BRB No. 06-0793 BLA

JAMES FIORENTINO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 07/13/2007
	)	
Respondent	)	DECISION and ORDER

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

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

Michelle S. Gerdano (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (05-BLA-6284) of Administrative Law Judge Paul H. Teitler on a subsequent 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). The administrative law judge initially accepted the parties' stipulation that claimant worked in qualifying coal mine employment for 4.42 years. Adjudicating this subsequent claim pursuant to 20 C.F.R.

[1] Claimant filed his first application for benefits on October 23, 1979. That claim was finally denied by the district director on March 13, 1981. Director's Exhibit 1. Claimant filed a subsequent application for benefits on July 1, 2004, which is the subject of this appeal. Director's Exhibit 3.

Part 718, the administrative law judge found that the Director, Office of Workers' Compensation Programs (the Director), conceded the presence of a totally disabling respiratory or pulmonary impairment. The administrative law judge, therefore, found that claimant demonstrated that one of the applicable conditions of entitlement, previously adjudicated against him, had changed since the date upon which the order denying the prior claim became final, pursuant to 20 C.F.R. §725.309. Considering all of the evidence of record, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis established by x-ray and medical opinion evidence under Section 718.202(a)(1) and (a)(4) and erred in failing to find that claimant's disability was due to pneumoconiosis. Claimant argues that the administrative law judge's analysis of the x-ray and medical opinion evidence fails to comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §557(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), because the administrative law judge failed to discuss the x-ray interpretation of Dr. Simelaro and the administrative law judge mischaracterized evidence when he reviewed the medical opinions of record. The Director has not responded.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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).

Claimant first contends that the administrative law judge erred in failing to consider and address Dr. Simelaro's December 6, 2005 positive reading of the November 17, 2005 chest x-ray film, which, claimant asserts, was admitted into the record as part of Claimant's Exhibit 4.[3] Claimant contends that the administrative law judge erred in not

[2] We affirm the administrative law judge's determinations regarding length of coal mine employment and pursuant to 20 C.F.R. §§718.202(a)(2)-(3), 718.204(b), and 725.309 because these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 2, 3-6.

[3] Claimant's Exhibit 4 consists solely of Dr. Simelaro's medical report, wherein he describes his findings on physical examination, claimant's coal mine employment and

considering Dr. Simelaro's reading at Section 718.202(a)(1) on the ground that Dr. Simelaro did not identify the date on which the x-ray was taken. Claimant contends that this finding is a misrepresentation of the record since the date of the x-ray film Dr. Simelaro reviewed was clearly noted in the description of Claimant's Exhibit 4, which was contained in claimant's list of exhibits admitted into the record, and was described in claimant's Pre-Hearing Statement as the November 17, 2005 x-ray.[4] In addressing the x-ray evidence at Section 718.202(a)(1), the administrative law judge stated that he would not consider Dr. Simelaro's x-ray reading, which was contained in his narrative medical report, because Dr. Simelaro did not identify the date the x-ray was taken. Decision and Order at 4.

The regulation at Sectiton 718.102 provides, in pertinent part, that an x-ray film must be submitted along with the description and interpretation of the findings. The regulation also provides that the x-ray report shall specify the name and qualifications of the person who took the film, in addition to the name and qualifications of the physician interpreting the film. Additionally, the regulation provides that the report shall further specify that the film was interpreted in compliance with this paragraph. 20 C.F.R. §718.102(c). Section 718.102(d) requires that the original film on which the x-ray report is based be supplied. 20 C.F.R. §718.102(d); *see Webber v. Peabody Coal Co.*, 23 BLR

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smoking histories, the results of pulmonary function studies and the results of an x-ray. As part of his medical report, Dr. Simelaro interpreted the x-ray as follows:

> A reading. Quality is good. Computer film. Small opacities are rated at 1/2. Lower lobe. Rounded PQ's. No large opacity. No pleural thickening. There is a diffuse amount of bullous disease in this chest film which goes along with bullous emphysema. There is some interstitial disease in the upper lobes which goes along with coal dust inhalation.
>
> The reason why there is a problem with this x-ray is because the lung profusion does not extend out because of the bullous changes. I would recommend a CT scan to see how far these bullae really extended. I will take the liberty to order this for the next time he comes down here.

Claimant's Exhibit 4. The exhibit does not contain the original x-ray film dated November 17, 2005 to which claimant refers on appeal, nor does it contain any indication of the date of the x-ray Dr. Simelaro read.

[4] The Pre-Hearing Statement lists as x-ray evidence in support of claimant's claim, the December 6, 2005 reading by Dr. Simelaro and the January 10, 2006 reading by Dr. Smith of a November 17, 2005 x-ray.

1-123, 1-131 (2006) (*en banc*) (Boggs, J., concurring); *Smith v. Martin County Coal Corp.*, 23 BLR 1-69 (2004).

There is no evidence in the record that the x-ray read on December 6, 2005 by Dr. Simelaro, as referred to in his report, met the above standards. Even if the reading was, as claimant contends, a reading of the November 17, 2005 x-ray, we conclude that the administrative law judge permissibly declined to consider it under Section 718.202(a)(1), as there is no evidence in the record that the standards set forth in Section 718.102 were met. Accordingly, we conclude that claimant has not established that the administrative law judge erred in not considering Dr. Simelaro's x-ray interpretation contained in his narrative medical report. 20 C.F.R Part 718, App. A., 20 C.F.R. §§718.102, 718.202(a)(1); *Webber*, 23 BLR at 1-131.

Claimant also avers that the administrative law judge erred in relying on the holding in *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993),[5] when he found that the x-ray evidence could not establish the existence of pneumoconiosis because it was evenly balanced. Claimant contends that the administrative law judge's analysis of the conflicting x-ray evidence constitutes a mechanical nose count of the x-ray readings. Citing the administrative law judge's language in the Decision and Order, claimant specifically contends that the administrative law judge's determination under Section 718.202(a)(1) that claimant "must lose" because the x-ray interpretations were "evenly balanced" fails to comply with the requirements of the APA because that the administrative law judge does not sufficiently explain the bases for his conclusions, the weight assigned to the evidence, and the relationship between the evidence and his legal and factual conclusions. Claimant's Brief in Support of Petition for Review at 5; Decision and Order at 4.

In considering the x-ray evidence at Section 718.202(a)(1), the administrative law judge correctly found that, of the six x-ray interpretations of three x-ray films, three were read as negative for the existence of pneumoconiosis by Dr. Navani, a Board-certified B reader, and three were read as positive for the existence of pneumoconiosis by Dr. Smith,

[5] In *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), the United States Supreme Court overruled the true doubt rule, which provided that equally balanced evidence creates true doubt to be resolved in claimant's favor, as violative of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §557(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), and accordingly, held that claimants have the burden of establishing all requisite elements of entitlement under 20 C.F.R. Part 718 by a preponderance of the evidence.

a Board-certified B reader. Decision and Order at 4; Director's Exhibits 15, 36, 42; Claimant's Exhibits 1, 2, 7.[6] Consequently, the administrative law judge concluded that the three positive and three negative interpretations were equally credible and "evenly balanced" readings rendered by "highly qualified physicians" who reached contrary conclusions, and that therefore, "claimant must lose since he bears the burden of persuasion." Decision and Order at 4.

Hence, contrary to claimant's contention, the administrative law judge's analysis does not constitute a mechanical nose count of the x-ray interpretations, but instead, constitutes a qualitative and quantitative analysis of the x-ray evidence as he evaluated the radiological expertise of the physicians in determining the credibility of the conflicting readings. The administrative law judge, within a permissible exercise of his discretion, found that the x-ray evidence was in equipoise and, hence, that claimant failed to satisfy his burden of establishing the existence of pneumoconiosis, pursuant to Section 718.202(a)(1), by a preponderance of the evidence. This was rational. *See Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12 ("when the evidence is evenly balanced, … claimant must lose."); *Maher Terminals, Inc. v. Director, OWCP* [*Santoro*], 992 F.2d 1277, 1285 (3d Cir. 1993) (administrative law judge must consider whether claimant's evidence satisfies the preponderance of the evidence standard); *see also 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. 1994); Decision and Order at 4. Because the administrative law judge's determination that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) was rational and supported by substantial evidence, we affirm it.

Next, claimant asserts that the administrative law judge erred in crediting the opinion of Dr. Mariglio, who did not find pneumoconiosis, over the opinion of Dr. Simelaro, who did, to find that the medical opinion evidence did not establish pneumoconiosis at Section 718.202(a)(4). Claimant specifically contends that the administrative law judge erred in crediting Dr. Mariglio's opinion over Dr. Simelaro's because the x-ray upon which Dr. Mariglio relied was not admitted into the record, while the x-ray upon which Dr. Simelaro relied was part of the record. Claimant also contends that Dr. Simelaro, not Dr. Mariglio, had better knowledge of claimant's coal mine employment and smoking histories. Thus, claimant contends that, contrary to the administrative law judge's finding, Dr. Simelaro, not Dr. Mariglio, rendered a more detailed and comprehensive report as to the existence of pneumoconiosis. In addition,

[6] X-rays dated September 27, 2004, November 17, 2005, and December 7, 2005, were read as negative by Dr. Navani, Board-certified B reader, and as positive by Dr. Smith, a Board-certified B reader. Director's Exhibits 15, 36, 42; Claimant's Exhibits 1, 3, 7.

claimant contends that the administrative law judge's alternative finding that, even if the opinions were equally probative, claimant would still fail to establish the existence of pneumoconiosis, is impermissible as it shows that the administrative law judge engaged in a mechanical nose count of the evidence.

A review of the record reveals that Dr. Mariglio administered two complete pulmonary evaluations of claimant, on September 27, 2004 and on December 7, 2005. Each evaluation consisted of findings on physical examination and results of chest x-rays, pulmonary function studies, arterial blood gas studies, and electrocardiograms. Director's Exhibits 11, 38. Contrary to claimant's assertion that Dr. Mariglio relied upon an x-ray film not contained in the evidence of record, both of Drs. Mariglio's reports are accompanied by chest x-ray films, dated September 27, 2004 and December 7, 2005, respectively, upon which he relied. Director's Exhibits 11, 15, 36, Claimant's Exhibits 1, 7.

In assessing the credibility of the medical opinions of Drs. Simelaro and Mariglio, the administrative law judge found that the record contained reliable x-ray evidence supportive of each physician's opinion and that both physicians agreed that claimant's pulmonary testing demonstrated a severe obstructive respiratory impairment. The administrative law judge nevertheless found Dr. Simelaro's opinion less persuasive because, contrary to claimant's assertion, Dr. Simelaro failed to discuss the actual number of years claimant worked in coal mine employment and Dr. Simelaro failed to explain why he concluded that claimant's minimal coal dust exposure was equally responsible for his pulmonary disease as was his fifty years of smoking. The administrative law judge noted that Dr. Mariglio discussed claimant's fifty-year cigarette smoking history as well as his minimal six-year coal mine employment history. Hence, the administrative law judge found that the probative value of Dr. Mariglio's opinion, which attributed claimant's respiratory disease to smoking, was enhanced because the doctor fully discussed claimant's lengthy smoking history and his minimal number of years of coal dust exposure. This was rational. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48, 1-52 (1990); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); *Gouge v. Director, OWCP*, 8 BLR 1-307 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985). Decision and Order at 6; Director's Exhibits 11, 38. In addition, the administrative law judge, within a permissible exercise of discretion, found the opinion of Dr. Mariglio, that claimant's chronic obstructive pulmonary disease and emphysema were secondary to cigarette smoking, not pneumoconiosis, outweighed that of Dr. Simelaro because it was better supported by claimant's objective test results and physical examination findings. Consequently, the administrative law judge reasonably determined that Dr. Mariglio's opinion was entitled to dispositive weight. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993);

Clark v. Karst-Robbins Coal Co., 12 BLR 1-149 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). Hence, we affirm the administrative law judge's determination that claimant failed to satisfy his burden by establishing the existence of pneumoconiosis by a preponderance of the medical opinion evidence, pursuant to Section 718.202(a)(4). *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983) (crediting of physician's report is credibility determination within purview of administrative law judge); Decision and Order at 6.

Because the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a), a requisite element of entitlement under Part 718, is rational, contains no reversible error, and is supported by substantial evidence, we affirm the administrative law judge's determination that entitlement to benefits is precluded. *See* 20 C.F.R. §718.202(a); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*).[7]

[7] Our affirmance of the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a), a requisite element of entitlement under Part 718, obviates the necessity to address claimant's argument regarding the administrative law judge's finding that claimant's total disability was not due to pneumoconiosis at Section 718.204(c). *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge