BRB No. 99-0275 BLA

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

Appeal of the Decision and Order-Denying Benefits of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Kenneth S. Stepp (Kenneth S. Stepp, P.A., P.S.C.), Inverness, Florida, for claimant.

Jennifer U. Toth (Henry L. Solano, 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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (97-BLA-1515) of Administrative Law Judge Mollie W. Neal 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 that the instant

[1]Claimant initially filed a claim for benefits on May 29, 1981, which was denied by the district director on September 16, 1981, on the basis of claimant having failed to establish any of the elements of entitlement. Director's Exhibit 34. No further action was taken until the filing of a second claim on September 21, 1987, which was denied by the district director on the basis of failure to establish any of the elements

claim constituted a duplicate claim pursuant to 20 C.F.R. §725.309 and was governed by the standard enunciated in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, *rev'g en banc* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert denied*, 519 U.S. 1090 (1997), by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises. The administrative law judge found that claimant established a coal mine employment history of nine years and that the newly submitted evidence established the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). Decision and Order at 4-10. Accordingly, the administrative law judge concluded that claimant established a material change in conditions pursuant to Section 725.309. Decision and Order at 10. The administrative law judge found, however, that the entirety of the relevant evidence of record failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 10-18. Accordingly, benefits were denied.

On appeal, claimant contends generally that various x-ray reports and medical opinions support a finding of the existence of pneumoconiosis and that the administrative law judge erred in rejecting these opinions. Claimant further asserts that his testimony at the hearing supports a finding of the existence of pneumoconiosis. The Director, Office of Workers' Compensation Programs (the

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of entitlement and also on the basis of failure to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Director's Exhibit 35. No further action was taken until the filing of the instant claim on November 6, 1995. Director's Exhibit 1. After denial by the district director and a hearing, Director's Exhibits 20-25, 32, 33, the administrative law judge issued the Decision and Order denying benefits from which claimant now appeals.

Director), responds and urges affirmance of the denial of benefits.[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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359 (1965).

Claimant contends generally that the positive x-ray interpretations of Drs. Landry and Mathur establish the existence of pneumoconiosis. We reject claimant's assertion and affirm the administrative law judge's determination that the x-ray evidence of record failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

[2]We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination as well as his finding that claimant established a totally disabling respiratory impairment pursuant to Section 718.204(c) and therefore demonstrated a material change in conditions pursuant to Section 725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We further affirm, on the same basis, the administrative law judge's finding that the evidence of record did not establish the existence of pneumoconiosis at Section 718.202(a)(2) and (3). *See Skrack, supra*.

In considering the x-ray evidence, the administrative law judge, in a permissible exercise of discretion, found that the weight of the x-ray interpretations by the physicians with the dual qualifications of B-reader and board-certified radiologist,[3] was negative for the existence of pneumoconiosis.[4] Inasmuch as the administrative law judge has relied on qualitative factors in his review of the x-ray evidence and concluded that the weight of such evidence failed to establish the existence of pneumoconiosis, we affirm the determination that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1). *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); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see also Woodward v. Director, OWCP,* 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

Claimant further asserts generally that the medical opinions of Dr. Bowers, Director's Exhibit 10, Dr. Rasmussen, Director's Exhibit 9, Dr. Morales, Director's Exhibit 24, Dr. Kreitzer, Director's Exhibit 35, and Dr. O'Brien, Director's Exhibit 26, establish the existence of pneumoconiosis. We reject claimant's assertion and affirm the administrative law judge's determination that the x-ray evidence of record failed to establish the existence of pneumoconiosis pursuant to Section

[3]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 established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16 , 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A board-certified radiologist is a physician who has been certified by the American Board of Radiology as having a particular expertise in the field of radiology. While the administrative law judge erroneously concluded that Dr. Goldstein was a dually-qualified physician, we hold that the error was harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), in view of Dr. Goldstein's negative reading and the administrative law judge's proper weighing of the rest of 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).

[4]The record contains a total of fourteen interpretations by readers with these dual qualifications. Of these fourteen, twelve were read negative for the existence of pneumoconiosis, Director's Exhibits 14, 16-18, 34, 35, and two were read positive, Director's Exhibit 12; Claimant's Exhibit 4.

718.202(a)(1).

Contrary to claimant's assertion, the medical opinions of Drs. Kreitzer and O'Brien fail to diagnose the presence of pneumoconiosis or any disease arising out of coal mine employment and thus these physicians' opinions are precluded from supporting a finding of the existence of pneumoconiosis at Section 718.202(a)(4). *See* Director's Exhibits 26, 35; 20 C.F.R. §§718.201, 718.202(a)(4). Further, in a permissible exercise of his discretion, the administrative law judge found that both Dr. Rasmussen's and Dr. Morales's diagnoses of pneumoconiosis were entitled to little weight as the physicians failed to explain their conclusions. *See York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985); *White v. Director, OWCP*, 6 BLR 1-368, 1-371 (1983). Further still, the administrative law judge permissibly accorded little weight to Dr. Bowers's diagnosis of pneumoconiosis as the physician failed to fully consider the effect of claimant's smoking history on his diagnosis, *see generally Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985)*; Rickey v. Director, OWCP*, 7 BLR 1-106 (1984). Accordingly, the administrative law judge permissibly found Dr. Bowers's opinion to be unreasoned, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp*. 8 BLR 1-46 (1985), and we affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4) inasmuch as the administrative law judge properly found that no credible medical opinion diagnosed the presence of the disease. *See Ondecko*, *supra*.

Finally, claimant contends generally that the administrative law judge erred in failing to consider the lay testimony of claimant as support for a finding of pneumoconiosis. The Board has consistently held that lay testimony is insufficient to overcome contrary, probative medical evidence of record. *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985). Moreover, the determination of the existence of pneumoconiosis is a medical determination to be made by medical experts. *See generally Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984). In the absence of any credible medical evidence diagnosing the presence of pneumoconiosis, we must reject claimant's assertion. Inasmuch as claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement under Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc),* we must affirm the denial of benefits.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge