BRB No. 00-0892 BLA

MARION G. McKEE Claimant-Petitioner v. PAT WHITE FUELS, INCORPORATED and KENTUCKY COAL PRODUCERS SELF INSURANCE FUND Primary Employer/Carrier-Respondents WHITLEY DEVELOPMENT CORPORATION and OLD REPUBLIC INSURANCE COMPANY, INCORPORATED Secondary Employer/ Carrier-Respondents) DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED:_____ DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

John L. Grigsby (Appalachian Research and Defense Fund of Kentucky, Inc.) Barbourville, Kentucky, for claimant.

Lois A. Kitts (Baird, Baird, Baird & Jones), Pikeville, Kentucky, for primary employer.

Mark E. Solomons (Greenberg & Traurig LLP), Washington, D.C., for secondary employer.

Barry H. Joyner (Howard M. Radzely, 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: HALL, Chief Administrative Appeals Judge, SMITH, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (99-BLA-0233) of Administrative Law Judge Robert L. Hillyard 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] This case involves a duplicate claim.[2] Adjudicating the miner's duplicate claim pursuant to 20 C.F.R. Part 718 (2000), the administrative law judge determined that claimant established eleven years of coal mine employment and a material change in conditions pursuant to 20 C.F.R. §§725.309 and 718.204(c) (2000). Turning to the merits of the claim, the administrative law judge considered all of the relevant evidence and found that although claimant established that he was totally

[1]The Board was notified by counsel that claimant died on March 2, 2001.

[2]Claimant filed his first application for benefits on October 10, 1984. Director's Exhibit 38. The district director denied the claim on August 5, 1985. Claimant did not appeal and the claim was deemed abandoned and administratively closed on November 13, 1985. Claimant filed the current claim on January 21, 1998. Director's Exhibit 1.

disabled pursuant to 20 C.F.R. §718.204(c)(1) and (4) (2000), the preponderance of the evidence failed to prove that claimant suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) or that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000).[3] Accordingly, benefits were denied.

[3]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 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

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 for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001).

The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

On appeal, claimant contends that the administrative law judge's consideration of the evidence is erroneous pursuant to Sections 718.202(a)(1), (3), (4), and 718.204(b) (2000).[4] Both employers have responded and urge affirmance of the denial of benefits.[5] The Director, Office of Workers' Compensation Programs, has indicated that he will not participate in the merits of this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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 pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from 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. 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*).

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[4]The administrative law judge's findings regarding the length of claimant's coal mine employment and pursuant to 20 C.F.R. §§718.202(a)(2), 718.204(c) and 725.309 (2000) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

[5]The administrative law judge identified Pat White Fuels Incorporated as the operator responsible for the payment of benefits pursuant to 20 C.F.R. §725.492. Decision and Order at 6. The administrative law judge further determined that if, for some reason, Pat White Fuels Incorporated is unable to assume liability for the payment of benefits should entitlement be established, Whitley Development Corporation would be the responsible operator. *Id*.

Pursuant to Section 718.202(a)(1) (2000), the administrative law judge found that the record contains fifty-two interpretations of sixteen x-rays, of which forty-five are by physicians who are either "B" readers or dually qualified as Board-certified radiologists and "B" readers. Decision and Order at 19. The administrative law judge found that of the forty-five readings by better qualified physicians, thirty-seven were negative for pneumoconiosis. Relying on the majority of the interpretations by highly qualified physicians, the administrative law judge concluded that the preponderance of the x-ray evidence failed to demonstrate the presence of pneumoconiosis. *Id.*

Claimant contends that the administrative law judge erred in considering five negative interpretations by Dr. Wheeler, which are based upon copies of x-rays, rather than the originals. Director's Exhibit 32. Claimant also argues that the administrative law judge failed to note that five x-ray readings by Dr. Fino are duplicative of readings he had previously performed. With respect to the readings Dr. Wheeler performed of copies of claimant's chest x-rays, the exclusion of these interpretations from the record would not alter the administrative law judge's ultimate determination that the majority of the interpretations by highly qualified physicians fails to demonstrate the presence of pneumoconiosis. Error, if any committed by the administrative law judge is, therefore, harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Regarding Dr. Fino's x-ray readings, in his Decision and Order, the administrative law judge listed the x-rays by the date on which the x-ray was taken, not interpreted, and included only one reading by Dr. Fino of each of the films. Decision and Order at 6-11. Thus, the administrative law judge condensed the multiple interpretations by Dr. Fino of any particular x-ray into a single entry based upon the x-ray date and did not count them as multiple interpretations.

Claimant also asserts that the administrative law judge erred in treating the readings proffered by Drs. Binns and Abramowitz as negative for pneumoconiosis without addressing the comments that the physicians included with their readings. This contention is devoid of merit as the regulations makes plain, an x-ray must be classified at least as Category 1 in order to establish the existence of pneumoconiosis by x-ray at Section 718.202(a)(1). See Section 718.102(b). Since neither Dr. Abramowitz, nor Dr. Binns need an x-ray as Category 1 or better, they offered no evidence of pneumoconiosis and their reading were correctly deemed negative. In fact, both doctors checked the box indicating that there were no pleural abnormoralities consistent with pneumoconiosis. Director's Exhibit 34 at 3, 5.

In addition, claimant contends that the administrative law judge did not discuss a 1985 positive x-ray reading by Dr. Richard O'Neill. The administrative law judge specifically noted the physician's x-ray interpretation of 1/2, s, t in his discussion of Dr.

O'Neill's July 12, 1985 medical opinion under Section 718.202(a)(4) (2000), but did not include this reading in his summary of the x-ray evidence.[6] Decision and Order at 6-11; Director's Exhibit 38. With respect to the administrative law judge's finding under Section 718.202(a)(1) (2000), however, the administrative law judge rationally relied upon the preponderance of negative readings by the highly qualified physicians of record. Decision and Order at 19. Inasmuch as the record does not indicate that Dr. O'Neill is similarly qualified, claimant has failed to indicate how this omission by the administrative law judge would alter the ultimate findings at Section 718.202(a)(1). *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-710 (1990). Therefore, we hold that this error is harmless. *See Johnson*, *supra*; *Larioni*, *supra*. Inasmuch as the administrative law judge rationally found that the preponderance of the x-ray interpretations by physicians who are highly qualified is negative for the existence of pneumoconiosis, we affirm his findings pursuant to Section 718.202(a)(1). *See Woodward*, *supra*; *Edmiston*, *supra*.

Claimant next challenges the administrative law judge's finding that claimant failed to establish the existence of complicated pneumoconiosis pursuant to Section 718.202(a)(3) and 20 C.F.R. §718.304 (2000). The evidence relating to the presence of complicated pneumoconiosis includes an x-ray dated February 13, 1998, on which Drs. Barrett and Bassali detected large opacities and Dr. Sargent stated that he was uncertain as to whether the x-ray contained large opacities consistent with complicated pneumoconiosis or represented healed tuberculosis or some other granulomatous disease. Director's Exhibit 8; Claimant's Exhibit 5. Drs. Abramowitz, Binns, and Fino read this x-ray as negative for pneumoconiosis of any type, while Dr. Baker detected simple pneumoconiosis, but found no large opacities. Director's Exhibits 8, 31, 34. Dr. Bassali also read an x-ray dated May 13, 1998 as positive for complicated pneumoconiosis while Drs. Wheeler, Scott, and Broudy found this film to be negative for pneumoconiosis. Director's Exhibits 29, 35; Claimant's Exhibit 5. The record also contains five CT scan readings. Drs. Scott and Wheeler determined that CT scans dated November 5, 1994 and December 29, 1998, were negative for pneumoconiosis. Employer's Exhibit 8. Dr. Tucker found the presence of severe pulmonary fibrosis attributable to previous granulomatous infection on a July 6, 1999 CT scan. Employer's Exhibit 6.

In addressing Section 718.304 (2000), the administrative law judge considered the evidence set forth above, with the exception of Dr. Barrett's diagnosis of large opacities

[6]Dr. O'Neill stated in his medical report that the chest x-ray indicates "remotely coal workers' pneumoconiosis, 1/2, s/t." Director's Exhibit 38.

on the February 13, 1998 x-ray and the negative readings of the December 29, 1998 CT scan proffered by Drs. Scott and Wheeler. The administrative law judge stated that:

> Based on a review of the record evidence, I find that the evidence weighing against a finding of complicated pneumoconiosis is at least as strong as the evidence weighing in favor of such a finding. Consequently, the claimant has failed to prove by a preponderance of the evidence that he suffers from complicated pneumoconiosis and is not entitled to the presumption of pneumoconiosis.

Decision and Order at 20. Claimant alleges that the administrative law judge's finding must be vacated as the administrative law judge failed to note that Dr. Barrett detected large opacities on the x-ray dated February 13, 1998 and neglected to consider the opinions of Drs. Saha, Vaezy, and O'Neill. Director's Exhibits 8, 38; Claimant's Exhibits 1, 2. We disagree. The regulations provide that complicated pneumoconiosis may be demonstrated by x-ray evidence, by biopsy or autopsy evidence yielding massive lesions in the lung, or by consideration of any acceptable medical means of diagnosis. 20 C.F.R.§718.304(a)-(c). *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

Pursuant to Section 718.202(a)(1) (2000), the administrative law judge addressed all of the x-ray readings of record, including all but one of those in which large opacities were noted, and rationally found that the preponderance of readings by highly qualified physicians was negative for pneumoconiosis. Decision and Order at 19; *see Woodward, supra*; *Edmiston, supra*. We hold that the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of simple pneumoconiosis pursuant to section 718.202(a)(1) supports his finding that the x-ray evidence indicating large opacities is insufficient to establish complicated pneumoconiosis pursuant to Section 718.304(a). Decision and Order at 19-20. As a result, the inclusion of Dr. Barrett's reading would not alter this finding. *See Melnick supra.*

Nevertheless, the administrative law judge properly considered the CT evidence pursuant to Section 718.304(c) and rationale found that Drs. Wheeler and Scott interpreted a November 5, 1994 scan as negative for pneumoconiosis. His omission of the same physicians' readings of the December 29, 1998 CT scan is of no significance, as they were also negative for pneumoconiosis. *See Johnson, supra*; *Larioni, supra*. The administrative law judge further noted that in his interpretation of the scan dated July 6, 1999, Dr. Tucker diagnosed "severe pulmonary fibrosis with retraction, most likely related to previous granulomatous infection." Decision and Order at 20; Employer's Exhibit 6. Dr. Tucker's finding does not constitute a diagnosis of complicated pneumoconiosis nor does it provide a basis upon which a determination could be made

that the processes viewed on the CT scan were equivalent to opacities greater than one centimeter in size if viewed on an x-ray. 20 C.F.R. §718.304(c); *see Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999). Inasmuch as the administrative law judge's findings are rational and supported by substantial evidence, we must affirm the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis under Sections 718.202(a)(3) and 718.304 (2000).

Claimant also alleges that the administrative law judge erred in his weighing of the evidence at Section 718.202(a)(4). The administrative law judge found that although Drs. Kleinerman, Fino, Branscomb and Broudy did not examine claimant, their opinions that claimant did not suffer from pneumoconiosis were based on a thorough review of the record and were well-reasoned, and were therefore entitled to some weight. Decision and Order at 20. The administrative law judge then considered the contrary medical opinions by Drs. Baker, Turner, Vaezy, Kraman, and Saha and determined that they were not entitled to as much weight.[7] The administrative law judge found, therefore, that claimant failed to prove by a preponderance of the medical opinion evidence that he suffers from pneumoconiosis at Section 718.202(a)(4). Decision and Order at 21.

[7]The administrative law judge found that Dr. Turner's opinion that claimant suffered from chronic obstructive pulmonary disease which may be related to previous dust exposure, previous infections or cigarette smoking, was equivocal, poorly supported, and entitled to little weight. The administrative law judge also found that Dr. Turner failed to specifically address the extent of claimant's smoking history and relied partially on x-ray findings, which the administrative law judge determined to be negative for pneumoconiosis. Decision and Order at 20. With respect to Dr. Vaezy's opinion, the administrative law judge found that the physician's opinion that claimant had coal workers' pneumoconiosis based on history and fifteen years of dust exposure failed to address claimant's extensive smoking history and was unsupported. *Id*. The administrative law judge also found that Dr. Kraman's opinion that claimant's pneumoconiosis probably arose out of coal mine employment failed to state the basis for the conclusion and was equivocal. The administrative law judge accorded little weight to the opinions and reports by Drs. Saha, Whitley and O'Neill as they failed to identify the etiology of their diagnoses of obstructive airway disease, chronic obstructive pulmonary disease and chronic bronchitis. The administrative law judge found that Dr. Baker's diagnosis of pneumoconiosis was supported by his examination of claimant was entitled to some weight. *Id*.

Claimant argues that the administrative law judge should have accorded determinative weight to the opinions of Drs. Baker, Vaezy, and Turner.[8] Claimant states that Dr. Turner's affirmative response to the question of whether claimant's coal-dust induced lung disease contributes to his respiratory impairment is a statement that claimant's lung disease arose out of coal mine employment. We disagree. The administrative law judge acted within his discretion in finding that in the same document, Dr. Turner's statement that claimant has chronic lung disease which "may" be related to previous coal dust exposure, previous infections or cigarette smoking is equivocal and therefore, insufficient to establish legal pneumoconiosis pursuant to Section 718.201. Decision and Order at 20; Claimant's Exhibit 1; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986).

Regarding Dr. Vaezy's opinion, contrary to claimant's contention, although significant weight may be accorded to the treating physician's opinion, the administrative law judge is not required to do so when he or she determines that the treating physician's opinion is not well-documented and well-reasoned. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *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). In the present case, the administrative law judge acted within his discretion in finding that Dr. Vaezy's diagnosis of coalworkers' pneumoconiosis on the basis of claimant's medical history and fifteen years of dust exposure lacked support and detail sufficient to substantiate the diagnosis. Decision and Order at 21; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Inasmuch as the administrative law judge rationally found that the medical opinion evidence is equally balanced, we affirm his finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4). *See Director, OWCP v. Greenwich Collieries [Ondecko],* 512 U.S. 267, 18 BLR 2A-1 (1994).

In light of our affirmance of the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), an essential element of entitlement, we must also affirm the denial of

[8]Claimant does not challenge the weight accorded to the opinions by Drs. Kraman, Saha, Whitley and O'Neill. These findings are therefore affirmed as unchallenged on appeal. *Skrack, supra*.

benefits. *See Trent*, *supra*. Consequently, we need not reach claimant's arguments concerning the administrative law judge's findings under Section 718.204(b).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge