

BRB No. 03-0160 BLA

FRED MORGAN)
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 Claimant-Petitioner)
)
 v.)
)
 KENTUCKY GEM COAL COMPANY) DATE ISSUED: 09/12/2003
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 and)
)
 KENTCUKY CENTRAL 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 - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Phillip Lewis, Hyden, Kentucky, for claimant.

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (01-BLA-0857) of Administrative Law Judge Daniel J. Roketenetz rendered on a 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 The administrative law judge found eleven and one-quarter years of coal mine employment established based on his review of the record, and concluded that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis and a totally disabling respiratory impairment, elements of entitlement previously adjudicated against claimant. The administrative law judge, therefore, found that a material change in conditions was not established pursuant to *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Accordingly, benefits were denied.²

On appeal, claimant contends that the evidence is sufficient to establish the existence of pneumoconiosis based on x-ray evidence and medical opinion evidence pursuant to 20 C.F.R. ' 718.202(a)(1) and (4). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers= Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.

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 establish 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. ' ' 718.3, 718.202, 718.203, 718.204. Failure to establish any 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*).

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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² Claimant filed his first claim for benefits on October 16, 1985. That claim was denied on May 24, 1991. Director=s Exhibit 45. The denial was affirmed by the Board on May 26, 1994. Director=s Exhibit 16-01. Claimant filed the instant duplicate claim on November 1, 1999.

Claimant contends that the administrative law judge erred in his weighing of the new x-ray evidence by relying on the numerical superiority of the negative x-ray evidence. We disagree. Of the numerous readings of the four new x-rays, one was a positive reading by a B-reader and the remaining readings were negative readings by dually, qualified, board-certified, B-readers. The administrative law judge accorded greater weight to the negative readings by the dually qualified physicians than to the single positive reading by the B-reader. Decision and Order at 7; Director=s Exhibits 8, 14-16, 32, 35, 40; Claimant=s Exhibit 1. This was rational. 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). Accordingly, we affirm the administrative law judge=s finding that the new x-ray evidence failed to establish the existence of pneumoconiosis and a material change in conditions.³

Claimant also argues that the administrative law judge erred in his weighing of the new medical opinion evidence by according greater weight to the opinion of Dr. Broudy than to the opinions of Drs. Varghese and Collett. Claimant=s argument is without merit. Drs. Varghese and Collett, both treating physicians, diagnosed a chronic obstructive pulmonary disease and pneumoconiosis. Director=s Exhibits 13, 18, 37, 41. Dr. Broudy found claimant did not suffer from pneumoconiosis. Director=s Exhibit 32. The administrative law judge found that the opinions of Drs. Varghese and Collett were not well-reasoned and documented as they failed to provide adequate explanation for their conclusions and failed to consider claimant=s smoking history. This was rational. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). Further, although noting that the opinions of Drs. Varghese and Collett, claimant=s treating physicians, were entitled to greater weight, 20 C.F.R. ' 718.104(d), the administrative law judge permissibly accorded their opinions little weight as he found them to be poorly reasoned and documented. See *Eastover Mining Co. v. Williams*, 2003 WL 21756342 (6th Cir. July 31, 2003); *Jericol v. Mining, Inc. v. Napier*, 301 F.3d 703, BLR (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 834, 22 BLR 2-320 (6th Cir. 2002). Thus, the administrative law judge rationally found Dr. Broudy=s opinion more persuasive as he found it to be better reasoned, documented, and supported by the objective evidence of record. *Clark*, 12

³ The administrative law judge=s finding that the existence of pneumoconiosis cannot be established at 20 C.F.R. ' 718.202(a)(2), (3) is affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

BLR 1-149; *Dillon*, 11 BLR 1-113; *Fields*, 10 BLR 1-19; *King*, 8 BLR 1-262. Accordingly, we affirm the administrative law judge=s finding that the new medical opinion evidence failed to establish the existence of pneumoconiosis and, thereby, a material change in conditions.

The administrative law judge is empowered to weigh the evidence and to draw his own inferences therefrom, *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, *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge=s finding that the evidence of record is insufficient to establish the existence of pneumoconiosis as it is supported by substantial evidence and is in accordance with law. Because claimant failed to establish the existence of pneumoconiosis, as an essential element of entitlement, the administrative law judge properly denied benefits on this claim. *See Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.⁴

⁴ We will not address claimant=s general contention that the evidence of record is sufficient to establish a totally disabling respiratory impairment as it is not sufficiently briefed, *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge