BRB Nos. 00-0968 BLA
00-0968 BLA-A

CHARLES B. HOOPS, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELK RUN COAL COMPANY	)	
	)	DATE ISSUED:
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 Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Douglas A. Smoot and Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Jeffrey S. Goldberg (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: SMITH and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (99-BLA-

1193) of Administrative Law Judge Robert J. Lesnick 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).[1] After crediting claimant with at least seventeen years of coal mine employment, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant argues that the administrative law judge erred in finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000) and and (a)(4) (2000). Employer responds in support of the administrative law judge's denial of benefits. Employer has filed a cross-appeal, arguing that the administrative law judge erred in his consideration of the opinions of Drs. Zaldivar, Castle, Fino, Jarboe and Morgan pursuant to 20 C.F.R. §718.202(a)(4) (2000). The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief.[2]

[1]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 65 Fed. Reg. 80,045-80,107 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Inasmuch as no party challenges the administrative law judge's findings pursuant to 20 C.F.R. § 718.202(a)(2) and (a)(3) (2000), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 and stayed, for the duration of the lawsuit, 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, determines that the regulations at issue in the lawsuit will 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). In the present case, the Board established a briefing schedule by order issued on March 16, 2001, to which employer and the Director have responded.[3] Employer contends that the instant case must be stayed if the amended regulations are applied.[4] The Director asserts that the amended regulations would not affect the outcome of this case. Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000); *see also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Inasmuch as the administrative law

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[3]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 16, 2001 is construed as a position that the challenged regulations will not affect the outcome of this case.

[4]Employer contends that the revised regulations at Sections 718.104(d), 718.201(c) and 718.204(a), if applied, could affect the outcome of this case. Revised Section 718.104(d) provides that an adjudicator must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. However, this regulation only applies to evidence developed after January 19, 2001. *See* 20 C.F.R. §718.104(d). The revised definition of pneumoconiosis does not affect this case. *See* 20 C.F.R. §718.201. Finally, inasmuch as the administrative law judge denied benefits based upon his finding that the evidence was insufficient to establish the existence of pneumoconiosis, the revisions to 20 C.F.R. §718.204(a), a regulation addressing disability, are not at issue in the instant case.

judge, in the instant case, found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000), his findings, if affirmable, would conform to the Fourth Circuit holding in *Compton*.

Claimant initially contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis. We disagree. In his consideration of whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge found that the clear preponderance of the x-ray evidence is negative for pneumoconiosis, including those interpretations rendered by physicians qualified as B readers and/or Board-certified radiologists. Decision and Order at 13. The record includes fifteen interpretations of two x-rays taken on January 6, 1999 and May 19, 1999. Two physicians dually qualified as B readers and Board-certified radiologists, Drs. Patel and Cole, interpreted claimant's January 6, 1999 x-ray as positive for pneumoconiosis. Director's Exhibits 14-16. However, six equally qualified physicians, Drs. Wiot, Spitz, Shipley, Wheeler, Scott and Kim, interpreted this x-ray as negative for pneumoconiosis. Director's Exhibits 25, 28; Employer's Exhibits 14, 15. Claimant's subsequent May 19, 1999 x-ray was uniformly interpreted as negative for pneumoconiosis.[5] Director's Exhibit 29; Employer's Exhibits 1, 2, 5, 8, 10. Inasmuch as the administrative law judge's finding that the clear preponderance of the x-ray evidence is negative for pneumoconiosis is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1).

Claimant also contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). While Dr. Rasmussen opined that claimant suffers from pneumoconiosis, Director's Exhibit 11; Claimant's Exhibit 1, Drs. Zaldivar, Fino, Caffrey, Jarboe, Castle, Bush, Naeye, Oesterling and Morgan opined that claimant does not suffer from the disease. Director's Exhibit 29; Employer's Exhibits 4, 7, 9, 11-13, 16-19, 21-25, 27-31.

Claimant argues that the administrative law judge erred in discrediting Dr. Rasmussen's finding of coal workers' pneumoconiosis. We disagree. In his consideration of whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge properly discredited Dr. Rasmussen's diagnosis of coal workers' pneumoconiosis because it was based

[5]Six of the negative interpretations of claimant's May 19, 1999 x-ray were rendered by physicians dually qualified as B readers and Board-certified radiologists. Employer's Exhibits 1, 2, 5, 8, 10.

upon a questionable positive x-ray interpretation.[6] *Compton*, *supra;* Decision and Order at 13. The administrative law judge also properly questioned Dr. Rasmussen's diagnosis of pneumoconiosis because the biopsy evidence was interpreted as negative for pneumoconiosis.[7] Decision and Order at 14.

[6]Dr. Rasmussen based his finding of coal workers' pneumoconiosis in part upon Dr. Patel's positive interpretation of a January 6, 1999 x-ray. Director's Exhibit 11. The administrative law judge noted that the "vast majority" of the x-ray interpretations were negative for pneumoconiosis. Decision and Order at 14. In light of the Fourth Circuit's decision in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000), the administrative law judge properly weighed the x-ray evidence and Dr. Rasmussen's opinion together in determining whether claimant suffers from pneumoconiosis.

[7]Although Dr. Rasmussen acknowledged that the biopsy evidence was insufficient to support a finding of coal workers' pneumoconiosis, Dr. Rasmussen noted that the biopsy results could not exclude the presence of coal workers' pneumoconiosis in the rest of claimant's lungs. *See* Claimant's Exhibit 1.

Dr. Rasmussen also diagnosed diffuse interstitial fibrosis and asthma, both of which he attributed in part to claimant's coal dust exposure. Director's Exhibit 11; Claimant's Exhibit 1. The administrative law judge, however, acted within his discretion in discrediting Dr. Rasmussen's opinion because he failed to explain the basis for his conclusion that claimant's pulmonary conditions were related to his coal dust exposure.[8] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 13-14; Director's Exhibit 11; Claimant's Exhibit 1.

Inasmuch as the administrative law judge properly discredited Dr. Rasmussen's opinion, the only opinion of record supportive of a finding of pneumoconiosis, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis.[9] *See*

[8]The administrative law judge noted that Dr. Rasmussen, after reviewing biopsy, CT scan, and other medical evidence, stated that while the evidence does not prove the existence of occupationally related diffuse interstitial pulmonary fibrosis, "it clearly indicates that such a relationship has by no means been excluded...." Decision and Order at 13-14; Claimant's Exhibit 1. The administrative law judge further noted that Dr. Rasmussen opined, with little additional explanation, that claimant's totally disabling respiratory insufficiency was, at least in part, the consequence of his occupational dust exposure. *Id.* The administrative law judge found that Dr. Rasmussen failed to provide a sufficient explanation for this conclusion. *Id.*

[9]Employer has filed a cross-appeal, arguing that the administrative law judge erred in his consideration of the opinions of Drs. Zaldivar, Castle, Fino, Jarboe and Morgan pursuant to 20 C.F.R. §718.202(a)(4) (2000). However, in light of our affirmance of the

20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis, we need not address the contentions raised in employer's cross-appeal. *See Larioni v. Director, OWCP*, 6 BLR 1-1284 (1986).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge