BRB No. 02-0457 BLA

R. K. HOSKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NALLY & HAMILTON ENTERPRISES	)	DATE ISSUED:
	)	
and	)	
	)	
LIBERY MUTUAL 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 Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

W. Barry Lewis (Lewis & Lewis Law Offices), Hazard, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (00-BLA-1116) of Administrative Law Judge Thomas F. Phalen, Jr. 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 that claimant

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

established twenty and three-quarter years of coal mine employment and that claimant began smoking a pack of cigarettes a day in his twenties, resumed the habit after he was laid off from the coal mines in April of 1996 and continued smoking until November 18, 1998, the day of his hearing. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] Considering the evidence, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis, that pneumoconiosis arose out of coal mine employment, total disability, or that total disability was due to pneumoconiosis. Benefits were, accordingly, denied.

On appeal, claimant contends that the administrative law judge erred in finding that the medical evidence was insufficient to establish the existence of pneumoconiosis and total

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

[2] Claimant filed this claim for benefits on May 22, 1997. Administrative Law Judge Thomas F. Phalen, Jr. issued a Decision and Order on February 11, 1999, finding that claimant established the existence of pneumoconiosis arising out of coal mine employment, and disability, but denying benefits because claimant failed to establish causation. Director's Exhibit 46. The Board affirmed the administrative law judge's findings as to the existence of pneumoconiosis and total disability, but granted the Director's motion to remand the case to provide claimant with a complete, credible, pulmonary examination, specifically to address the issue of causation as required by the Act, and therefore the Board vacated the denial of benefits and remanded the case to the district director. *Hoskins v. Nally & Hamilton Enterprises*, BRB No. 99-0591 BLA (Mar. 24, 2000).

disability. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, is not participating in this appeal.

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 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 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 the administrative law judge erred in relying solely on the qualifications of the x-ray readers and in relying on the numerical superiority of the negative x-ray interpretations to find that the existence of pneumoconiosis was not established by x-ray evidence at Section 718.202(a)(1). Contrary to claimant's contention, the administrative law judge reasonably determined that the x-ray evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) based on the numerical superiority of the negative readings by physicians with superior qualifications.[3] Decision and Order at 12; Director's Exhibits 14-20, 22, 23, 33-40, 46; Employer's Exhibit 1; 20 C.F.R. §718.202(a)(1); *see Staton v. Norfolk & Western Ry. 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).[4] Hence, the administrative law judge's finding at Section 718.202(a)(1) is affirmed.

[3] Contrary to claimant's contention, the administrative law judge did not selectively analyze the evidence.

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

Turning to the medical opinion evidence, claimant argues that the administrative law judge erred in not finding the existence of pneumoconiosis established based on the well-reasoned opinions of Drs. Powell, Burki, Vaezy and Baker, each of whom found the existence of pneumoconiosis. Claimant contends that the administrative law judge erred in discrediting the opinions of these physicians because their positive x-ray findings were contrary to the administrative law judge's finding on the weight of the x-ray evidence and also contends that the administrative law judge may not discredit a physician's report based on a positive x-ray merely because the record contains subsequent negative x-rays. While claimant correctly contends that an administrative law judge may not reject a physician's opinion which relies on positive x-rays contrary to the administrative law judge's finding that the x-ray evidence of record is negative, *Church v. Eastern Assoc. Coal Co.*, 20 BLR 1-8 (1996); *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986); *Fitch v. Director, OWCP*, 9 BLR 1-45 (1986), the administrative law judge may, contrary to claimant's argument, discount an opinion based on a positive x-ray which is subsequently reread negative. *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1-1294-5 (1984); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984).[5]

Hence, the administrative law judge could permissibly discount: the opinion of Dr. Vaezy because the x-ray he read as positive was subsequently reread negative by Drs. Sargent and Barrett, Board-certified, B-readers; the opinion of Dr. Powell, a B-reader who read an x-ray as positive, when three other physicians, including a B-reader, and a Board-certified B-reader found the same x-ray to be negative; and the opinion of Dr. Baker, a B-reader, whose positive x-ray was reread negative by Dr. Fino, a B-reader, and Drs. Sargent and Barrett, Board certified, B-readers. *Fuller*, *supra*; *Winters*, *supra*.[6]

Further, in considering these opinions, the administrative law judge accorded less

[5] The administrative law judge made clear that a doctor's reliance upon an inaccurate x-ray interpretation "is not reason enough to discredit the opinion." Decision and Order at 13.

[6] The administrative law judge does not find that Dr. Burki's positive x-ray was subsequently reread. Decision and Order at 8.

weight to Dr. Powell's opinion because Dr. Powell relied on an inaccurate smoking history, *i.e.*, he was not aware that claimant "smoked in his 20's;" permissibly accorded less weight to Dr. Burki's opinion because his consideration of "four years of smoking at one-half pack per day" was contradicted by claimant's own hearing testimony of seven years, and permissibly accorded less weight to Dr. Baker's opinion "because he relied on a scant three-year smoking history." This was reasonable. *See Stark v. Director*, 9 BLR 1-36 (1986); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-49 (1989)(*en banc*).

The administrative law judge permissibly accorded greater weight to Dr. Dahhan's opinion of no pneumoconiosis because it was consistent not only with his own x-ray interpretation, but also with those of every dually certified reader of record and because of Dr. Dahhan's superior qualifications, *i.e.*, he is Board-certified in both internal medicine and pulmonary disease. Decision and Order at 13. *Clark*, *supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Thus, the administrative law judge rationally found that "[w]hile there is some evidence in favor of a finding of pneumoconiosis, . . . the contrary evidence [is] more persuasive," Decision and Order at 14, and therefore, the preponderance of the evidence does not establish the existence of pneumoconiosis at Section 718.202(a)(4). Accordingly, we affirm the administrative law judge's finding that clamant failed to establish the existence of pneumoconiosis as it is supported by substantial evidence and is in accordance with law. Because we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement, we need not consider claimant's argument on disability. *See Trent*, *supra*; *Perry*, *supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge