BRB No. 00-0891 BLA

MICKEY CLINE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
HOBET MINING INCORPORATED	)	
	)	
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-Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe & Farmer), Norton, Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Mary Forrest-Doyle (Judith E. Kramer, 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: HALL, Chief Administrative Appeals Judge, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (99-BLA-0438) of Administrative Law Judge Daniel L. Leland with respect to 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). The administrative law judge credited claimant with twenty-five years of coal mine employment and considered the claim, filed on February 9, 1998, under the regulations set forth in 20 C.F.R. Part 718 (2000).[1] The administrative law judge determined that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b)(2000). The administrative law judge further found that the evidence of record was insufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304 (2000). Finally, the administrative law judge determined that claimant did not establish that he is totally disabled under 20 C.F.R. §718.204(c)(2000).[2] Accordingly, benefits were denied.

[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). For the convenience of the parties, all citations to the regulations herein refer to the amended regulations unless otherwise noted.

[2]The revised regulations address the issue of total disability at 20 C.F.R. §718.204(b). 65 Fed. Reg. 80,049 (2000)(to be codified at 20 C.F.R. §718.204(b)).

Claimant argues on appeal that the administrative law judge erred in failing to find that the x-ray evidence of record supported invocation of the irrebuttable presumption of total disability due to pneumoconiosis. Claimant also asserts that the administrative law judge did not properly weigh the medical opinion evidence concerning the issue of total respiratory or pulmonary disability pursuant to Section 718.204(c)(2000). Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not responded to the merits of claimant's appeal.[3]

[3]The administrative law judge's findings with respect to the length of claimant's coal mine employment and pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), and 718.204(c)(1)-(3)(2000) are affirmed as they are unchallenged on appeal. *See 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 Association 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 9, 2001, to which the Director has responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Employer has also responded, asserting, without explanation, that the present case is impacted by the new regulation in which nonpulmonary and nonrespiratory conditions which cause respiratory or pulmonary impairments are deemed relevant to the determination of total disability. 65 Fed. Reg. 80,049 (2000)(to be codified at 20 C.F.R. §718.204(a)).[4] We disagree, inasmuch as in addressing the issue of total disability under Section 718.204(c)(2000), the administrative law judge considered whether the evidence of record was sufficient to establish that claimant is suffering from a totally disabling respiratory or pulmonary impairment, regardless of its source. Decision and Order at 7. Having reviewed the briefs and the record in the case at bar, 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's scope of review is defined by statute. The administrative law 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 (2000), claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R.

[4]Claimant has not responded to the Board's Order. 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 9, 2001, is construed as a position that the challenged regulations will not affect the outcome of this case.

§§718.3, 718.202, 718.203, 718.204 (2000). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

With respect to the administrative law judge's determination that the evidence of record did not support a finding of complicated pneumoconiosis pursuant to Section 718.304 (2000), claimant argues that the administrative law judge erred in finding that Dr. Wheeler's x-ray interpretations outweighed the interpretations of Drs. Ranavaya, Gaziano, Leef, Robinette, Aycoth, Cappiello, and Ahmed. Claimant also maintains that the administrative law judge should have taken into consideration the score that Dr. Repsher received on his B reader examination regarding the identification of large opacities. With respect to Dr. Fino's opinion, that claimant does not have complicated pneumoconiosis, claimant asserts that the administrative law judge erred in relying solely upon Dr. Fino's qualifications and in ignoring Decisions and Orders in which other administrative law judges have discredited Dr. Fino's diagnoses. These contentions are without merit.

Pursuant to Section 718.304(a)(2000), the administrative law judge considered the x-ray evidence of record and acted within his discretion in determining that inasmuch as four of the six physicians dually qualified as B readers and Board-certified radiologists did not find large opacities on claimant's x-rays as required by Section 718.304(a)(2000) for complicated pneumoconiosis, the x-ray evidence was insufficient to establish invocation of the irrebuttable presumption. Decision and Order at 7; *see McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *see also Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Furthermore, the administrative law judge did not err in crediting Dr. Wheeler's readings because Dr. Wheeler specifically stated that he saw no large opacities on claimant's x-rays. Director's Exhibits 34, 35, 37; Employer's Exhibits 1, 9, 13. The validity of Dr. Wheeler's statements regarding the cause of the small nodules on the x-rays is irrelevant to this finding. Claimant's argument concerning Dr. Repsher's x-ray interpretations also has no merit, as the administrative law judge relied upon the interpretations of dually qualified readers to resolve the conflict in the x-ray evidence. Dr. Repsher is a B reader, but is not a Board-certified radiologist. Employer's Exhibits 7, 12. Finally, claimant's allegations regarding the administrative law judge's consideration of Dr. Fino's opinion, as it concerns the existence of complicated pneumoconiosis are irrelevant, as the administrative law judge did not weigh Dr. Fino's opinion under Section 718.304 (2000). *See* Decision and Order at 7. We affirm, therefore, the administrative law judge's finding that the irrebuttable presumption of total disability due to pneumoconiosis was not invoked pursuant to Section 718.304 (2000).

Pursuant to Section 718.204(c)(4)(2000), the administrative law judge weighed the medical reports in which the issue of total respiratory or pulmonary disability was addressed and determined that the opinions in which Drs. Crisalli, Dahhan, Renn, Repsher, and Fino concluded that claimant is not totally disabled outweighed the contrary opinion of Dr. Robinette. *Id*. Claimant alleges that the administrative law judge erred in crediting the opinions of Drs. Fino and Dahhan.[5] Contrary to claimant's assertions, the administrative law judge did not rely upon Dr. Fino's qualifications to accord his opinion greater weight than the opinion of Dr. Robinette. *Id*. The administrative law judge stated that Dr. Fino's opinion, like the opinions of Drs. Crisalli, Dahhan, Renn, and Repsher, was better supported by the objective test results than Dr. Robinette's opinion. *Id*. Claimant's criticism of the administrative law judge's crediting of Dr. Dahhan's opinion is similarly misplaced: claimant cites no error in the administrative law judge's crediting of Dr. Dahhan's opinion for his finding that claimant was not totally disabled, on the ground that it was supported by the objective study results. Since this issue reflects the sole point of the administrative law judge's reliance upon the opinions of both Drs. Fino and Dahhan, we need not address claimant's various allegations of error with respect to these physicians' opinions.[6] *See Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

---

[5]Claimant also maintains that the opinions of Dr. Robinette and Ranavaya are sufficient to establish that claimant is totally disabled pursuant to Section 718.204(c)(2000). Claimant's statement is tantamount to a request that the Board reweigh the evidence of record, a function that the Board is not empowered to perform. *See Fagg v. Amax Coal Co.*, 6 BLR 1-107 (1983).

[6]Because Dr. Fino did not examine claimant in this case, but rather conducted a record review, the state in which Dr. Fino is licensed to practice medicine is not at issue in this case. Dr. Fino's alleged belief that pneumoconiosis/coal dust exposure cannot

Inasmuch as claimant's allegations of error are without merit, we affirm the administrative law judge's determination that the opinions in which Drs. Crisalli, Dahhan, Renn, Repsher, and Fino concluded that claimant is not totally disabled outweighed the contrary opinion of Dr. Robinette, as they are better supported by the objective evidence of record. *See King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). We also affirm, therefore, the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to Section 718.204(c)(2000), an essential element of entitlement, and the denial of benefits. *See Trent*, *supra*; *Gee*, *supra*.

---

cause an obstructive impairment is also not at issue, as the source of any respiratory or pulmonary impairment suffered by claimant was not addressed in light of the administrative law judge's finding that claimant did not establish total disability under Section 718.204(c)(2000).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge