

BRB No. 00-1178 BLA

ROY W. BRAY)
)
 Claimant-Petitioner)
)
 v.)
)
 B & L ENERGY RESOURCES,) DATE ISSUED:
)
 INCORPORATED)
)
 and)
)
 KENTUCKY COAL PRODUCERS)
 SELF-INSURANCE FUND))
)
 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.

Mark L. Ford (Ford & Siemon), Harlan, Kentucky, for claimant.

Rodney E. Buttermore, Jr. (Buttermore & Boggs), Harlan, Kentucky, for
employer.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals
Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (99-BLA-1262) of
Administrative Law Judge Thomas F. Phalen, Jr. on this duplicate 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 In this duplicate claim,² the administrative law judge

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, 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 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 claims, determined 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. 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*, Civ.No.00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

² Claimant filed his first application for benefits with the district director on October 30, 1986, which the district director denied on April 7, 1987 and August 2, 1988. Claimant took no further action on this claim. *See* Director's Exhibit 19. Claimant filed his second application for benefits on December 27, 1993, which the district director denied on April 29, 1994. Following a hearing, Administrative Law Judge Rudolf L. Jansen issued a Decision and Order denying benefits because the newly submitted evidence failed to demonstrate a totally disabling respiratory impairment and thereby a material change in conditions. Benefits were, therefore, denied. On appeal, the Board vacated the findings at Section 718.204(c)(4), *see* 20 C.F.R. §718.204(b)(2)(iv), and remanded the case for the administrative law judge to determine whether the newly submitted medical opinion evidence was sufficient to establish a totally disabling respiratory impairment and thereby a material change in conditions. The Board further held that, should the administrative law judge find a material change in conditions established, he must then consider all the relevant evidence on the merits. *Bray v. B & L Energy Resources, Inc.*, BRB No. 96-0839 BLA (Dec. 11, 1996). On remand, Judge Jansen found the newly submitted medical evidence sufficient to demonstrate a totally disabling respiratory impairment at 20 C.F.R. §718.204(c), *see* 20 C.F.R. §718.204(b)(2), therefore, a material change in conditions. Considering the evidence of record, Judge Jansen found the evidence sufficient to demonstrate the presence of a totally disabling respiratory impairment, but insufficient to establish the existence of

found the newly submitted medical opinion evidence sufficient to establish a material change in conditions as the new evidence showed the presence of pneumoconiosis. In accordance with the parties' stipulation, the administrative law judge credited claimant with twelve years of coal mine employment. The administrative law judge also found employer to be the responsible operator. Turning to the merits, the administrative law judge found the evidence sufficient to demonstrate the presence of a totally disabling respiratory impairment but insufficient to establish the existence of pneumoconiosis or that pneumoconiosis was a substantially contributing cause of claimant's totally disabling respiratory impairment. Benefits were, accordingly, denied.

On appeal, claimant challenges the findings of the administrative law judge on the existence of pneumoconiosis and disability causation. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence.³ The Director, Office of Workers' Compensation Programs (the Director), has

pneumoconiosis or that pneumoconiosis was a substantially contributing cause of claimant's disabling respiratory impairment. Benefits were, accordingly, denied. *See* Director's Exhibit 20. Claimant took no further action on this claim. Claimant filed his third application for benefits, the claim before us now, on November 23, 1998. *See* Director's Exhibit 1.

³ Employer incorrectly argues that this case is a request for modification pursuant to 20 C.F.R. §725.310 (2000). Claimant's prior claim was finally denied on October 3, 1997, and the present claim was filed on November 23, 1998, more than one year after the final denial of the prior claim. *See* 20 C.F.R. §§725.309, 725.310 (2000); Director's Exhibits 1, 20.

filed a letter indicating that he will not participate in this appeal.⁴

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 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 a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.1, 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant first contends that although the administrative law judge correctly considered all the evidence of record after determining that a material change in conditions had been established by the newly submitted evidence, he erred in finding that the existence of pneumoconiosis was not established by according greater weight to the earlier x-ray evidence of record.

In finding that the x-ray evidence of record did not establish the existence of pneumoconiosis, the administrative law judge permissibly accorded greater weight to readings by the majority of the better qualified readers who rendered interpretations which were negative for the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. 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). Further, the administrative law judge permissibly found that the most recent x-ray evidence did not establish the existence of pneumoconiosis because the physician who interpreted the 1999 x-ray as positive commented on the poor quality of the film and the physician who interpreted the 1998 films did not classify them in accordance with the regulations. *See* 20 C.F.R.

⁴ We affirm the administrative law judge's finding on the length of coal mine employment, the designation of employer as the responsible operator, and at 20 C.F.R. §725.309 (2000) as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

§§718.102(b), 718.202(a)(1); *Cranor v. Peabody Coal Co.*, 22 BLR 1-2, 1-5 (1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *see also York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766, 1-769 (1985); *Valazak v. Bethlehem Mines Corp.*, 6 BLR 1-282 (1983). Accordingly, we affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis.

Claimant next contends that the administrative law judge erred in evaluating the medical opinion evidence concerning the existence of pneumoconiosis based on the fact that the x-ray evidence was found to be negative and the blood gas tests did not establish disability. Specifically, claimant contends that the administrative law judge erred in not according greater weight to the opinion of Dr. Kiser, who found pneumoconiosis and asthma, because it was the most recent opinion of record.

Considering all the medical opinion evidence relevant to the existence of pneumoconiosis at 718.202(a)(4), the administrative law judge permissibly accorded greater weight to the opinions of Drs. Branscomb, Dahhan and Vuskovich, than to the opinions of Drs. Anderson, Clarke, Jackson, Kiser, Powell and Williams because their opinions were better supported by the objective medical evidence, they offered specific clinical findings and objective medical evidence to support their opinions, and they thoroughly explained why claimant's symptoms, pulmonary function studies and blood gas studies were consistent with asthma, but inconsistent with pneumoconiosis. In contrast, the administrative law judge accorded little weight to the opinions of the physicians who diagnosed pneumoconiosis because they offered no explanation, other than positive x-ray interpretations, for their diagnosis of pneumoconiosis. This was proper. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Further, although the administrative law judge noted that Dr. Kiser was the only physician who opined that claimant suffered from both pneumoconiosis and asthma, and that Dr. Kiser performed the most recent examination of claimant, nonetheless the administrative law judge found that Drs. Branscomb, Dahhan and Vuskovich offered more persuasive explanations for their opinions that claimant did not suffer from pneumoconiosis; the administrative law judge also observed that Drs. Branscomb and Dahhan possessed superior qualifications in the areas of internal and pulmonary medicine. This was proper. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel, supra*; *Stark, supra*. Accordingly, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis by medical opinion evidence is affirmed. Further, as claimant has failed to challenge the administrative law judge's findings under any of the other methods provided for establishing the existence of pneumoconiosis, his finding that the record evidence in this case fails to establish the existence of pneumoconiosis must be affirmed. *Skrack v. Island*

Creek Coal Co., 6 BLR 1-710 (1983). Because claimant has failed to establish the existence of pneumoconiosis, an essential element of entitlement, we need not consider claimant's argument on disability causation. See 20 C.F.R. § 718.1, 718.3; *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Trent, supra*; *Perry, supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge