BRB No. 01-0193 BLA

MYRTLE FAYE WISELY (Widow of JOEL WISELY)	)	
Claimant-Petitioner	)	
v.	)	
ZEIGLER COAL COMPANY	)	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 on Remand of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

Dorothy L. Page (Howard M. Radzely, 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, United States Department of Labor.

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

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order on Remand (97-BLA-

0544) of Administrative Law Judge Clement J. Kichuk denying benefits on claims [1] filed by the miner and survivor 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). This case has been before the Board previously. In the original Decision and Order, Administrative Law Judge Edward J. Murty, Jr. adjudicated the claims pursuant to 20 C.F.R. Part 718, based on their respective filing dates, and found that employer was the responsible operator and further concluded that the evidence of record was insufficient to establish that the miner was totally disabled due to pneumoconiosis or that the miner's death was due to pneumoconiosis. Accordingly, benefits were denied.

Pursuant to claimant's appeal, the Board vacated the administrative law judge's Decision and Order denying benefits and remanded the case to the administrative law judge for further consideration. *Wisely v. Zeigler Coal Co.*, BRB No. 98-1551 BLA (Sept. 30, 1999)(unpub.). Initially, the Board affirmed the administrative law judge's determination that the biopsy evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) (2000). The Board, however, vacated the administrative law judge's findings with respect to 20 C.F.R. §§718.202(a)(1), (3), (4) and 718.205 (2000) and remanded the case for the administrative law judge to reconsider the medical evidence thereunder. *Wisely, supra*.

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[1]Claimant is Myrtle Faye Wisely, the miner's widow. The miner, Joel Wisely, filed his application for benefits on January 13, 1981. Director's Exhibit 28. The miner died on September 14, 1989 and claimant filed a survivor's claim on August 27, 1993. Director's Exhibits 1, 6.

[2]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 20 C.F.R. Parts 718, 722, 725 and 726 (2001). 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). 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). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

On remand, due to the unavailability of Administrative Law Judge Murty, the case was assigned to Administrative Law Judge Clement J. Kichuk who concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (3) and (4) (2000). Accordingly, the administrative law judge denied benefits on both claims. In the instant appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established, in failing to fully consider the evidence of record pursuant to 20 C.F.R. §§718.203 and 718.204 (2000) and in failing to find that the miner's death was due to pneumoconiosis. Employer responds, urging affirmance of the denial of benefits and asserting that it should be dismissed as the responsible operator. The Director, Office of Workers' Compensation Programs, has filed a letter responding to employer's contention regarding the responsible operator issue but has not otherwise responded to the merits of the appeal.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the law. 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).

In order to establish entitlement to benefits in the miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to prove any of these requisite elements compels a denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Additionally, in order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5)(2001); *see also Peabody Coal Co. v. Director, OWCP, [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal and the evidence of record, we conclude that the

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit as the miner was employed in the coal mine industry in the State of Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. T he administrative law judge, in the instant case, permissibly determined that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983).

Initially, claimant's contention that the administrative law judge's Decision and Order fails to comport with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), is without merit. The administrative law judge fully discussed the relevant evidence of record and his reasoning is readily ascertainable from his discussion of the evidence.

With respect to the merits, claimant initially contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established based upon the x-ray evidence. Claimant's Brief at 8-11. We disagree. Claimant's contentions constitute a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988). The administrative law judge, in the instant case, set forth the x-ray evidence of record and properly noted that there were only six x-ray interpretations of readable quality, each of a different x-ray. Decision and Order on Remand at 5-6; Director's Exhibits 13, 28, 30, 32. The administrative law judge found that the physicians reading these x-rays had similar qualifications as B-readers and/or pulmonologists and that of these six interpretations, only two were positive for the existence of pneumoconiosis. Decision and Order on Remand at 5-6; Director's Exhibits 13, 28. The administrative law judge further noted that the two x-rays read as positive were both preceded and followed by two x-rays read as negative. Decision and Order on Remand at 5-6; Director's Exhibits 13, 28, 30, 32. The administrative law judge concluded that "the negative films present a real challenge to the reliability of the

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[4]The Administrative Procedure Act requires each adjudicatory decision to include a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record...." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

[5]Contrary to claimant's assertion, the record does not contain an interpretation of an April 12, 1976 x-ray. The record does contain a letter by Dr. James A. Merchant, dated April 2, 1976, that references "category 1 simple pneumoconiosis" but this interpretation was not made part of the record. Director's Exhibit 12.

[6]The x-ray interpretations dated February 6, 1981 and November 23, 1988 were positive for the existence of pneumoconiosis while the interpretations dated February 27, 1972, March 25, 1975, June 12, 1989 and June 14, 1989 were negative for the disease. Director's Exhibits 13, 28, 30, 32.

positive readings" and thus claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) (2000). Decision and Order on Remand at 5-6.

Contrary to claimant's assertion, the administrative law judge, in the instant case, permissibly concluded that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) (2000) as the x-ray readings do not sufficiently support a finding of coal workers' pneumoconiosis. Director's Exhibits 13-17, 28, 30, 32; Decision and Order on Remand at 4-6; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *Trent, supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Moreover, we reject claimant's assertion that the positive interpretation by Dr. Pitman, dated February 6, 1981, should be given controlling weight as the physician is a B-reader and a board-certified radiologist. Claimant's Brief at 8. The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Moreover, an administrative law judge is not required to accord determinative weight to an x-ray solely because it is read by a B-reader and board-certified radiologist. *See Clark, supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Trent, supra*. Additionally, the administrative law judge did not rely solely upon the progressive nature of pneumoconiosis in reaching his decision, but clearly questioned the credibility of the x-ray evidence in light of the negative readings of record. Decision and Order on Remand at 5-6; *Kuchwara, supra*; *Piccin, supra*. Thus, the administrative law judge rationally concluded that claimant did not meet her burden of persuasion. Decision and Order on Remand at 5; Director's Exhibits 13-17, 28, 30, 32; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990). We, therefore, affirm the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) (2000) as it is supported by substantial evidence.

Claimant also challenges the administrative law judge's determination that the x-ray

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[7]We must also reject claimant's contention that the administrative law judge failed to address the positive x-ray interpretation of Dr. Gaziano. Claimant's Brief at 10-11. The administrative law judge, in the instant case, clearly addresses the November 23, 1988 interpretation by Dr. Gaziano but finds it insufficient, in light of the negative interpretations of record, to meet claimant's burden of proof pursuant to 20 C.F.R. §718.202(a)(1) (2000). Decision and Order on Remand at 5-6. Furthermore, we also reject claimant's contention that the administrative law judge erred in relying upon the radiology report of Dr. McLeod as the physician's qualifications are not in the record. The administrative law judge properly noted that the physician was a radiologist but did not rely upon this report in finding the six readable x-rays of record insufficient to establish the existence of simple pneumoconiosis. Decision and Order on Remand at 6; Director's Exhibit 10.

evidence is insufficient to establish complicated pneumoconiosis. Claimant's Brief at 11-13. The administrative law judge, in the instant case, considered all the relevant evidence and concluded that while Dr. Gaziano read the x-ray dated November 23, 1988 as showing simple and complicated pneumoconiosis, equally qualified physicians had read later x-rays as showing no pneumoconiosis. Decision and Order on Remand at 6-7; Director's Exhibits 13, 30, 32. The administrative law judge rationally found that the x-ray interpretation by Dr. Gaziano, finding a category B opacity, was insufficient to meet claimant's burden of proof as the administrative law judge properly questioned the credibility of this diagnosis in light of the negative interpretations by physicians with equal qualifications. *Clark, supra*; *Trent, supra*; *Kuchwara, supra*. Contrary to claimant's contention, the administrative law judge did not reject Dr. Gaziano's diagnosis for failing to submit a narrative with the x-ray or for rating the film quality less than perfect, but rather found the diagnosis not credible in light of the other relevant evidence of record. Decision and Order on Remand at 6-7. Moreover, claimant's contention that the administrative law judge erred in considering the other relative evidence of record in questioning the reliability of Dr. Gaziano's x-ray interpretation is without merit as the administrative law judge properly considered all of the relevant medical evidence, including the medical opinions in determining the existence of complicated pneumoconiosis. Decision and Order on Remand at 6-7; Director's Exhibits 13, 18, 30, 32; Employer's Exhibits 3, 5; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991). Additionally, the administrative law judge, permissibly found Dr. Long's opinion was insufficient to support claimant's burden of proof as the physician did not set forth any clinical data or identify the medical evidence which formed the basis for her opinion. Decision and Order on Remand at 6-8; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark, supra*; *Trumbo, supra*. Thus, the administrative law judge, within his discretion as fact-finder, carefully analyzed the evidence and properly concluded that claimant failed to establish complicated pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). *Melnick, supra.*

With respect to 20 C.F.R. §718.202(a)(4) (2000), the administrative law judge properly considered the entirety of the medical opinion evidence of record and permissibly accorded greater weight to the medical opinions of Drs. Castle, Renn, Kleinerman, Naeye and Dahhan, which stated that the miner did not have pneumoconiosis or any other occupationally acquired pulmonary condition, than to the contrary opinions of Drs. Oey, Long, Sanjabi, Cohen and Jones. *Kuchwara, supra*; Decision and Order on Remand at 7-10. The administrative law judge, in a rational exercise of discretion as the fact-finder, permissibly concluded that the opinions of the physicians supportive of claimant's burden are

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[8]Contrary to claimant's assertion, the administrative law judge did not weigh Dr. Long's opinion against the x-ray evidence with regard to the existence of simple pneumoconiosis but rather he permissibly considered this opinion as it relates to the existence of complicated pneumoconiosis. Decision and Order on Remand at 6-7; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991).

contradicted by the objective medical evidence and are not well-documented and well-reasoned since the physicians do not explain or offer support for their diagnosis of pneumoconiosis and that the opinion of Dr. Castle was entitled to the greatest weight as the opinion was well-reasoned, fully documented and supported by the objective medical tests and clinical data which the physician carefully evaluated. *See Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. 1990); *Migliorini v. Director, OWCP*, 898 F.2d 1292, 13 BLR 2-418 (7th Cir. 1990); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Lafferty, supra*; *Clark, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Perry, supra*; Decision and Order on Remand at 7-12; Director's Exhibits 10, 18, 20, 28, 32; Employer's Exhibits 1, 3, 5, 7, 9; Claimant's Exhibits 1-2. The administrative law judge is empowered to weigh the medical opinion evidence of record and to 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. *See Clark, supra*; *Anderson, supra*; *Worley, supra*. Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (2000).

Inasmuch as claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement in both a miner's claim and a survivor's claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *See Railey, supra*; *Trumbo, supra*; *Kneel v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988); *Trent, supra*; *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Perry, supra*. Moreover, we need not address employer's argument, or the Director's response thereto, challenging the administrative law judge's responsible operator finding since we affirm the denial of benefits and, thus, this case no longer presents any real case or controversy for adjudication. *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990).

Accordingly, the administrative law judge's Decision and Order denying benefits in both the miner's and survivor's claims is affirmed.

SO ORDERED.

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[9]Claimant correctly argues that the administrative law judge improperly considered invocation of the presumption contained in 20 C.F.R. §718.305 (2000). A remand is not required, however, as the administrative law judge properly considered the evidence of record and rationally determined that it did not establish the existence of pneumoconiosis, a finding that establishes rebuttal of the presumption. *See* 20 C.F.R. §718.305(d) (2000); *Alexander v. Island Creek Coal* Co., 12 BLR 1-44 (1988); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); Decision and Order on Remand at 5-12.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge