

BRB No. 05-0967 BLA

KENNETH BREWER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED: 06/29/2006
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits on Remand of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

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

Barry H. Joyner (Howard M. Radzely, 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: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Claimant appeals the Decision and Order – Denying Benefits on Remand (03-BLA-5008) of Administrative Law Judge Gerald M. Tierney issued with regard to claimant's subsequent 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). Since this claim is before the Board for a second time, we incorporate by reference the relevant procedural history set forth in the Board's prior decision. *See Brewer v. Director, OWCP*, BRB No. 03-0768 BLA (Aug. 20, 2004) (unpub.). In claimant's prior appeal, the Board affirmed the administrative law judge's finding that the newly submitted evidence failed to establish the existence of pneumoconiosis, but the Board

vacated his determination that the newly submitted evidence was insufficient to establish that claimant suffered from a totally disabling respiratory or pulmonary impairment, because the administrative law judge had failed to provide an adequate explanation for questioning both the validity of a non-qualifying October 23, 2001 pulmonary function study, and the credibility of Dr. Ranavaya's opinion diagnosing that claimant was totally disabled by a moderate respiratory impairment, based upon his interpretation of that non-qualifying study. *Brewer*, BRB No. 03-0768, slip op. at 6. The Board instructed the administrative law judge on remand to reconsider the new evidence relevant to whether claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv), and whether claimant had established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *Id.* The Board further instructed the administrative law judge, if necessary, to consider the merits of entitlement based on a review of all of the record evidence.¹ *Id.*

On remand, the administrative law judge found that Dr. Ranavaya's opinion established that claimant was totally disabled, and thus, found that claimant had established a change in an applicable condition of entitlement pursuant to Section 725.309(d). However, after he reviewed all of the record evidence, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis. Accordingly, the administrative law judge denied benefits.

Claimant appeals, asserting that the administrative law judge "again failed to explain his reasons for crediting or discrediting Dr. Ranavaya's opinion." Claimant's Brief (not paginated). Claimant maintains that Dr. Ranavaya offered no explanation for his conclusion that claimant's respiratory impairment was unrelated to coal dust exposure, other than his own negative x-ray report. Claimant generally submits that the weight of the x-ray evidence is positive for pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), responds to claimant's appeal, urging the Board to affirm the denial of benefits because the administrative law judge in effect found the evidence relevant to the existence of pneumoconiosis to be equally probative. Director's Brief at 3. The Director contends that while the administrative law judge's decision could have been more fully explained, since the path of his reasoning is clear, the Board should affirm his finding that claimant failed to establish the existence of

¹ The Board noted that if the administrative law judge found Dr. Ranavaya's opinion not to be credible, according to the concession of the Director, Office of Workers' Compensation Programs, claimant would not have received a complete, credible pulmonary evaluation, and the administrative law judge would have discretion to remand the claim to the district director or allow further development of any necessary evidence, *see* 20 C.F.R. §725.456(e). *Brewer v. Director, OWCP*, BRB No. 03-0768 BLA (Aug. 20, 2004) (unpub.), slip op. at 6.

pneumoconiosis. Director's Brief at 3, *citing Markus v. Old Ben Coal Co.*, 712 F.2d 322, 327, 5 BLR 2-130, 137 (7th Cir. 1983) (an administrative law judge's decision will be affirmed where a proper rationale is discernable).

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).

After consideration of the administrative law judge's Decision and Order, the briefs of the parties, and the issues presented on appeal, we affirm the administrative law judge's denial of benefits as it is supported by substantial evidence. Specifically, we affirm the administrative law judge's finding that claimant failed to establish the existence of either clinical or legal pneumoconiosis by a preponderance of the evidence pursuant to 20 C.F.R. §718.202(a).

In accordance with the Board's directive, the administrative law judge on remand determined that claimant was totally disabled from a respiratory or pulmonary impairment, and thus, found that claimant established a change in an applicable condition of entitlement. Because the administrative law judge had already determined in his prior decision that the new evidence failed to show that claimant suffered from pneumoconiosis, the administrative law judge focused his attention on the prior claim evidence, which consisted of two readings of a May 20, 1993 x-ray along with Dr. Carrillo's May 20, 1993 report, diagnosing legal pneumoconiosis. Director's Exhibit 1; Decision and Order - Denying Benefits on Remand (D&O on Remand) at 2-3.

The administrative law judge noted with respect to the x-ray evidence that the earlier chest x-ray readings did not tip the balance in favor of claimant, as Dr. Valiveti, a Board-eligible radiologist, read the May 20, 1993 x-ray as positive for pneumoconiosis, while Dr. Gaziano, a B-reader, read the same x-ray as negative for the disease. Director's Exhibit 1; D&O on Remand at 2. In addressing the issue of legal pneumoconiosis at Section 718.202(a)(4), the administrative law judge noted that the evaluations performed by Dr. Carrillo in 1993 and by Dr. Ranavaya in 2001, included similar work and smoking histories, and the same type of objective testing, and that they agreed that claimant had chronic obstructive pulmonary disease (COPD). Director's Exhibit 1, 5; D&O on Remand at 3. While Dr. Carrillo opined that claimant's suffered from mild obstructive pulmonary disease due to both coal dust exposure and smoking, Dr. Ranavaya conversely opined that claimant's COPD was unrelated to coal dust exposure and "most probably" due to claimant's 50-year smoking history. Director's Exhibits 1, 5. In weighing the conflicting evidence, the administrative law judge found:

While Dr. Carillo's report supports a diagnosis of pneumoconiosis, Dr. Ranavaya's more recent report does not. Claimant does not meet his burden of proof. Claimant does not prove, by the preponderance of the evidence, the existence of pneumoconiosis at §718.202(a)(4).

D&O on Remand at 3.

In this appeal, citing no specific evidence, claimant argues that the administrative law judge erred in failing to find that the weight of the x-ray evidence established the existence of pneumoconiosis. Claimant's assertion of error is without merit. We note that the Board previously affirmed the administrative law judge's finding at Section 718.202(a)(1) that claimant failed to prove the existence of pneumoconiosis based on a preponderance of the x-ray evidence obtained in conjunction with his subsequent claim. *Brewer*, BRB No. 03-0768, slip op. at 3-4. On remand, the administrative law judge properly considered the prior claim evidence and found that it contained two readings of an x-ray, one read as positive for pneumoconiosis by a Board-eligible radiologist, and one read as negative by a B-reader. Because the administrative law judge essentially considered the positive and negative reading of the earlier x-ray to be in equipoise, and since he had already found the new evidence to be insufficient to establish the existence of pneumoconiosis, the administrative law judge properly found that claimant failed to carry his burden of proving the existence of pneumoconiosis based on the x-ray evidence. *See 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).

With respect to the medical opinion evidence, although claimant correctly asserts that the administrative law judge did not specifically discuss the credibility of Dr. Ranavaya's opinion on the existence of pneumoconiosis, he clearly found no basis for crediting Dr. Carillo's opinion over that of Dr. Ranavaya's as to the etiology of claimant's COPD, and claimant does not allege any specific error in the administrative law judge's consideration of Dr. Carrillo's opinion. In order to justify vacating the administrative law judge's credibility determination, claimant must show that Dr. Carrillo provided a credible opinion of legal pneumoconiosis, which is reasoned and documented, and that the administrative law judge erred in considering his opinion and Dr. Ranavaya's opinion to be equally probative; but claimant does not make that argument. Because substantial evidence supports the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis by a preponderance of x-ray and medical opinions presented in the record, we affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1) and (4).

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 a finding of 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). Because claimant failed to establish the existence of pneumoconiosis, benefits are precluded.

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

JUDITH S. BOGGS
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to affirm the denial of benefits, and more specifically to affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(4). Instead of weighing the conflicting medical opinion evidence relevant to the existence of legal pneumoconiosis, the administrative law judge simply stated: "While Dr. Carrillo's report supports a diagnosis of pneumoconiosis, Dr. Ranavaya's more recent report does not. Claimant does not meet his burden of proof." Decision and Order – Denying Benefits on Remand at 3. I am unable to discern from the administrative law judge's Decision and Order whether he considers the evidence to be equally probative as he makes no direct statement to that effect. I consider his analysis to be too cursory to stand up to 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. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), that he fully explain the specific bases for his decision, the weight assigned to the evidence and the relationship he finds between the evidence and his legal and factual conclusions, *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984). Because the

administrative law judge's two sentence analysis does not discharge his duty under the APA to weigh the conflicting medical evidence, I would remand this case for further consideration under 20 C.F.R. §718.202(a). I would instruct the administrative law judge to resolve the conflicts in the medical evidence, *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989), and provide a full, detailed opinion on the relevant issues of entitlement in accordance with the APA.

ROY P. SMITH
Administrative Appeals Judge