BRB No. 01-0409 BLA

GARY RASNAKE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BBC COAL COMPANY	)	
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	DATE ISSUED:_____
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Gary Rasnake, Cleveland, Virginia, *pro se*.

H. Ashby Dickerson (Penn, Stuart, & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant,[1] without the assistance of counsel,[2] appeals the Decision and Order (99-

[1]Claimant is Gary Rasnake, the miner, who filed his present claim for benefits on October 1, 1997. Director's Exhibit 1. The miner's first claim, filed on January 10, 1996, was denied on March 27, 1996. Director's Exhibit 44.

The record also contains a letter from claimant, dated June 21, 1996, in which he appeals the March 1996 denial. Director's Exhibit 44. In a letter submitted by employer's

BLA-0214) of Administrative Law Judge Richard A. Morgan denying benefits on a miner's 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).[3] Initially, the administrative law

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counsel, employer refers to a September 4, 1996 denial, but evidence of this denial is not in the record. *Id.* Therefore, it is unclear whether claimant also appealed the September 4, 1996 denial of his first claim. However, we deem any error the administrative law judge may have made in failing to resolve this issue, *i.e.* whether this case should be considered as a modification rather than a duplicate claim, to be harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), inasmuch as the administrative law judge considered all the evidence to determine whether claimant is entitled to benefits on the merits of his case. *See generally Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

[2]Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[3]The Department of Labor has amended the regulations implementing the Federal

judge credited claimant with "at least 13.8 years" of coal mine employment. Decision and Order at 3. The administrative law judge found that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000) by establishing total respiratory disability. Decision and Order at 19. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) (2000). Decision and Order at 21-26. The administrative law judge also found the evidence sufficient to establish total respiratory disability, but insufficient to establish that claimant's total respiratory disability was due to his pneumoconiosis. Decision and Order at 29-31. Accordingly, benefits were denied.

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.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[4]

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by the Act, 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates*, Inc., 380 U.S. 359 (1965).

[4]We affirm the administrative law judge's length of coal mine employment finding inasmuch as it is not adverse to claimant and is unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to Section 718.202(a)(1) (2000), the record contains numerous x-ray readings of the twenty-seven x-rays contained in the record. Only seven of these interpretations were read as positive for the existence of pneumoconiosis. "Based upon the qualifications of the readers, the number of the readings, and the accompanying comments," the administrative law judge found that only the positive interpretation of the February 27, 1992 x-ray was unchallenged, *i.e.* not subsequently read as negative by another qualified physician. Decision and Order at 22. The administrative law judge ultimately determined that the other five x-rays, which had been read as positive, were negative for the existence of pneumoconiosis "based upon the number of negative readings by readers who are B readers[5] or board certified radiologists or dually qualified." *Id.* Therefore, the administrative law judge concluded that claimant failed to establish the existence of pneumoconiosis based on the x-ray evidence because he found that "the majority of the negative readings are by the most qualified physicians." *Id.* We affirm the administrative law judge's Section 718.202(a)(1) (2000) finding inasmuch as he properly held that claimant failed to establish the existence of pneumoconiosis pursuant to this subsection. *See* 20 C.F.R. §718.202(a)(1); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984).

Pursuant to 20 C.F.R. §718.202(a)(2) (2000), the administrative law judge considered whether the biopsy evidence established the existence of pneumoconiosis. In doing so, the administrative law judge reviewed the opinions of Dr. Sides, the reviewing pathologist, and Dr. Naeye. Dr. Sides found scattered black particulate pigment of both the carbonaceous and anthracotic type. Director's Exhibit 11. Dr. Naeye stated that there was not enough lung tissue available on the slides provided to determine whether coal workers' pneumoconiosis is present, but noted that the lung tissue that is available has none of the findings of coal workers' pneumoconiosis. Director's Exhibit 28. The revised regulations explicitly provide that "[a] finding in an autopsy or biopsy of anthracotic pigmentation. . .shall not be sufficient, by itself, to establish the existence of pneumoconiosis," and, therefore, the administrative law judge permissibly found that there is no biopsy evidence of pneumoconiosis. 20 C.F.R.

[5]A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

§718.202(a)(2). Accordingly, we affirm the administrative law judge's Section 718.202(a)(2) (2000) finding. *See* 20 C.F.R. §718.202(a)(2); *Hapney v. Peabody Coal Co.*, 22 BLR 1-104 (2001)(*en banc*, with Smith, J. and Dolder, J., dissenting in part and concurring in part).

Moreover, the administrative law judge properly found that claimant is not entitled to any of the presumptions set out at 20 C.F.R. §718.202(a)(3) (2000). Because there is no evidence of complicated pneumoconiosis in the record,[6] the presumption found at 20 C.F.R. §718.304 is inapplicable to this claim. *See* 20 C.F.R. §718.304. Additionally, the presumptions found at 20 C.F.R. §§718.305, 718.306 are inapplicable to the instant case which involves a living miner's claim filed after January 1, 1982. *See* 20 C.F.R. §§718.305(e), 718.306. Therefore, we affirm the administrative law judge's Section 718.202(a)(3) (2000) finding. *See* 20 C.F.R. §718.202(a)(3).

[6]Drs. Haines, Cooper, Wheeler, and Scott, the four physicians who interpreted the two CT scans in the record, found a lung density of two centimeters or greater, but did not attribute this mass to pneumoconiosis. Director's Exhibits 11, 27. Accordingly, the administrative law judge permissibly found that the CT scan evidence does not establish simple or complicated pneumoconiosis. *See generally Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

Pursuant to Section 718.202(a)(4), the administrative law judge thoroughly discussed all of the medical opinions in the record and permissibly discredited the physicians' opinions that are supportive of claimant's burden, as discussed below. Decision and Order at 12-18, 22-26. Specifically, the administrative law judge accorded less weight to the opinion of Dr. Forehand, who found chronic bronchitis and interstitial lung disease likely due to smoking and coal dust exposure, because this physician "grossly under assessed" claimant's smoking history.[7] Decision and Order at 25; *see Sellards v. Director, OWCP*, 17 BLR 1-77 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). After noting that Dr. Shukla was claimant's treating physician for three and one-half years, the administrative law judge discredited his opinion as well as Dr. Greenfield's inasmuch as he found that these two physicians failed to fully explain their diagnoses of pneumoconiosis.[8] Decision and Order at 23-25; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Crosson v. Director, OWCP*, 6 BLR 1-809 (1984); *Duke v. Director, OWCP*, 6 BLR 1-673, 1-675 (1983).

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[7]Dr. Forehand noted a smoking history of one pack per day for ten years. Director's Exhibit 10. Considering claimant's testimony and the smoking histories claimant provided to various physicians over the years, the administrative law judge rationally determined, *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985), that claimant had a smoking history of at least thirty-five pack years. Decision and Order at 4-5.

[8]Specifically, the administrative law judge found that "Dr. Shukla suggests the miner likely has an occupational dust disease but does not fully explain why" and that "Dr. Greenfield concluded with little or no explanation that the miner's COPD was secondary to smoking." Decision and Order at 25.

Moreover, the administrative law judge declined to credit Dr. Sargent's diagnosis of coal workers' pneumoconiosis which was based on a positive x-ray contrary to the weight of the x-ray evidence.[9] Decision and Order at 25; *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *see generally Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Finally, the administrative law judge gave more weight to the opinion of Dr. Castle, who found that claimant did not suffer from pneumoconiosis, than to the opinions of Drs. Smiddy, Sy, and Kanwal,[10] based on Dr. Castle's superior qualifications.[11] *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Therefore, the administrative law judge concluded that "claimant has not met his burden of proof in establishing the existence of pneumoconiosis." Decision and Order at 26.

Inasmuch as an administrative law judge has broad discretion in assessing the evidence of record to determine whether a party has met its burden of proof, *see Maddaleni*

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[9]Dr. Sargent stated in his report that "[i]t is my impression that [claimant] is suffering from simple coal workers' pneumoconiosis based on his positive chest x-ray." Director's Exhibit 44-29.

[10]Drs. Smiddy and Sy found the existence of pneumoconiosis and Dr. Kanwal found chronic obstructive pulmonary disease due to smoking and coal dust exposure. Director's Exhibits 12, 44-11; Claimant's Exhibit 1.

[11]The record reveals that Dr. Castle is Board-certified in internal medicine and pulmonary disease and is a B-reader, whereas Drs. Sy and Smiddy are Board-eligible in pulmonary disease. Employer's Exhibit 13; Director's Exhibit 12; Claimant's Exhibit 9. Dr. Kanwal's qualifications are not in the record.

v. Pittsburg & Midway Coal Mining Co., 14 BLR 1-135 (1990); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *see Markus v. Old Ben Coal Co.*, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983)(administrative law judge is not bound to accept opinion or theory of any given medical officer, but weighs evidence and draws his own inferences); *Anderson*, *supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we hold that the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis based on the medical opinion evidence. *See* 20 C.F.R. §718.202(a)(4); *Ondecko*, *supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Additionally, while the administrative law judge cited *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), he did not specifically weigh all of the relevant evidence together to determine whether claimant established the existence of pneumoconiosis pursuant to Section 718.202(a) (2000). However, because the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis pursuant to each of the subsections found at Section 718.202(a)(1)-(a)(4) (2000), *see* discussion, *supra*, it was unnecessary for the administrative law judge to do so. Therefore, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a).

Inasmuch as we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, *see* 20 C.F.R. §718.202(a), a requisite element of entitlement under Part 718, *see Trent*, *supra*; *Perry*, *supra*, we also affirm his denial of benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge