BRB No. 03-0773 BLA

DAVID HUFFMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 07/23/2004
	)	
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

C. Patrick Carrick (Carrick Law, PLLC), Morgantown, West Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (02-BLA-5385) of Administrative Law

Judge Michael P. Lesniak denying benefits on a claim[1] 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).[2] The administrative law judge credited claimant with at least thirty-seven years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Based on employer's concession, the administrative law judge found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). On the merits, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1)-(4). Although the administrative law judge found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), he found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits. On appeal, claimant challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also challenges the administrative law judge's finding that the evidence is insufficient to establish total disability

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[1]Claimant filed his first claim on August 2, 1988. Director's Exhibit 1. On January 19, 1989, the Department of Labor denied this claim because claimant failed to establish the existence of pneumoconiosis and total disability. *Id.* Because claimant did not pursue this claim any further, the denial became final. Claimant filed his second claim on October 15, 1991. Director's Exhibit 2. On October 7, 1994, Administrative Law Judge Robert J. Shea issued a Decision and Order denying benefits, *id*., which the Board affirmed, *Huffman v. Consolidation Coal Co.*, BRB No. 95-0546 BLA (June 28, 1995)(unpub.). The denial became final because claimant did not pursue this claim any further. Claimant filed his third claim on October 3, 1996. Director's Exhibit 3. On January 15, 1997, the Department of Labor denied this claim because claimant failed to establish the existence of pneumoconiosis, total disability and a material change in conditions. *Id.* Since claimant did not pursue this claim any further, the denial became final. Claimant filed his fourth claim on February 17, 1999. Director's Exhibit 4. The Department of Labor denied this claim on May 6, 1999 because claimant failed to establish the existence of pneumoconiosis, total disability and a material change in conditions. *Id.* As claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on January 30, 2001. Director's Exhibit 6.

[2]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 (2002). As the instant claim was filed after the effective date of the amended regulations, all citations to the regulations refer to the amended regulations.

due to pneumoconiosis at 20 C.F.R. §718.204(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[3]

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant initially contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Claimant argues that the most recent x-ray readings are sufficient to establish the existence of pneumoconiosis. In considering whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis,[4] the administrative law judge acted within his discretion in according the greatest weight to the x-ray interpretations rendered by physicians dually qualified as B readers and Board-certified radiologists. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). Of the eleven x-ray interpretations rendered by physicians with these qualifications, the administrative law judge found that only two are positive for pneumoconiosis. Decision and Order at 20. In regard to claimant's two most recent x-rays taken on March 28, 2001 and May 21, 2001, the administrative law judge found that the only interpretations of these x-rays rendered by dually qualified physicians are negative for pneumoconiosis.[5] *Id*. Since it 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 at 20 C.F.R. §718.202(a)(1). *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

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

[4]The record consists of twenty-seven interpretations of eight x-rays dated September 15, 1988, November 19, 1991, July 1, 1992, November 6, 1996, March 17, 1999, July 3, 2000, March 28, 2001 and May 21, 2001. Of the twenty-seven interpretations, twenty-three are negative for pneumoconiosis, Director's Exhibits 1-4, 19, 23, 39; Employer's Exhibits 1, 3, and four are positive for pneumoconiosis, Director's Exhibits 1, 3, 20, 34.

[5]Drs. Hayes and Hurst, each dually qualified as a Board-certified radiologist and a B reader, read claimant's March 28, 2001 x-ray as negative for pneumoconiosis. Director's Exhibits 19, 39.

Claimant also contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). While Dr. Devabhaktuni, Dr. Lobl and the West Virginia Occupational Pneumoconiosis Board opined that claimant suffers from pneumoconiosis, Director's Exhibits 1-4, 14, Drs. Branscomb, Fino and Renn opined that claimant does not suffer from the disease, Director's Exhibits 2, 23; Employer's Exhibits 5, 6. In finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis, the administrative law judge credited the opinions of Drs. Branscomb and Renn that claimant did not suffer from pneumoconiosis over the contrary opinions of Dr. Devabhaktuni, Dr. Lobl and the West Virginia Occupational Pneumoconiosis Board.[6]

Claimant contends that the administrative law judge erred in crediting the opinions of Drs. Branscomb and Renn based upon their qualifications. Contrary to claimant's assertion, the administrative law judge did not rely upon the qualifications of Drs. Branscomb and Renn as a basis for according greater weight to their opinions. Rather, the administrative law judge properly credited the opinions of Drs. Branscomb and Renn that claimant did not suffer from pneumoconiosis over the contrary opinions of Dr. Devabhaktuni, Dr. Lobl and West Virginia Occupational Pneumoconiosis Board because he found that their opinions were better documented and reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). With regard to the opinions of Drs. Branscomb and Renn, the administrative law judge stated:

> Their respective opinions are consistent with the objective diagnostic tests of record, physical findings, and [c]laimant's medical history. Each clearly sets forth his reasons for concluding [c]laimant did not have coal worker's (sic) pneumoconiosis. Moreover, they properly took in to (sic) consideration [c]laimant's significant history of coal mine employment ending in 1988 and [c]laimant's heavy history of cigarette smoking that was ongoing.

Decision and Order at 21.

In contrast, the administrative law judge stated, "I accord less weight to the opinion[s] of Dr. Lobl and the Occupational Pneumoconiosis Board because both failed to provide a rationale for finding a nexus between [c]laimant's pulmonary disease and his coal mine

[6]Citing *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), the administrative law judge discounted Dr. Fino's opinion because it was based, at least in part, on the assumption that coal workers' pneumoconiosis does not cause an obstructive defect. Decision and Order at 22. The administrative law judge also discounted Dr. Fino's opinion because Dr. Fino failed to provide legitimate reasons for ruling out coal dust exposure as a cause or aggravation of claimant's obstructive lung disease. *Id.*

employment." *Id.* at 22. Further, the administrative law judge stated that "[Dr. Devabhaktuni] also agreed that he based his opinion (*i.e.* that at least some of [c]laimant's respiratory impairment was due to coal dust exposure) *solely* on [c]laimant's history of exposure." *Id.* Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).[7] Moreover, since the administrative law judge properly weighed the evidence together at 20 C.F.R. §718.202(a)(1)-(4) in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a).

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. §718.204(a), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See 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*). Consequently, we need not address claimant's contentions regarding the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[7] In crediting the opinions of Drs. Branscomb and Renn over the opinions of Dr. Devabhaktuni, Dr. Lobl and the West Virginia Occupational Pneumoconiosis Board, the administrative law judge found that Dr. Fino's opinion supported the opinions of Drs. Branscomb and Renn. However, as previously noted, the administrative law judge discounted Dr. Fino's opinion. Nonetheless, since the administrative law judge properly credited the opinions of Drs. Branscomb and Renn over the opinions of Dr. Devabhaktuni, Dr. Lobl and the West Virginia Occupational Pneumoconiosis Board, we hold that any error by the administrative law judge in relying upon Dr. Fino's opinion to support the opinions of Drs. Branscomb and Renn is harmless, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge