

BRB No. 97-1194 BLA

DARELD P. NELSON)		
)		
Claimant-Petitioner)		
)		
v.)		
)		
BASIN COOPERATIVE SERVICES)	DATE	ISSUED:
)		
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 Living Miner's Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman & Linnet, P.C.), Denver Colorado, for claimant.

John W. Walters (Jackson & Kelly), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Living Miner's Benefits (93-BLA-1876) of Administrative Law Judge Thomas M. Burke 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 administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

¹ Claimant is Dareld P. Nelson, the miner, who filed a claim with the Department of Labor (DOL) on May 14, 1993. Director's Exhibit 1.

On appeal, claimant challenges the administrative law judge's finding at Section 718.202(a)(4), contending that the medical opinion evidence establishes the existence of pneumoconiosis. Claimant asserts that the administrative law judge improperly discounted the opinion of Dr. James diagnosing pneumoconiosis. Claimant also asserts that the opinion of Dr. Kriengkrairut, claimant's treating physician, is supportive of such a finding. Finally, claimant asserts that Dr. Repsher's opinion is somewhat supportive of a finding of pneumoconiosis because he opined that claimant had chronic obstructive pulmonary disease (COPD) and asthma. Claimant contends that the evidence establishes that claimant is totally disabled due to pneumoconiosis at Section 718.204(b), (c), despite the fact that the administrative law judge made no findings thereunder. Employer, in response, asserts that the administrative law judge's finding that the evidence fails to establish entitlement is supported by substantial evidence, and accordingly, it urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a response brief in the instant appeal.²

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

Claimant challenges the administrative law judge's finding that the evidence fails to

² Inasmuch as the administrative law judge's findings that the evidence establishes 30 years of coal mine employment, and fails to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(3), *see* Decision and Order at 3, n.2, 6, are unchallenged on appeal, they are affirmed. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Claimant initially asserts that the administrative law judge erred in his consideration of Dr. James's opinion that claimant suffers from pneumoconiosis. The administrative law judge summarized the relevant medical opinions, Decision and Order at 6-9, and correctly found that Dr. James was the only physician of record to provide a conclusive diagnosis of pneumoconiosis. Decision and Order at 9. The administrative law judge found that Dr. James's report was not as well-reasoned or well-documented as the other reports of record. Contrary to claimant's contentions, the administrative law judge discussed Dr. James's conclusions but found that his report was outweighed by the contrary and supportive opinions of Drs. Repsher, Castle, Fino and Kriengkrairut because they were based upon more extensive documentation. The administrative law judge rationally found that Dr. Castle's opinion that claimant's impairment is due to his asthma was most persuasive because it explained the irreversible component of claimant's spirometry testing was related to asthma and this was supported by several other medical reports of record. In addition, the administrative law judge also permissibly discounted Dr. James's opinion, in part, because he found that the physician failed to explain his diagnosis of pneumoconiosis in light of two of his own x-rays which he read as negative for pneumoconiosis. Decision and Order at 9-10; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988).

The administrative law judge also accorded greater weight to the reports of Drs. Repsher, Castle, Fino and Kriengkrairut because they were "more in accord with the preponderantly negative chest x-ray evidence of record. Decision and Order at 10. Although an administrative law judge may not weigh x-rays against medical opinions, but must independently weigh the medical opinions at Section 718.202(a)(4), this error is harmless, inasmuch as the administrative law judge in the instant case provided a valid alternative reason for crediting the opinions of Drs. Repsher, Castle, Fino and Kriengkrairut because he found they were also based upon more extensive documentation than the report of Dr. James. Decision and Order at 10; *see Pettry v. Director, OWCP*, 14 BLR 1-98 (1990); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark, supra*; *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Moreover, there is no merit to claimant's contention that Dr. Kriengkrairut's opinion is supportive of a finding of the existence of pneumoconiosis. Dr. Kriengkrairut submitted several medical reports. Director's Exhibits 12, 13; Claimant's Exhibits 8, 9, 11; Employer's Exhibit 5. In his first report, Dr. Kriengkrairut opined pulmonary emphysema and coal workers' pneumoconiosis based upon the results of pulmonary function studies and chest x-rays. Director's Exhibit 12. As the administrative law judge correctly noted, Dr. Kriengkrairut then changed his opinion, Decision and Order at 6, wherein the physician stated that "my conclusion after reviewing the chest x-ray again and the report from the B-

reader, I would tend to say that this man's problem of dyspnea is mostly due to pulmonary emphysema. Coal workers' pneumoconiosis can be seen sometimes with emphysema and fibrosis, however, this does not show on the present chest x-ray." *Id*; Director's Exhibit 13. Even later, Dr. Kriengkrairut diagnosed hypertension and severe COPD-asthma, but does not mention pneumoconiosis at all. Claimant's Exhibit 9; Employer's Exhibit 5. Finally, in his most recent report, the physician stated that there "is some question regarding the pulmonary emphysema that could be due to smoking or due to pneumoconiosis but according to the original report on the chest x-ray, it did not show pneumoconiosis on the x-ray." Claimant's Exhibit 11. We therefore reject claimant's contention that Dr. Kriengkrairut's opinion is supportive of a diagnosis of pneumoconiosis.

Finally, we also reject claimant's contention that Dr. Repsher's opinion of COPD and asthma is supportive of a finding of pneumoconiosis. While it is true that Dr. Repsher diagnosed COPD and asthma, he clearly stated that "COPD is unrelated to coal dust exposure and is due to cigarette smoking and asthma." Employer's Exhibits 7, 15 at 16-18. A diagnosis of COPD or asthma which is unrelated to coal dust exposure is not a diagnosis of pneumoconiosis. *See Dockins v. McWane Coal Co.*, 9 BLR 1-57 (1986); *see* 20 C.F.R. §718.201. Thus, we affirm the administrative law judge's finding that the evidence fails to establish the existence of pneumoconiosis at Section 718.202(a)(4), as it is supported by substantial evidence and is in accordance with applicable law.³ As this finding precludes entitlement pursuant to the Part 718 regulations, *see Trent, supra; Perry, supra*, we affirm the administrative law judge's denial of benefits.

³ We need not address claimant's contentions relative to Section 718.204, as they are rendered moot by our disposition of this case. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge