

BRB No. 00-0625 BLA

ARCHIE GLEN ELKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WEBSTER COUNTY COAL	)	
CORPORATION	)	DATE ISSUED:
	)	
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 Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Dick Adams (Adams, Day and Hinton), Madisonville, Kentucky, for claimant.

Laura Metcoff Klaus (Arter and Hadden), Washington, D.C., for employer.

Sarah M. Hurley (Judith E. Kramer, 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, United States Department of Labor.

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

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order (1998-BLA-0178) of Administrative Law Judge Robert L. Hillyard 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).<sup>2</sup> This case involves a duplicate claim. The administrative law judge found that claimant established thirty-one years of qualifying coal mine employment and that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2000), total respiratory disability pursuant to 20 C.F.R. §718.204(c)(2000) or a material change in conditions pursuant 20 C.F.R. §725.309(2000).

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<sup>1</sup>Claimant is Archie Glen Elkins, the miner, who filed claims for benefits on August 25, 1986 and October 29, 1987 which were denied on January 26, 1987 and December 14, 1987, respectively, because claimant failed to establish either the existence of pneumoconiosis or total respiratory disability. Director's Exhibit 23. Claimant filed the instant claim for benefits on February 9, 1998. Director's Exhibit 1.

<sup>2</sup>The Department of Labor 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). For the convenience of the parties, all citations to the regulations herein refer to the previous regulations, as the disposition of this case is not affected by the amendments.

Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to accord determinative weight to the medical opinion of Dr. Houser, claimant's treating physician. Employer responds urging affirmance. The Director, Office of Workers' Compensation Programs, responds declining to submit a brief on appeal.<sup>3</sup>

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<sup>3</sup>The administrative law judge's findings that claimant established thirty-one years of coal mine employment, that the x-ray evidence is insufficient to establish the existence of pneumoconiosis and that the pulmonary function study and arterial blood gas study evidence is insufficient to establish total respiratory disability are affirmed as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which claimant, employer and the Director have responded.<sup>4</sup> Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant's sole contention is that the administrative law judge failed to give superior or presumptive weight to the opinion of claimant's treating physician, Dr. Houser. Claimant's Brief at 3-6. In a report dated January 5, 1998, Dr. Houser opined that claimant has evidence of progressive massive fibrosis involving the right upper lung zone, specifically a Category A large opacity. Director's Exhibit 19. In a report dated August 5, 1999, Dr. Houser noted that biopsy and x-ray evidence had been interpreted as being positive for the existence of pneumoconiosis, and restated his opinion that claimant has progressive massive fibrosis in the right upper lung zone. Claimant's Exhibit 2. In his reports, Dr. Houser indicated that he has seen claimant for examinations and/or care and treatment on August 15, 1986, August 7, 1995 and October 21, 1997. Director's Exhibit 19; Claimant's Exhibit 2.

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<sup>4</sup>In a brief dated March 14, 2001, employer asserted that the regulations at issue in the lawsuit do not affect the outcome of the case. Employer also stated that if the Board believes that the new regulations somehow affect the disposition of this appeal, the case must be stayed for the duration of the briefing, hearing and decision schedule in accordance with the preliminary injunction of the United States District Court for the District of Columbia. In a brief dated March 8, 2001, the Director, Office of Workers' Compensation Programs, asserted that the regulations at issue in the lawsuit do not affect the outcome of the case. However, in a brief dated March 12, 2001, claimant asserted that the amended regulations would affect the outcome of the case. The amendments to the regulations cited by claimant at 20 C.F.R. §725.414 apply only to claims filed after January 19, 2001. Consequently, those regulations do not apply to the instant claim.

The record also contains an operative record dated November 10, 1997, in which Dr. Houser describes a bronchoscopy that he performed on claimant. Director's Exhibit 19. In his description of the procedure, Dr. Houser's states that two of the four biopsies obtained were "black consistent with coal workers' pneumoconiosis grossly." *Id.*

The Sixth Circuit has held that the opinions of treating physicians are entitled to greater weight than those of non-treating physicians. *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). Furthermore, the Board has held that a physician's status as a treating physician is just one of the factors to be considered by the administrative law judge in rendering a decision. *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994). In the instant case, the administrative law judge considered Dr. Houser's opinion that the biopsy slides indicated the existence of complicated pneumoconiosis and found this opinion entitled to less weight than the contrary opinions of the physicians Board-certified in pathology.<sup>5</sup> The administrative law judge, however, did not discuss the fact that Dr. Houser performed the bronchoscopy and has treated claimant for his respiratory condition. Inasmuch as Dr. Houser's status, if he is found to be claimant's treating physician, may impact the weight accorded his opinion, we vacate the administrative law judge's findings pursuant to Sections 718.202(a)(2)-(4)(2000) and 718.204(c)(4)(2000), and remand the case for the administrative law judge to reconsider the medical opinion evidence of record.

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<sup>5</sup>While Dr. Houser's medical report indicates that he is the Medical Director of the Black Lung Clinic at Deaconess Hospital, the record does not contain any other evidence of Dr. Houser's credentials. Director's Exhibit 19. Drs. Hutchins and Caffrey are Board-certified in pathology, while Dr. Naeye is a professor of pathology at the Pennsylvania State University College of Medicine. Director's Exhibit 20; Employer's Exhibits 8, 9.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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J. DAVITT McATEER  
Administrative Appeals Judge