BRB No. 01-0175 BLA

SAM BURGETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BIG ELK CREEK COAL COMPANY, INCORPORATED	)	
	)	
and	)	DATE ISSUED:
	)	
OLD REPUBLIC 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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Mark E. Solomons (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (00-BLA-0032) of Administrative Law Judge Thomas F. Phalen, Jr. 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). Claimant filed a claim for benefits on August 9, 1995. In a Decision and Order dated February 17, 1998, Administrative Law Judge Daniel J. Roketenetz credited claimant with at least twenty-seven years of coal mine employment and considered the claim pursuant to the applicable regulations at 20 C.F.R. Part 718 (2000). Judge Roketenetz determined that the evidence was insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4) (2000), and further found the evidence insufficient to establish total disability under 20 C.F.R. §718.204(c)(1)-(4) (2000). Accordingly, Judge Roketenetz denied benefits. Claimant appealed. The Board affirmed Judge Roketenetz's findings under Section 718.204(c), and thus affirmed Judge Roketenetz's decision denying benefits. *Burgett v. Big Elk Creek Coal Co., Inc.*, BRB No. 98-0738 BLA (Mar. 2, 1999)(unpublished).

Claimant filed a request for modification with the district director by letter dated April 21, 1999. The district director denied modification, and subsequently, the case was referred to Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge), who held a hearing on modification on April 19, 2000. In his Decision and Order, the administrative law judge credited claimant with at least twenty-seven years of coal mine employment, and

---

[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). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). On August 10, 2001, the Board rescinded its prior order requiring the parties to submit briefs on the issue of the impact of the amended regulations to this case.

[2]The Board did not address Judge Roketenetz's findings under 20 C.F.R. §718.202(a) (2000) in view of its affirmance of Judge Roketenetz's finding that total disability, a requisite element of entitlement, was not established under 20 C.F.R. §718.204(c) (2000). *Burgett v. Big Elk Creek Coal Co., Inc.*, BRB No. 98-0738 BLA (Mar. 2, 1999)(unpublished).

considered entitlement under Part 718 (2000). In considering modification, the administrative law reviewed all of the evidence of record and found it insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4) (2000), and total disability under Section 718.204(c)(1)-(4) (2000). The administrative law judge thus found that neither a change in conditions nor a mistake in a determination of fact was established pursuant to 20 C.F.R. §725.310, and accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established under Section 718.202(a)(1) and (a)(4) (2000), and total disability due to pneumoconiosis established under Section 718.204 (2000). Employer responds in support of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend to participate in this appeal.

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).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In contending that the administrative law judge erred in finding the x-ray evidence of record insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1) (2000), claimant argues that the administrative law judge erred in crediting the negative x-ray readings of record over the positive x-ray readings of record by relying on the qualifications of the physicians reading the films and the numerical superiority of the negative readings. Claimant's contention is without merit. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises, has held that these factors must be considered by a fact-finder when weighing the x-ray evidence. *See Staton v. Norfolk & Western Railroad 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). The administrative law judge correctly stated that Judge Roketenetz previously considered more than forty x-ray interpretations of films which were taken between 1992 and 1997. Decision and Order at 4, 8. The

[3]The x-ray evidence submitted prior to claimant's request for modification consists of forty-four x-ray interpretations, thirty-nine of which are negative for pneumoconiosis. Director's Exhibits 33, 34, 39-46, 62-64, 66-71, 74-77, 79-81. All of the negative readings were submitted by B readers and/or Board-certified radiologists. Only two of the five positive readings were submitted by physicians with special radiological qualifications,

administrative law judge properly found that only five of these readings were positive for pneumoconiosis, and only two of these five positive interpretations were submitted by B Readers. Decision and Order at 4-5, 8; Director's Exhibits 35-38, 61. The administrative law judge further properly found that the overwhelming majority of the previous readings which were negative for pneumoconiosis were submitted by B readers and/or Board-certified radiologists. Decision and Order at 5; Director's Exhibits 33, 34, 39-46, 62-64, 66-71, 74-77, 79-81. With regard to the x-ray readings submitted in connection with claimant's request for modification, the administrative law judge properly determined that all six of the interpretations were negative for pneumoconiosis. Decision and Order at 5, 8; Director's Exhibits 94, 96; Employer's Exhibits 1, 2. The administrative law judge thus properly found that, because the negative readings of record constitute the majority of interpretations and are verified by more highly-qualified physicians, the x-ray evidence was insufficient to establish, by a preponderance of the evidence, a finding of pneumoconiosis. *See Staton, supra; Woodward, supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 7-8. Inasmuch as it is supported by substantial evidence and is in accordance with law, we affirm the administrative law judge's finding that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) (2000). *Staton, supra; Woodward, supra; Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *see* 20 C.F.R. §718.202(a)(1); Decision and Order at 8; Director's Exhibits 33-46, 61-64, 66-71, 74-77, 79-81, 94, 96; Employer's Exhibits 1, 2.

Claimant's only challenge to the administrative law judge's consideration of the medical opinion evidence under Section 718.202(a)(4) (2000) is that the administrative law judge may have selectively analyzed the evidence thereunder, thereby committing error. Claimant provides no support for his contention, however, and the administrative law judge's Decision and Order reflects that the administrative law judge properly considered all of the medical opinion evidence without engaging in a selective analysis. Decision and Order at 8-9. The administrative law judge stated that, for the reasons stated by Judge Roketenetz in the prior decision denying benefits, he was assigning greater weight to the opinions of Drs. Dahhan and Westerfield, who examined claimant and found claimant did not suffer from pneumoconiosis. Decision and Order at 8; Director's Exhibits 27, 28. The administrative

---

specifically, Drs. Baker and Powell, who are B readers. Director's Exhibits 35, 61.

[4]In his Decision and Order dated February 17, 1998, Judge Roketenetz discounted the opinions of Drs. Anderson, Myers, Baker and Powell, which indicate that claimant has pneumoconiosis, and credited the contrary reports of Drs. Dahhan and Westerfield. Judge Roketenetz Decision and Order at 8. Judge Roketenetz discounted the opinions of Drs. Anderson, Myers, Baker and Powell because each of the doctors relied upon his own positive x-ray reading in diagnosing pneumoconiosis, x-ray readings which were later re-read as negative by physicians with superior radiological qualifications. *See Winters v. Director, OWCP*, 6 BLR 1-877 (1984); Judge Roketenetz Decision and Order at 8; Director's Exhibits 24, 25, 29, 61.

law judge properly found that the opinions of Drs. Dahhan and Westerfield were well-reasoned and documented, and supported by the opinions of Drs. Fino and Branscomb, who reviewed the medical evidence of record and opined that claimant does not suffer from pneumoconiosis, and claimant does not contend otherwise. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); Decision and Order at 8-9; Director's Exhibits 82, 83. Accordingly, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4) (2000). *See* 20 C.F.R. §718.202(a)(4).

Inasmuch as we affirm the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4) (2000), a requisite element of entitlement under Part 718 (2000), we affirm the administrative law judge's denial of benefits. *See Trent, supra; Gee, supra; Perry, supra.* We need not address, therefore, claimant's contentions with regard to total disability under Section 718.204.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER

[5]We further affirm the administrative law judge's findings that claimant did not establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3) (2000), as claimant does not challenge these findings on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 8.

[6]We decline to address the administrative law judge's findings with regard to a change in conditions or a mistake in a determination of fact under 20 C.F.R. §725.310 (2000) inasmuch as the administrative law judge considered this claim on the merits, and properly denied benefits for claimant's failure to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4) (2000). *See* 20 C.F.R. §§718.202(a)(1)-(4) and 725.310.

Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge