western Railroad 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); *Worhach v. Director*, OWCP, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Claimant further asserts that the administrative law judge erred in failing to find the existence of pneumoconiosis established based upon the medical opinions of Drs. Baker and Hussain. Claimant's Brief at 4-7. We disagree. In considering the medical opinions pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge rationally considered the quality of the evidence in determining whether the opinions of record are supported by the underlying documentation and adequately explained. *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Worhach*, 17 BLR 1-105; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark*, 12 BLR 1-149; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Kuchwara*, 7 BLR 1-167; Decision and Order at 9-13. The administrative law judge acted within his discretion, as fact-finder, in concluding that the opinion of Dr. Hussain was insufficient to meet claimant's burden of proof as the physician did not offer any explanation for his diagnosis of pneumoconiosis other than his own x-ray interpretation and claimant's length of coal dust exposure. *See Jericol Mining ,Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); Decision and Order at 11-12; Director's Exhibit 8; Claimant's Exhibit 2.

Additionally, the administrative law judge permissibly found the opinion of Dr. Baker insufficient to establish the existence of pneumoconiosis. *Kuchwara*, 7 BLR 1-167; Decision and Order at 12-13. Although the physician found his x-ray interpretation insufficient to diagnose clinical pneumoconiosis, Dr. Baker further opined that the miner suffered from mild

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[3]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

resting arterial hypoxemia causing a minimal respiratory impairment, which could satisfy the definition of legal pneumoconiosis set forth in 20 C.F.R. §718.201(a)(2).[4] Director's Exhibit 9. The administrative law judge, in a proper exercise of his discretion, rationally found that Dr. Baker's diagnosis of mild resting hypoxemia was unreliable and thus insufficient to establish the existence of pneumoconiosis since the opinion did not discuss what effect claimant's past smoking history and ischemic heart disease may have had on claimant's current condition and the physician did not provide any supporting rationale for finding the condition due to coal dust exposure other than claimant's exposure history. *See Napier*, 301 F.3d 703, 22 BLR 2-537; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark*, 12 BLR 1-149; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens*, 8 BLR 1-16; *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Decision and Order at 12-13; Director's Exhibit 9.

Further, contrary to claimant's assertion, the administrative law judge noted that Dr. Baker treated claimant but was not required to accord determinative weight to the opinion solely because it is offered by a treating physician. *See Napier*, 301 F.3d 703, 22 BLR 2-537; *Stephens*, 298 F.3d 511, 22 BLR 2-495; *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Tedesco v. Director*, OWCP, 18 BLR 1-103 (1994); *Clark*, 12 BLR 1-149; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 9-11; Director's Exhibit 9; Claimant's Exhibits 1, 3. Claimant's reliance upon 20 C.F.R. §718.104(d) is misplaced in this instance. Although an administrative law judge may give a treating physician's opinion controlling weight, the weight that is to be given to the treating physician must also be based on the credibility of the physician's opinion in light of its reasoning and documentation. *See* 20 C.F.R. §718.104(d)(5); *Napier*, 301 F.3d 703, 22 BLR 2-537; *Stephens*, 298 F.3d 511, 22 BLR 2-495; *Cornett*, 227 F.3d 569, 22 BLR 2-107; *Collins*, 21 BLR 1-181; *Worhach*, 17 BLR 1-105; *Trumbo*, 17 BLR 1-85; *Clark*, 12 BLR 1-149. In the instant case, the administrative law judge permissibly determined that the opinion of Dr. Baker was poorly reasoned. *See Napier*, 301 F.3d 703, 22 BLR 2-537; *Lafferty*, 12 BLR 1-190 (1989); *Clark*, 12 BLR 1-149; *Taylor*, 8 BLR 1-405; *Lucostic*, 8 BLR 1-46; *Hutchens*, 8 BLR 1-16; *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Decision and Order at 12-13; Director's Exhibit 9; Claimant's Exhibits 1, 3.

Moreover, the administrative law judge permissibly accorded greater weight to the

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[4]Dr. Baker, in his March 21, 2001 report, based upon his negative x-ray and normal pulmonary function and blood gas studies, opined that claimant did not have pneumoconiosis based upon x-ray but did diagnose mild resting arterial hypoxemia causing minimal respiratory impairment which could be contributed to by his coal dust exposure to some extent. Director's Exhibit 9.

opinions of Drs. Dahhan and Branscomb, than to the contrary opinions of Drs. Baker and Hussain, as the physicians offered well reasoned and documented opinions which are supported by the objective medical evidence of record. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Stephens*, 298 F.3d 511, 22 BLR 2-495; *Worhach*, 17 BLR 1-105; *Trumbo*, 17 BLR 1-85; *Lafferty*, 12 BLR 1-190; *Clark*, 12 BLR 1-149; *Fields*, 10 BLR 1-19; Decision and Order at 12; Employer's Exhibits 2, 4. We therefore affirm the administrative law judge's credibility determinations with respect to the medical opinion evidence as they are supported by substantial evidence and are in accordance with law.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge permissibly concluded that the evidence of record does not establish the existence of pneumoconiosis, claimant has not met his burden of proof on all the elements of entitlement. *Clark*, 12 BLR 1-149; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark*, 12 BLR 1-149; *Anderson*, 12 BLR 1-111; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis as it is supported by substantial evidence and is in accordance with law. *See Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

Because claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement in a miner's claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded and we need not address the administrative law judge's additional findings pursuant to 20 C.F.R. §718.204. *See Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge