BRB No. 03-0478 BLA

WILLIARD F. FOUCH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND FORK CONSTRUCTION, LTD.	)	DATE ISSUED: 03/26/2004
	)	
and	)	
	)	
FRONTIER INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Willard F. Fouch, Belfry, Kentucky, pro se.

Scott A. White (White & Risse L.L.P.), St. Louis, Missouri, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (2001-BLA-0557) of Administrative Law Judge Joseph E. Kane 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] The administrative law judge found, and the

[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

parties stipulated to, twenty-seven years of coal mine employment. The administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718 based on the date of filing. The administrative law judge further found the evidence of record insufficient to establish the existence of pneumoconiosis or a totally disabling respiratory impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b). Accordingly, benefits were denied.

On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, is not participating in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and must, therefore, be affirmed. In considering the x-ray evidence, the administrative law judge accorded little weight to Dr. Alexander's readings of the June 14, 2000 and October 30, 2000 x-rays, reporting large opacities due to pneumoconiosis as this finding was contradicted by the readings of all the other x-rays of record. This was reasonable. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988). Likewise, the administrative law judge accorded little weight to Dr. Fino's readings of the October 30, 2000 x-ray and October 30, 2000 CT scan reporting no pulmonary changes, in light of all the other x-ray readings of record which found some changes, but disagreed as to whether they were due

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effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

to pneumoconiosis or emphysema. *Dillon*, 11 BLR at 114. For the same reason, the administrative law judge accorded little weight to Dr. Dahhan's completely negative reading of a May 10, 2001 x-ray. *Dillon*, 11 BLR at 114. Setting aside these less than credible readings, the administrative law judge found that the remaining x-ray evidence consisted of sixteen positive readings and fifteen negative readings, both read by equally qualified readers. Accordingly, the administrative law judge found the x-ray evidence to be in equipoise, and concluded, therefore, that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). This was rational. Decision and Order at 15; Director's Exhibits 10, 20; Employer's Exhibits 1, 2, 8, 10, 13, 16, 19, 21, 27; Claimant's Exhibits 1-13, 23; 20 C.F.R. §718.202(a)(1); *Director, OWCP v. Greenwich Colleries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Colleries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Abshire v. D & L Coal Co.*, 22 BLR 1-202, 1-212 (2002).

In addition, the administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(2) as there was no biopsy evidence of record. 20 C.F.R. §718.202(a)(2). Likewise, the administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(3) as the evidence did not establish the existence of complicated pneumoconiosis inasmuch as Dr. Alexander's finding of large opacities was outweighed by the other x-ray evidence, and this was a living miner's claim filed after January 1, 1982. Decision and Order at 15; *see* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Dillon*, 11 BLR at 114; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

Turning to the medical opinion evidence, the administrative law judge properly accorded greater weight to the opinion of Dr. Dahhan, that claimant did not have pneumoconiosis, as he found it based on a "more complete consideration of the totality of the medical evidence" than were the opinions of Drs. Younes and Burki, diagnosing the existence of pneumoconiosis, which he found to be "supported only by the positive chest x-ray readings". Decision and Order at 17. The administrative law judge, therefore, found Dr. Dahhan's opinion to be better documented and reasoned and, therefore, entitled to greater weight than the opinions of Drs. Younes and Burki. This was rational. *See Cornett v. Benham Coal Co., Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-262, 1-265 (1985); *Brown v. Director, OWCP*, 7 BLR 1-730, 1-733 (1985). Further, the administrative law judge noted that Dr. Dahhan's opinion was supported by the opinions of Drs. Tuteur, Renn, and Repsher. *See Dillon*, 11 BLR at 1-114. The administrative law judge's finding that the medical opinion evidence

failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) is, therefore, affirmed.

The administrative law judge is empowered to weigh the medical evidence of record and draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal if the administrative law judge's findings are supported by substantial evidence, *see Anderson*, 12 BLR at 1-113. Consequently, we affirm the administrative law judge's finding that the evidence of record was insufficient to establish the existence of pneumoconiosis. Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement, we need not consider claimant's argument concerning total disability. *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

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