BRB No. 07-0619 BLA

T.G. Claimant-Petitioner v. BLUE MOUNTAIN ENERGY and OLD REPUBLIC INSURANCE COMPANY, INCORPORATED Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/15/2008 DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis, P.C.), Chicago, Illinois, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2004-BLA-5323) of Administrative Law Judge Richard K. Malamphy 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). The administrative law judge credited claimant with thirty years of qualifying coal mine employment, and adjudicated this claim, filed on June 15, 2001, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found the weight of the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's weighing of the evidence in finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (4).[1] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this case.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[2] 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 under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Claimant initially challenges the administrative law judge's exclusion of the letter from the Department of Health and Human Services advising the Mine Safety and Health Administration that claimant's x-ray had been "read by NIOSH-approved physicians who found Category 1, simple coal workers' pneumoconiosis." (MSHA letter). Claimant contends that the administrative law judge erred in excluding the MSHA letter from the

[1] We affirm, as unchallenged on appeal, the administrative law judge's finding with regard to the length of claimant's coal mine employment and his finding that the evidence of record did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[2] The Board will apply the law of the United States Court of Appeals for the Tenth Circuit, as the miner was last employed in the coal mining industry in Colorado. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 2.

record, on the grounds that it exceeded claimant's two affirmative readings allowed under 20 C.F.R. §725.414(a)(2)(i) and because it failed to meet the standards for x-ray evidence as set forth in 20 C.F.R. §§718.202(a)(1) and 718.102, arguing that the administrative law judge should have entered the document into evidence as a treatment record under 20 C.F.R. §725.414(a)(4). Claimant's Exhibit 10; Decision and Order at 7; Claimant's Brief at 10. We disagree. The regulatory limitations on evidence permit no more than two x-ray interpretations in a party's affirmative case, and the administrative law judge properly determined that claimant had met his designated limit, but, in any event, that the MSHA letter failed to meet the standards for x-rays as set forth in Sections 718.202(a)(1) and 718.102. Decision and Order at 7. Furthermore, as evidentiary determinations are made by the administrative law judge, and claimant sought to admit the MSHA letter as positive x-ray evidence of pneumoconiosis, claimant may not now seek to gain its admittance as a treatment record while the case is pending before the Board. *See generally Dempsey v. Sewell Coal Co.,* 23 BLR 1-47 (2004)(*en banc*); *Harris v. Old Ben Coal Co.*, 23 BLR 1-273 (2007)(*en banc recon.*) (McGranery & Hall, JJ., concurring and dissenting), *aff'g* 23 BLR 1-98 (2006)(*en banc*) (McGranery & Hall, JJ., concurring and dissenting); Transcript at 8-9; Claimant's Post-Hearing Brief at 3, 5. Accordingly, we affirm the administrative law judge's finding that the MSHA letter was inadmissible under Section 725.414(a).

Claimant next argues that because Drs. Wiot, Cappiello, and Ahmed are all Board-certified radiologists and B readers, the administrative law judge erred in finding the qualifications of Dr. Wiot to be superior, as the administrative law judge failed to explain any relevant basis for his distinction. Claimant's Brief at 11-12; Decision and Order at 8. We disagree. While the administrative law judge noted the qualifications of Drs. Ahmed and Cappiello in the field of radiology, he permissibly accorded greater weight to the physician he determined had much more extensive radiological experience, including experience in the area of pneumoconiosis. Decision and Order at 8; Director's Exhibit 19; *see Wyoming Fuel Co. v. Director, OWCP* [*Brandolino*], 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996); *Dixon v. North Camp Coal Co.*, 8 BLR 1-31, 1-37 (1991); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984).

Claimant further contends that in weighing the x-ray evidence, the administrative law judge erred in ignoring the party affiliation of the x-ray readers. Claimant's contention lacks merit. After properly finding that the MSHA letter was not an admissible x-ray reading, the administrative law judge considered each x-ray and the qualifications of the readers, and permissibly determined that the opinion of Dr. Shockey, who provided the Department of Labor examination, was entitled to less weight because he was neither Board-certified nor a B reader. Decision and Order at 7, 8. Furthermore, the identity of a party who hires a medical expert does not, by itself, demonstrate partiality or partisanship on the part of the physician. *See Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992); *Dixon v. North Camp Coal Co.*, 8 BLR 1-31, 1-37 (1991);

Sheckler, 7 BLR 1-128, 1-131; *see also Stanford v. Valley Camp Coal Co.*, 7 BLR 1-906 (1985); *Chancey v. Consolidation Coal Co.*, 7 BLR 1-240 (1984). The administrative law judge acted within his discretion in according greater weight to the readings of the physicians who possessed superior radiological qualifications, and we affirm his finding that the weight of the evidence was negative for pneumoconiosis at Section 718.202(a)(1), as supported by substantial evidence. *See Brandolino*, 90 F.3d 1502, 20 BLR 2-302.

Regarding the medical opinion evidence at Section 718.202(a)(4), claimant contends that the administrative law judge failed to comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a), in not resolving, with a scientific rationale, the dispute raised by competing medical theories and the underlying causation theories. Claimant's Brief at 13-29. Claimant also contends that the administrative law judge failed to compare the physicians on their respective expertise in black lung and occupational lung diseases. Claimant's Brief at 29-31. Claimant's arguments are without merit. In finding that clinical pneumoconiosis had not been established, *see* 20 C.F.R. §718.201(a)(1), the administrative law judge determined that Drs. Renn and Repsher found no evidence of the disease, and he permissibly discounted Dr. Cohen's positive diagnosis that was based in part on inadmissible x-rays, and Dr. Shockey's diagnosis of coal workers' pneumoconiosis that was based on his positive x-ray interpretation. Decision and Order at 20; *see Dempsey*, 23 BLR 1-47; *Anderson*, 12 BLR 1-111. Considering the issue of legal pneumoconiosis, the administrative law judge reviewed the opinions of Drs. Shockey, Cohen, and Parker, Director's Exhibit 11, Claimant's Exhibit 5, 6, 13, 14, who opined that claimant's obstructive impairment was due at least in part to his coal mine employment, and the contrary opinions of Drs. Renn and Repsher, Director's Exhibit 23, Employer's Exhibit 4, 10, 14, who determined that claimant's impairment was due entirely to smoking. The administrative law judge found that each doctor was extremely qualified in pulmonary medicine and that every report was well reasoned and well supported by its underlying documentation. Decision and Order at 9-22. After discussing these reports and finding that the conflicting opinions were evenly balanced and entitled to equal weight, the administrative law judge permissibly concluded that claimant failed to establish the existence of legal pneumoconiosis, as defined at Section 718.201(a)(2), by a preponderance of the evidence. Decision and Order at 22; *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Claimant's additional arguments are essentially a request to reweigh the evidence, which is beyond the Board's scope of review. *See Anderson*, 12 BLR 1-111. Accordingly, we affirm the administrative law judge's finding that the evidence is insufficient to establish either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

The administrative law judge addressed all relevant evidence, assigned the evidence appropriate weight, and provided valid reasons for his credibility determinations. Thus, his Decision and Order comports with the requirements of the APA. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). As his findings are supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Consequently, we affirm the administrative law judge's denial of benefits. *See Anderson*, 12 BLR 1-111.

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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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge