BRB No. 00-0563 BLA

WARNER CALLAHAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Jennifer U. Toth (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, the United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-0513) of Administrative Law Judge Daniel J. Roketenetz denying benefits 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]

[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 previous regulations, as the disposition of this case is not affected by the amendments.

The parties stipulated, and the administrative law judge found, that claimant[2] had established thirty years of coal mine employment. The administrative law judge considered the claim pursuant to the provisions of 20 C.F.R. Part 718 (2000) and found that the evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total respiratory disability pursuant to 20 C.F.R. §718.204(c). Thus, the administrative law judge found that claimant failed to demonstrate a change in conditions, or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (1999).[3] Accordingly, benefits were denied.

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.

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[2]Claimant's initial application for benefits was filed on November 24, 1993, and was denied by Administrative Law Judge Frank D. Marden on April 26, 1996. Director's Exhibits 1, 42. Judge Marden's Decision and Order was subsequently affirmed by the Board in response to claimant's appeal. *Callahan v. Perry County Coal Corporation,* BRB No. 96-1008 BLA (Apr. 9, 1997)(unpub.); Director's Exhibit 54. On June 10, 1997, claimant filed a request for modification and submitted additional evidence. Director's Exhibit 56.

[3]The amendments to the regulation at 20 C.F.R.§725.310 do not apply to claims, such as this, which were pending on January 19, 2001; rather, the version of this regulation as published in the 1999 Code of Federal Regulations is applicable. *See* 65 Fed. Reg. 80, 057 (2000)(to be codified at 20 C.F.R.§725.2(c)).

Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which only the Director has responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case.[4] Based on the brief submitted by the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will adjudicate the merits of this appeal.

[4]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 February 21, 2001 is construed as a position that the challenged regulations will not affect the outcome of this case.

On appeal, claimant argues that the administrative law judge erred in finding that the evidence was insufficient to establish the presence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4), and insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). The Director, Office of Workers' Compensation Programs (the Director), has responded and urges affirmance of the denial of benefits.[5]

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 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 Part 718, claimant must establish total respiratory disability due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Grant v. Director, OWCP,* 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988);[6] *Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Perry v. Director, OWCP,* 9 BLR 1-1 (1986)(*en banc*). Failure to prove any of these elements precludes entitlement. *Trent, supra; Perry, supra.*

[5]The administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) (2000) and 718.204(c)(1)-(3) (2000) are unchallenged on appeal and are, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6]The instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, inasmuch as claimant's coal mine employment occurred in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP,* 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

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 contains no reversible error. In addressing the issue of the existence of pneumoconiosis, the administrative law judge weighed the conflicting interpretations of the x-ray readings of record submitted since the previous denial of benefits, and rationally accorded determinative weight to the greater number of negative readings performed by physicians who are both B readers and Board-certified radiologists.[7] *See* 20 C.F.R. §718.202(a)(1); Decision and Order at 5-7; Director's Exhibits 55, 67, 70-76. This determination is supported by the record, as all of the negative interpretations were submitted by physicians who were either Board-certified radiologists or B readers. *See Staton v. Norfolk & Western Railway 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. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Moreover, we find no evidence to support claimant's suggestion that the administrative law judge selectively analyzed the x-ray evidence of record.

In addition, the administrative law judge considered all of the newly submitted medical reports and rationally accorded greater weight to the opinion of Dr. Dahhan, that claimant does not have pneumoconiosis, based upon his superior qualifications as a Board-certified physician in internal medicine and pulmonary diseases, and his well reasoned and documented opinion. Decision and Order at 7-9; Director's Exhibits 55, 67, 76, 76; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Contrary to claimant's contentions, the administrative law judge rationally found Dr. Bushey's opinion insufficient to establish the existence of pneumoconiosis since Dr. Bushey's diagnosis was based on an x-ray that was reread as negative by better qualified physicians, his pulmonary function study was found invalid, claimant's smoking history was not addressed, and Dr. Bushey failed to include an adequate basis for his conclusions. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); Decision and Order at 7-9; Director's Exhibit 55. We further find no merit in claimant's contention that the administrative law judge improperly rejected Dr. Prater's opinion, despite his status as

[7]A B reader is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E) (2000); 42 C.F.R.§37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135 n.16, 11 BLR 2-1 n.16 (1987), *reh'g denied* 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

claimant's treating physician, as the administrative law judge rationally determined that Dr. Prater's diagnosis of "possible pneumoconiosis" is equivocal and insufficient to satisfy claimant's burden of proof on this issue. *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Decision and Order at 7-9; Director's Exhibits 73, 76. Accordingly, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a).

Turning to the issue of total disability pursuant to Section 718.204(c), claimant advances two arguments without referring to the medical evidence of record. Claimant maintains that he cannot perform his usual coal mine work because he cannot be exposed to heavy concentrations of coal mine dust and that the administrative law judge erred in failing to consider that he is totally disabled from performing comparable and gainful work because of his age, education, and work experience. These contentions are without merit. Even assuming that the record contained medical evidence supporting a finding that claimant should not be exposed to coal mine dust, opinions regarding the need for the miner to avoid the inhalation of coal dust do not support a finding of total disability due to pneumoconiosis. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *see also DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Taylor v. Evans & Gambrel Co., Inc.*, 12 BLR 1-83 (1988). In addition, the administrative law judge was not required to reach the issue of whether claimant is able to perform comparable and gainful work, as he determined that the medical opinions of record do not establish the existence of a respiratory or pulmonary impairment that prevents claimant from performing his usual coal mine employment.[8] *See* 20 C.F.R. §718.204; *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *see also Ramey v. Kentland v. Elkhorn Coal Corp*., 775 F.2d 485, 7 BLR 2-124 (6th Cir. 1995).

With respect to the administrative law judge's findings under Section 718.204(c), although claimant alleges that "the administrative law judge erred in resolving that the claimant was not totally disabled," Claimant's Brief at 7, he has failed to identify any error made by the administrative law judge in his evaluation of the relevant medical evidence. Inasmuch as the absence of specific allegations of error regarding the administrative law judge's findings under Section 718.204(c) precludes Board review, we must affirm the

[8]Claimant's reliance on *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), is misplaced. In *Bentley*, the Board held that age, work experience and education are relevant only in considering claimant's ability to perform comparable and gainful work; an issue which the administrative law judge did not need to reach in light of his finding that claimant did not establish that he had any impairment which disabled him from his usual coal mine employment. *See* 20 C.F.R. §718.204(b)(1), (2) (2000).

administrative law judge's finding that the medical evidence of record is insufficient to establish that claimant is suffering from a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c).[9] *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

The administrative law judge is empowered to weigh and draw inferences from the medical evidence, *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. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987). Consequently, we affirm the administrative law judge's findings that the newly submitted evidence of record is insufficient to establish the existence of pneumoconiosis or a totally disabling respiratory impairment as they are supported by substantial evidence. We also affirm the administrative law judge's finding that claimant failed to establish a mistake of fact or change in condition, which precluded an award of benefits. 20 C.F.R. §725.310 (1999); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (1994).

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[9]The administrative law judge's finding that the newly submitted evidence was insufficient to establish total respiratory disability is supported by substantial evidence, as the pulmonary function studies were found invalid, the blood gas study was non-qualifying, there is no evidence of cor pulmonale with right sided congestive heart failure, and the physicians of record did not offer any opinion indicating that claimant suffers from a totally disabling respiratory or pulmonary impairment. Decision and Order at 10; Director's Exhibits 55, 57, 58, 67, 76; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, BLR (6th Cir. 2000); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge