

BRB No. 02-0437 BLA

WILLIAM W. ULBIN, Sr.)
)
 Claimant-)
 Petitioner)
)
 v.)
) DATE ISSUED:
)
 DIRECTOR, OFFICE OF)
 WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR) DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order on Remand - Denying Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Michelle S. Gerdano (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: McGRANERY, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denying Benefits (1999-BLA-1073) of Administrative Law Judge Paul H. Teitler 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).¹ This case is before

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These

the Board for the second time. In the Board's prior Decision and Order, the Board vacated the administrative law judge's length of coal mine employment determination and instructed the administrative law judge, on remand, to set forth fully his findings regarding claimant's coal mine employment. *Ulbin v. Director, OWCP*, BRB No. 00-1188 BLA, slip op. at 3 (Sep. 20, 2001)(unpub.). In addition, the Board vacated the administrative law judge's finding that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) but affirmed the administrative law judge's finding that pneumoconiosis was not established pursuant to Section 718.202(a)(2)-(a)(4), as unchallenged on appeal. *Ulbin*, slip op. at 4-5. However, in light of its holding regarding the Section 718.202(a)(1) finding, the Board vacated the administrative law judge's finding that the evidence established the existence of pneumoconiosis under Section 718.202(a) and *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), remanding the case for the administrative law judge to reconsider the relevant evidence under the standard enunciated in *Williams*. *Id.* In addition, the Board vacated the administrative law judge's Section 718.203(c) finding that claimant did not establish that his pneumoconiosis arose out of coal mine employment and remanded for the administrative law judge to specifically, and more fully, address Dr. Kraynak's opinion therein. *Ulbin*, slip op. at 6. Lastly, the Board vacated the administrative law judge's finding that the evidence of record failed to establish total respiratory disability and remanded the case for reconsideration of the evidence, like and unlike, pursuant to Section 718.204(b)(2),² particularly in light of the concession of the Director, Office of Workers' Compensation Programs (the Director), that the pulmonary function study evidence demonstrates total respiratory disability pursuant to Section 718.204(b)(2)(i). *Ulbin*, slip op. at 7-8.

On remand, the administrative law judge credited claimant with five and

regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² The provisions pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), are now found at 20 C.F.R. §718.204(b)(2).

three-quarters years of coal mine employment, based on claimant's Social Security Administration earnings statements as well as co-worker affidavits and claimant's testimony. With regard to the medical evidence, the administrative law judge considered the x-ray evidence of record and found the evidence to be evenly balanced. Consequently, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1) by a preponderance of the evidence. In light of the Board's affirmance of the administrative law judge's previous findings that pneumoconiosis was not established pursuant to Section 718.202(a)(2)-(a)(4), the administrative law judge concluded that claimant has not established the existence of pneumoconiosis under any of the available methods. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). In addition, claimant contends that the administrative law judge erred in not reconsidering the medical opinion evidence pursuant to Section 718.202(a)(4), arguing that he did not waive his right to challenge these findings previously and, thus, the administrative law judge's denial of his request to challenge these findings constitutes a denial of his right to due process of law. In response, the Director has submitted a Motion to Remand,³ concurring with claimant that the administrative law judge erred in his discussion of the x-ray evidence and requesting the Board to vacate the administrative law judge's Section 718.202(a)(1) findings. However, the Director disagrees with claimant that the administrative law judge erred in not reconsidering the medical opinion evidence pursuant to Section 718.202(a)(4), asserting that claimant failed to challenge the finding when the case was first before the Board. In a response to the Director's Motion to Remand, claimant reiterates his contention that the administrative law judge erred in denying benefits and urges the Board to reverse the denial of benefits and award benefits.⁴

The Board's scope of review is defined by statute. The administrative law

³ We accept the Director's Motion to Remand as his response brief in this appeal, and herein decide the case on the merits.

⁴ Since the parties do not challenge the administrative law judge's decision to credit claimant with five and three-quarters years of coal mine employment, this finding is affirmed as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of 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 that there is no reversible error contained therein. With respect to the administrative law judge's weighing of the x-ray evidence relevant to Section 718.202(a)(1), claimant and the Director argue that the administrative law judge erred by finding the x-ray evidence insufficient to establish pneumoconiosis without adequate explanation. We disagree.

Initially, we reject claimant's argument that the administrative law judge's consideration of the x-ray evidence involved a "mechanical nose count." Claimant's Brief at 12-13. The administrative law judge properly considered not only the number of readings but also the qualifications of the physicians, and rationally determined that the readings were evenly balanced. Decision and Order at 5. Thus, the administrative law judge properly found that claimant did not satisfy his affirmative burden of proof of the existence of pneumoconiosis by a preponderance of the x-ray evidence. Decision and Order at 5; 20 C.F.R. §718.202(a)(1); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990). As the administrative law judge has discussed the relevant considerations in weighing the x-ray evidence, we reject the contention that the administrative law judge's Decision and Order fails to specify the basis of his decision, or violates the provisions of the Administrative Procedure Act (the APA).⁵ *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Robertson v. Alabama By-Products Corp.*, 7 BLR 1-793 (1985).

⁵ The Administrative Procedure Act, 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) and 30 U.S.C. §932(a).

Moreover, claimant's contention that the administrative law judge, on remand, erred in failing to reconsider the medical opinion evidence pursuant to Section 718.202(a)(4) lacks merit. As the Director correctly contends, claimant had the opportunity to challenge this adverse finding in the prior appeal to the Board and failed to do so.⁶ Director's Motion to Remand at 3. Consequently, the administrative law judge's Section 718.202(a)(4) finding was affirmed by the Board in its 2001 Decision and Order as unchallenged on appeal. *Ulbin*, slip op. at 5, n.8. The administrative law judge, in his current decision, properly found that the Board affirmed his prior Section 718.202(a)(2)-(a)(4) findings that the existence of pneumoconiosis was not established and thus, determined that in light of his finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis, claimant has not established the existence of pneumoconiosis under Section 718.202(a).

Since claimant has not established the existence of pneumoconiosis pursuant to Section 718.202(a), a requisite element of entitlement under Part 718, an award of benefits is precluded. See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the administrative law judge's Decision and Order on Remand - Denying Benefits is affirmed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

⁶ Claimant filed a brief in response to the Director's Motion to Remand in the prior appeal to the Board, in which he argued that the administrative law judge properly considered the x-ray evidence pursuant to Section 718.202(a)(1). However, he did not otherwise address the administrative law judge's Section 718.202(a) findings. See Claimant's Response to Director's Motion to Remand dated January 22, 2001.

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge