BRB No. 00-0921 BLA

MICHAEL RANDOLPH ELKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
WESTMORELAND COAL COMPANY	)	
	)	
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 F. Sutton, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe, Bobby Steve Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

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

Timothy S. Williams (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, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (1999-BLA-1118) of Administrative Law Judge Daniel F. Sutton rendered 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] Claimant filed his application for benefits on February 24, 1998. Director's Exhibit 1. The District Director of the Office of Workers' Compensation Programs awarded benefits and employer requested a hearing, which was held on April 1, 1999.

The administrative law judge credited claimant with 18.5 years of coal mine employment and accepted the parties' stipulation that claimant is totally disabled by a respiratory or pulmonary impairment. The administrative law judge found, however, that all of the relevant evidence weighed together did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210, BLR (4th Cir. 2000). Accordingly, he denied benefits.

On appeal, claimant contends that the administrative law judge erred in admitting into the record the qualifying[2] results of a July 28, 1998 pulmonary function study and blood gas study administered by a technician who was not licensed as a respiratory care practitioner by the Commonwealth of Virginia. Claimant further asserts that the administrative law judge credited a medical opinion that was based on premises hostile to the Act. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds that the objective study issue need not be addressed because claimant's total respiratory disability is undisputed, and argues alternatively that the administrative law judge properly admitted the challenged studies into the record.[3]

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States Court of Appeals 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.*

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[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] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[3] We affirm as unchallenged on appeal the administrative law judge's finding of 18.5 years of coal mine employment and his finding that claimant is totally disabled by a respiratory or pulmonary impairment. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

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 all parties have responded. The Director states that none of the regulations at issue in the lawsuit affects the outcome of this case. Claimant, however, contends that two challenged regulations, 20 C.F.R. §718.201(a)(2)(defining pneumoconiosis to include obstructive pulmonary disease arising out of coal mine employment), and 20 C.F.R. §718.201(c)(defining pneumoconiosis as a latent and progressive disease), affect the outcome of this case. Employer contends that 20 C.F.R. §718.201(c), and 20 C.F.R. §718.204(a)(specifying that a nonrespiratory disability is irrelevant to whether a miner is totally disabled due to pneumoconiosis), affect the outcome of this case.

Based upon the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. The principle that pneumoconiosis is progressive is the same under both the existing law recognizing the progressive nature of pneumoconiosis, *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Richardson v. Director, OWCP*, 94 F.3d 164, 167-68, 21 BLR 2-373, 2-379 (4th Cir. 1996), and 20 C.F.R. §718.201(c), which codifies existing law. 65 Fed. Reg. 79937, 79971-72. Similarly, 20 C.F.R. §§718.201(a)(2) merely codifies existing law recognizing that obstructive lung impairments are encompassed within the definition of pneumoconiosis if they arise out of coal mine employment. *See Warth v. Southern Ohio Coal Co*., 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); 65 Fed. Reg. 79943. Further review indicates that all of the physicians agree that claimant has a disabling impairment which is respiratory in nature, and that no physician believes that claimant suffers from a nonrespiratory or nonpulmonary disability. Therefore, contrary to employer's assertion, 20 C.F.R. §718.204(a) is not implicated on this record. Additionally, based on our review, we conclude that none of the other challenged regulations affect the outcome of this case. Therefore, we will proceed with the adjudication 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 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

To determine whether the existence of pneumoconiosis was established, the administrative law judge first considered the sixty-one readings of eleven chest x-rays pursuant to 20 C.F.R. §718.202(a)(1). There were three positive readings, fifty negative readings, six readings which were not classified under the ILO system for either the presence or the absence of pneumoconiosis, and two reports indicating that an x-ray was unreadable. Of the three positive readings, one was rendered by a physician qualified as both a Board-certified radiologist and B-reader, and two were rendered by B-readers. Of the negative readings, forty-four were rendered by Board-certified radiologist/B-readers, and six were rendered by B-readers.

Weighing the x-ray readings in light of the readers' radiological qualifications, the administrative law judge found that each of the three positive readings was "countered . . . [by] negative re-readings by equally or better qualified radiologists. . . ." Decision and Order at 6; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). The administrative law judge expressly declined to rely upon the mere "numerical superiority of the negative interpretations," but found that the conflicting expert readings indicated that the x-ray evidence was, at best, "inconclusive and, consequently, an unreliable basis . . . on which to form an opinion regarding the existence of pneumoconiosis." Decision and Order at 11.

The administrative law judge then found, correctly, that the record contains no biopsy evidence to be considered pursuant to 20 C.F.R. §718.202(a)(2), and that the presumptions set forth at 20 C.F.R. §§718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306.

Finally, the administrative law judge considered the medical reports and testimony of eight different physicians pursuant to 20 C.F.R. §718.202(a)(4). Review of the record indicates that Dr. S.K. Paranthaman, whose credentials are not in the record, examined and tested claimant on March 24, 1998 and diagnosed simple coal workers' pneumoconiosis due to coal mine employment, chronic bronchitis and emphysema "primarily related to heavy cigarette smoking," and reactive airway disease unrelated to coal mine employment. Director's Exhibit 14 at 4. Dr. Paranthaman stated further that coal mine employment "could have aggravated" claimant's smoking-related bronchitis and emphysema. *Id*. Dr. Emory Robinette, whose qualifications are also not of record, examined and tested claimant on December 16, 1998 and diagnosed coal workers' pneumoconiosis by x-ray, and severe obstructive lung disease "with chronic cigarette addiction." Claimant's Exhibit 9 at 3. Dr. Robinette discussed several medical studies reporting a causal relationship between coal dust exposure and obstructive lung disease, but did not state that claimant's obstructive lung disease was due to or aggravated by coal dust exposure. Claimant's Exhibit 9 at 3-4. Nevertheless, the administrative law judge interpreted Dr. Robinette's discussion as a diagnosis of a "chronic lung disease due

at least in part to coal mine dust exposure which satisf[ies] the Act's broad definition of the disease." Decision and Order at 11; *see* 20 C.F.R. §718.201(a)(2)(defining "legal pneumoconiosis").

By contrast, Dr. James Castle, who is Board-certified in Internal Medicine and Pulmonary Disease and who is a B-reader, examined and tested claimant and reviewed claimant's medical records on July 28, 1998, and concluded that claimant does not have pneumoconiosis but suffers from asthma unrelated to coal mine employment and from "tobacco smoke induced pulmonary emphysema." Employer's Exhibit 9 at 8-9. Dr. A. Dahhan, who is also Board-certified in Internal Medicine and Pulmonary Disease and is a B-reader, examined and tested claimant and reviewed claimant's medical records on March 11, 1999, and concluded that claimant does not have pneumoconiosis but is disabled by chronic bronchitis and emphysema due to a "lengthy smoking habit which calculates to be about 100 pack years." Employer's Exhibit 22 at 8. Similarly, Drs. Gregory Fino, Kirk Hippensteel, Lawrence Repsher, and Bruce Stewart, all of whom are Board-certified in Internal Medicine and Pulmonary Disease, reviewed claimant's medical records and concluded that he does not have pneumoconiosis, but has a severe pulmonary impairment composed of chronic obstructive pulmonary disease and emphysema due to smoking, and asthma unrelated to coal mine employment. Employer's Exhibits 5, 7, 9, 15, 17, 19.

The administrative law judge accorded less weight to the opinions of Drs. Paranthaman and Robinette because he found that they "based their diagnoses of pneumoconiosis primarily, if not exclusively, on their positive x-ray interpretations, and they provided minimal alternative rational[e] for their conclusion that the [c]laimant's chronic lung disease is due at least in part to . . . coal mine dust." Decision and Order at 12. The administrative law judge found that, by contrast, the opinions of Drs. Castle, Dahhan, Fino, Hippensteel, Repsher, and Stewart were "better reasoned" because the physicians "attributed the [c]laimant's respiratory impairment to cigarette smoking and provided explanations of how the objective medical findings supported their conclusions to rule out coal mine employment as a causative factor." *Id*. Consequently, the administrative law judge found that claimant "has not established that he suffers from pneumoconiosis under [S]ection 718.202(a)." *Id*.

Claimant does not challenge the administrative law judge's analysis of the chest x-ray readings or the opinions of Drs. Paranthaman and Robinette, but instead argues that the administrative law judge erred by admitting the July 28, 1998, qualifying objective studies into the record, and argues that Dr. Fino's report merits no weight because another administrative law judge deciding a different claim found that Dr. Fino had expressed an opinion therein that was hostile to the Act.

We need not address claimant's contentions. Claimant bears the burden of

establishing the existence of pneumoconiosis, and here, substantial evidence supports the administrative law judge's unchallenged finding that the weight of the x-ray evidence and medical opinion evidence does not support claimant's burden. Specifically, the administrative law judge properly weighed the x-ray readings based on the readers' radiological credentials, *see Adkins, supra*, and permissibly analyzed Dr. Paranthaman's and Dr. Robinette's medical reasoning and the underlying bases of their diagnoses, and reasonably considered the physicians' comparative credentials. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-88-89 and n.4 (1993). Additionally, the administrative law judge correctly weighed the medical opinions as to the existence of pneumoconiosis against all of the relevant evidence of record, including the x-ray readings.[4] *See Compton, supra*.

As the administrative law judge's unchallenged findings are supported by substantial evidence, we affirm his finding that the existence of pneumoconiosis was not established. Because claimant has failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a necessary element of entitlement under Part 718, we affirm the denial of benefits. *See Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

[4] Claimant does not identify any way in which a physician's consideration of the qualifying, July 28, 1998 pulmonary function and blood gas studies undermined that physician's conclusion that claimant does not have pneumoconiosis.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge