BRB No. 04-0235 BLA

THOMAS D. BEAVERS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 08/05/2004
	)	
DRUMMOND COMPANY, INC.	)	
	)	
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 Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

William Z. Cullen (Sexton, Cullen & Jones, P.C.), Birmingham, Alabama, for claimant.

Laura A. Woodruff (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2003-BLA-5154) of Administrative Law Judge Gerald M. Tierney 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). Based on the date of filing, the administrative law judge adjudicated this claim pursuant to 20 C.F.R Part 718.[1] The administrative law judge credited claimant with

[1]Claimant filed an application for benefits on March 26, 2001, which was denied by the district director on August 14, 2002, due to claimant's failure to establish the existence of coal worker's pneumoconiosis, or total disability due to pneumoconiosis, although claimant established the presence of a totally disabling respiratory impairment. Director's Exhibits 2,

twenty-two years of coal mine employment and found employer to be the responsible operator. On the merits, the administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

On appeal, claimant challenges the findings of the administrative law judge that the evidence is insufficient to establish the existence of coal workers' pneumoconiosis or total disability due to pneumoconiosis. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate 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' claim 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. *See* 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*).

After considering the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. Pursuant to Section 718.202(a)(4),[2] claimant contends that the administrative law judge erred by crediting the opinion of Dr. Hasson that pneumoconiosis is not present,

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21. Claimant requested a formal hearing on September 4, 2002. Director's Exhibit 22.

[2]We affirm the findings of the administrative law judge on the length of coal mine employment, on the designation of employer as the responsible operator, and at 20 C.F.R. §§718.202(a)(1)-(3), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

asserting that this opinion is based solely on this physician's negative x-ray reading. We disagree. The record indicates that Dr. Hasson based his opinion on the results of his examination, claimant's objective test results, and medical and employment history, in addition to his negative x-ray reading. Director's Exhibit 11. Thus, it was within the administrative law judge's discretion, as the fact finder, to credit this opinion as a reasoned medical report. Decision and Order at 3-4; *Trumbo v. Reading Anthracite Co.,* 17 BLR 1-85 (1993); *Fields v. Island Creek Coal Co.,* 10 BLR 1-19 (1987).

We further find no merit in claimant's contention that the administrative law judge erred by crediting the opinions of Drs. Hasson and Goldstein, that claimant did not have pneumoconiosis, over the contrary opinion of Dr. Hawkins, who examined claimant for the Department of Labor and who, claimant asserts, has provided the only independent opinion of record since he was not hired by a party to the present claim. Director's Exhibits 10-13. Allegations of bias must be supported by specific evidence present in the record. *Melnick v. Consolidation Coal Co.,* 16 BLR 1-31 (1991)(*en banc*). As claimant has not specified any record evidence indicating that the opinions of Drs. Hasson and Goldstein are biased in employer's favor, we reject claimant's assertion. *Melnick,* 16 BLR 1-31. We hold that the administrative law judge permissibly accorded determinative weight to the opinions of Drs. Hasson and Goldstein, based on their superior qualifications as Board-certified pulmonologists, and Dr. Goldstein's review of all the record evidence, which the administrative law judge found gave this physician a more complete picture of claimant's health. Director's Exhibits 11-13; Decision and Order at 3-4; *Trumbo,* 17 BLR 1-85; *Dillon v. Peabody Coal Co.,* 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.,* 10 BLR 1-24 (1983); *Stark v. Director, OWCP,* 9 BLR 1-36 (1986). Moreover, the administrative law judge was not required to reject Dr. Goldstein's diagnosis due to his status as a non-examining physician. *Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985); *Newland v. Consolidation Coal Co.,* 6 BLR 1-1286 (1984).

The administrative law judge also permissibly accorded less weight to Dr. Hawkins's diagnosis of pneumoconiosis, as the physician relied on an x-ray reading which was interpreted as negative by a better qualified reader. Additionally, he based his opinion on claimant's symptoms, which were also noted by employer's physicians who did not attribute them to coal dust exposure. Lastly, Dr. Hawkins cited claimant's work history, which, by itself, does not establish the presence of pneumoconiosis. Director's Exhibit 10; Decision and Order at 3-4; *Trumbo,* 17 BLR 1-85; *Taylor v. Brown Badgett, Inc.,* 8 BLR 1-405 (1985). The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.,* 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.,* 12 BLR 1-20 (1988). As we hold that the administrative law judge's findings at Section 718.202(a)(4) are supported by substantial evidence, they are affirmed. *See Stomps v. Director, OWCP,* 816 F.2d 1533, 10 BLR 2-107

(11th Cir. 1987).[3] Because claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement in a Part 718 living miner's claim, we affirm the administrative law judge's denial of benefits, and we need not address claimant's remaining arguments on the issue of disability causation. *Trumbo,* 17 BLR 1-85.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit because claimant's coal mine employment occurred in the State of Alabama. Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).