BRB No. 01-0340 BLA

GORDON COUCH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	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 of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

McKinnley Morgan (Morgan, Bailey & Collins), Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLC), Washington, D.C., for employer.

Edward Waldman (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 DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-1097) of Administrative Law

Judge Robert L. Hillyard denying benefits 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] Claimant filed a duplicate claim on March 8, 1993.[2] In a Decision and Order

[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,

dated February 3, 1995, Administrative Law Judge Robert D. Kaplan found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Accordingly, Judge Kaplan denied benefits.

Claimant subsequently filed an appeal with the Board. However, while his appeal was pending, claimant filed a Motion to Remand, along with a June 2, 1995 medical report from Dr. Dineen. Claimant requested that the Board remand his case to the district director for purposes of modification. By Order dated July 31, 1995, the Board granted claimant's motion and remanded the case to the district director for modification proceedings. *Couch v. Shamrock Coal Co.*, BRB No. 95-1063 BLA (July 31, 1995) (Order) (unpublished). The Board also indicated that Dr. Dineen's medical report would be forwarded to the district director.

In a Decision and Order dated September 13, 1996, Judge Kaplan found that the

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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). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on November 14, 1975. Director's Exhibit 46. The district director denied benefits on July 19, 1979. *Id.* There is no indication that claimant took any further action in regard to his 1975 claim.

Claimant filed a second claim on March 8, 1993. Director's Exhibit 1.

newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). Judge Kaplan, therefore, found that the evidence was sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000) and a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Turning to the merits of claimant's 1993 claim, Judge Kaplan found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). Accordingly, Judge Kaplan denied benefits. By Decision and Order dated August 27, 1997, the Board, *inter alia*, affirmed Judge Kaplan's findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). *Couch v. Shamrock Coal* Co., BRB No. 96-1709 BLA (Aug. 27, 1997) (unpublished). By Order dated June 23, 1998, the United States Court of Appeals for the Sixth Circuit concluded that Judge Kaplan's finding that claimant failed to establish the existence of pneumoconiosis was supported by substantial evidence. *Couch v. Shamrock Coal Co.*, No. 97-4018 (6th Cir. June 23, 1998) (Order) (unpublished). The Sixth Circuit, therefore, denied claimant's petition for review. *Id.*

Claimant subsequently filed a request for modification. Administrative Law Judge Robert L. Hillyard (the administrative law judge), after crediting claimant with thirty-two years of coal mine employment, found that the newly submitted evidence was "arguably" sufficient to establish that claimant's disability had worsened since the issuance of Judge Kaplan's September 13, 1996 Decision and Order. The administrative law judge, therefore, found that claimant had established a change in conditions pursuant to 20 C.F.R. §725.310 (2000). In his consideration of the merits of claimant's 1993 claim, the administrative law judge found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). The administrative law judge, however, found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(a)(4) (2000). The administrative law judge also found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant argues that the revised regulations dictate that the opinion of his treating physician, Dr. Dineen, should have been accorded greater weight by the administrative law judge in his consideration of the evidence. Employer and the Director, Office of Workers' Compensation Programs, respond in support of the administrative law judge's denial of

benefits.[3]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Claimant contends that the revised regulations dictate that the opinion of his treating physician, Dr. Dineen, should have been accorded greater weight by the administrative law judge. We disagree. Revised Section 718.104(d) provides that an adjudicator must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. 20 C.F.R. §718.104(d). However, this regulation only applies to evidence developed after January 19, 2001. *See* 20 C.F.R. §718.101(b).

[3]Inasmuch as no party challenges the administrative law judge's length of coal mine employment finding or his finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(a)(3) (2000), these findings are affirmed. 20 C.F.R. §718.202(a)(1)-(a)(3); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer also contends that the administrative law judge erred in finding the evidence sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000).

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises, has held that the opinions of treating physicians are entitled to greater weight than those of non-treating physicians. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). However, in considering whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4)(2000), the administrative law judge acted within his discretion is according less weight to Dr. Dineen's finding of pneumoconiosis because the x-ray that he interpreted as positive for pneumoconiosis was interpreted by Dr. Sargent, a dually qualified B reader and Board-certified radiologist, as negative for pneumoconiosis,[4] thus calling into question the reliability of Dr. Dineen's opinion. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984)*; Arnoni v. Director, OWCP,* 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order 8; Director's Exhibits 79, 80, 83. The administrative law judge also found, *inter alia*, that the opinions of Drs. Fino and Dahhan, that claimant did not suffer from pneumoconiosis, were entitled to great weight because they were well reasoned and supported by the objective medical evidence. Decision and Order at 8; Director's Exhibit 88; Employer's Exhibit 1. Because the administrative law judge properly discredited Dr. Dineen's opinion, the administrative law judge was not required to mechanistically give greater weight to Dr. Dineen's opinion based upon his status as claimant's treating physician. *See generally Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995).

Claimant's remaining statements neither raise any substantive issue nor identify any specific error on the part of the administrative law judge in determining that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(4). We, therefore, affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis. *See 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).

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[4]Dr. Dineen, a B reader, interpreted claimant's December 7, 1998 x-ray as positive for pneumoconiosis. Director's Exhibit 79. Dr. Sargent, a dually qualified B reader and Board-certified radiologist, interpreted this x-ray as negative for pneumoconiosis. Director's Exhibit 83.

Dr. Magnes, a physician whose radiological qualifications are not found in the record, also interpreted claimant's December 7, 1998 x-ray. Although Dr. Magnes found, *inter alia*, changes consistent with an obstructive pulmonary disease and an old granulomatous disease, he did not interpret the film as revealing the presence of pneumoconiosis. Director's Exhibit 79.

In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See 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*). Consequently, we need not address employer's challenge to the administrative law judge's finding at 20 C.F.R. §725.310 (2000). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge