

BRB No. 99-0484 BLA

ELY SMITH)
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 Claimant-Petitioner)
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 v.)
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 E.J.J.L., INCORPORATED) DATE ISSUED:
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 and)
)
 KENTUCKY COAL PRODUCERS)
 SELF-INSURANCE FUND)
)
 Employer/Carrier-)
 Respondent)
)
 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 Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

John T. Chafin (Kazee, Kinner & Chafin), Prestonsburg, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (97-BLA-0419) of Administrative Law Judge Jeffrey Tureck on a duplicate 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 parties stipulated to twenty-five years of coal mine employment, and based on the date the claim was filed, the administrative law judge applied

the regulations at 20 C.F.R. Part 718. The administrative law judge reviewed all the newly submitted evidence pursuant to *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994) and found that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a), and therefore found that claimant failed to show a material change in conditions at Section 725.309(d). Accordingly, benefits were denied. Claimant appeals, contending that the administrative law judge erred in his weighing of the x-ray evidence at Section 718.202(a)(1) and the medical reports at Section 718.202(a)(4). Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational and 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).

Claimant contends that the administrative law judge erred by selectively analyzing the x-ray evidence and placing substantial weight on the numerical superiority of the negative readings. Claimant also contends that the administrative law judge need not defer to x-ray readers with superior qualifications pursuant to Section 718.202(a)(1). We disagree. The administrative law judge found a "multitude" of readings of x-rays taken since the previous claim was denied, but found that only four of the readings were positive. Although these readings were by B-readers, the administrative law judge also found that there were eighteen negative readings, including negative readings of two x-rays read as positive, which were by B-readers, as well. Thus the administrative law judge concluded that:

These x-ray readings clearly do not establish the existence of pneumoconiosis. The negative readings are four times as numerous as the positive readings and are by more than twice the number of physicians. Further, there are many more B-readers reading x-rays negative than positive. It cannot be found that the positive readings preponderate.

Decision and Order at 5.

Contrary to claimant's contention, in considering the x-ray evidence at Section 718.202(a)(1), the administrative law judge shall consider the qualifications of the readers. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Additionally, claimant fails to explain how the administrative law judge "selectively analyzed" the evidence. By referring to the numerical strength of the negative readings by B-readers, the administrative law judge met the directive of making a qualitative, as well as quantitative, evaluation of the x-ray readings. 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). We therefore reject claimant's contentions, and affirm the administrative law judge's weighing of the x-ray evidence at 718.202(a)(1).¹

Claimant next contends that it was error for the administrative law judge to discredit the opinions of Drs. Baker and Westerfield because they were based on a positive x-ray. Rather claimant argues that the opinions of Drs. Baker and Westerfield are sufficiently reasoned. Claimant also contends that the administrative law judge erred in relying upon the opinion of Drs. Branscomb as he never examined claimant, and, that he erred in relying on Dr. Vuskovich's opinion as supported by underlying documentation, such as blood gas studies, when in fact it was not supported by these studies.

The evidence of record contains seven medical opinions. Only Drs. Baker and Westerfield diagnosed pneumoconiosis. The administrative law judge permissibly found that the opinions of Drs. Baker and Westerfield entitled to no weight as their diagnoses of pneumoconiosis were clearly based on a positive x-ray, which was contrary to the weight of the x-ray evidence, and a CT scan that was interpreted negative for the existence of pneumoconiosis and were not supported by underlying documentation. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp*

¹ We affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(2) as unchallenged by claimant on appeal. See *Skrack v. Island Creek Coal Co., Inc.*, 6 BLR 1-710 (1983). In addition, the existence of pneumoconiosis cannot be established at Section 718.202(a)(3) as none of the presumptions contained therein are available to claimant in the instant case. 20 C.F.R. §§718.304, 718.305, 718.306.

of Utah, Inc., 12 BLR 1-111 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); Decision and Order at 5-6; Director's Exhibits 12, 28, 30.

Further, contrary to claimant's contention, the administrative law judge permissibly found the opinion of Dr. Branscomb, who found no pneumoconiosis, entitled to the greatest weight, based on his superior credentials, and because his opinion was the most well-reasoned, comprehensive of record and was supported by the opinions of Drs. Vuskovich and Broudy, and claimant's treating physicians, Drs. Rader and Mitchell. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *Trumbo, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).²

As the administrative law judge permissibly gave greatest weight to the opinion of Dr. Branscomb, and permissibly found that the opinions of Drs. Baker and Westerfield were not as credible, we affirm the weighing of the medical opinions at Section 718.202(a)(4), and affirm the administrative law judge's finding of no material change in conditions at Section 725.309(d). *See Carson, supra*; *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). As claimant has not established a material change in conditions, we affirm the denial of benefits. *Ross, supra*.

² Although it is true that the administrative law judge erred in stating that Dr. Vuskovich conducted a blood gas study, this error is harmless, as the administrative law judge did not accord determinative weight to Dr. Vuskovich's opinion, but rather found it supportive of Dr. Branscomb's opinion and blood gas studies are not determinative of pneumoconiosis. *See Trumbo, supra*; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge