BRB No. 99-0306 BLA

BETTY LOU OSKEY (Widow of LEO P. OSKEY)	)	
Claimant-Petitioner	)	
v.	)	
	)	DATE ISSUED:
PEABODY COAL COMPANY	)	
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order on Remand of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Betty Lou Oskey, Glouster, Ohio, *pro se*.

Laura Metcoff Klaus (Arter & Hadden LLP), Washington, D.C., for employer.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order on Remand (96-BLA-0332) of Administrative Law Judge Donald W. Mosser 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). This case is before the Board for the second time. In his original decision, the administrative law judge credited the miner with twenty-one years of coal mine employment, based on employer's concession, and adjudicated the miner's duplicate claim[2] and the survivor's claim pursuant to 20 C.F.R. Part 718.

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[1] Claimant is the widow of the miner, Leo P. Oskey, who died on December 4, 1994. Director's Exhibits 9, 11. The miner filed his most recent claim on July 16, 1994. Director's Exhibit 1. Claimant filed her survivor's claim on December 13, 1994. Director's Exhibit 9. The administrative law judge's denial of the survivor's claim was affirmed by the Board on April 29, 1998, *see Oskey v. Peabody Coal Co.*, BRB No. 97-1236 BLA (Apr. 29, 1998)(unpub.) and, therefore, the miner's claim is the only claim presently before the Board.

[2] The miner filed his initial application for benefits on December 24, 1981. Director's Exhibit 24. By letter dated June 9, 1982, the Department of Labor (DOL) informed the miner that his claim would be denied by reason of abandonment if he did not respond within thirty days. *Id*. The record contains no response to the June 1982 letter. The miner filed a second application for benefits on October 3, 1983. Director's Exhibit 25. This claim was finally denied by the district director on November 2, 1984, finding that the miner established none of the requisite elements of entitlement. *Id*. No further action was taken on this claim. On April 22, 1985, the miner filed his third application for benefits. Director's Exhibit 26. This claim was denied by the district director on December 3, 1985, again finding none of the requisite elements of entitlement established. *Id*. The miner filed a fourth application for benefits on July 6, 1988. Director's Exhibit 27. This claim was denied by the district director on January 26, 1989, finding that the miner failed to establish a material change in conditions and also that the evidence failed to establish any of the requisite elements of entitlement. *Id*. In addition, in a letter dated July 30, 1992, the district director denied the miner's request for a hearing because it was filed more than one year after the last denial in the case and, therefore, could not be a request for modification. *Id*. The miner filed a fifth application for benefits on August 7, 1992. Director's Exhibit 28. This claim was denied by the district director on December 31, 1992, finding that the miner failed to establish any of the requisite elements of entitlement. *Id*. The miner, through his attorney, requested a hearing. *Id*.

With regard to the miner's claim, the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge therefore concluded that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). With regard to the survivor's claim, the administrative law judge found the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in both the miner's duplicate claim and the survivor's claim.

Pursuant to claimant's appeal, the Board affirmed the denial of benefits in

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However, in a letter dated February 17, 1993, the district director informed the miner's attorney that it did not have a signed statement from the miner authorizing the attorney to act on the miner's behalf. *Id.* On March 23, 1994, the miner's attorney sent the DOL a letter in response to a letter dated March 8, 1994, which provided the necessary documentation authorizing him to represent the miner and inquiring if this information would be sufficient to allow the miner's old claim to be reopened. *Id*. There is no indication in the record that the DOL responded to the March 23, 1994 letter. The miner filed his sixth and most recent claim on July 16, 1994. Director's Exhibit 1. In his Decision and Order, the administrative law judge stated that "it appears as if [the miner's] fifth claim was never finally denied," Decision and Order at 11, and, therefore, the administrative law judge consolidated the evidence submitted with the miner's fifth and sixth claims, stating that the miner's "fifth and sixth claims, even if treated as one claim, still constitute a duplicate claim." *Id*.

the survivor's claim, holding that the administrative law judge rationally found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). With regard to the miner's duplicate claim, the Board affirmed the administrative law judge's finding that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis. However, the Board vacated the denial of benefits in the miner's duplicate claim and remanded the miner's claim to the administrative law judge for further consideration. In particular, the Board held that the administrative law judge must also consider whether the newly submitted evidence is sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c) and, thus, sufficient to establish a material change in conditions pursuant to Section 725.309(d). The Board also instructed the administrative law judge that if, on remand, the administrative law judge finds the evidence is sufficient to establish a material change in conditions, he must then determine whether the evidence as a whole, old and new, is sufficient to establish entitlement to benefits under Part 718. *Oskey v. Peabody Coal Co.*, BRB No. 97-1236 BLA (Apr. 29, 1998)(unpub.).

On remand, the administrative law judge found the newly submitted medical evidence sufficient to establish total respiratory disability pursuant to Section 718.204(c) and, thus, found that claimant established a material change in conditions. However, the administrative law judge further found that the entirety of the medical evidence of record, old and new, was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits in the miner's claim. In response to claimant's appeal, employer urges affirmance of the denial of benefits in the miner's claim. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.

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). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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 under Part 718, claimant must establish that the miner suffered from the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis

is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Id.*

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. The administrative law judge, in the instant case, permissibly determined that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *See Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge, within a reasonable exercise of his discretion as trier-of-fact, found that the weight of the x-ray evidence, in particular the readings by the better qualified physicians, was negative for the existence of pneumoconiosis and, therefore, insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Decision and Order at 5-7; Director's Exhibits 3, 12, 25-28; Claimant's Exhibit 3; *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); *Edmiston v. F & R Coal Co.*, 14 BLR 1-710 (1990); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Consequently, we affirm the administrative law judge's finding that the x-ray evidence of record failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).[3]

[3] Moreover, inasmuch as there is no biopsy or autopsy evidence, the miner has not established the existence of pneumoconiosis under Section 718.202(a)(2). 20 C.F.R. §718.202(a)(2). Likewise, the administrative law judge properly found that claimant was not entitled to any of the presumptions set forth under 20 C.F.R. §718.202(a)(3): there is no evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304; the claim was not filed prior to January 1, 1982, *see* 20 C.F.R. §718.305(e); and the instant case involves a living miner's claim, *see* 20 C.F.R. §718.306(a). Decision and Order at 9; 20 C.F.R.

§718.202(a)(2), (a)(3).

In addition, we affirm the administrative law judge's finding that the medical opinions of record are insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). In discussing the medical opinions, the administrative law judge permissibly accorded little weight to the opinion of Dr. Howell, that the miner's restrictive lung disease - chronic obstructive pulmonary disease was at least partially due to occupational exposure, because it was not supported by its underlying documentation and the physician failed to explain the basis for his diagnosis. Decision and Order at 6; Director's Exhibit 26; *see Lafferty v. Cannelton Industries,* Inc., 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985). The administrative law judge also found the September 1988 opinion of Dr. Foglesong entitled to little weight inasmuch as he reasonably found that this opinion was equivocal and not supported by the underlying documentation.[4] Decision and Order at 6; Director's Exhibit 27; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Lucostic, supra; Peskie, supra*. The administrative law judge also reasonably found that Dr. Foglesong failed to adequately explain his conclusions. *Id*. Similarly, the administrative law judge reasonably found that the 1992 opinion of Dr. Foglesong as well as Dr. Bontrager's 1995 opinion were entitled to little weight because these opinions were equivocal as to the existence of pneumoconiosis.[5] Decision and Order at 7; 1997 Decision and Order at 14; Director's Exhibits 20, 28; *Justice, supra*; *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

Moreover, the administrative law judge found entitled to the greatest weight, the medical opinions of Drs. Long and Grodner, in which the physicians reviewed the evidence of record and opined that the miner was not suffering from

[4] Following his September 1988 examination of the miner, Dr. Foglesong diagnosed a restrictive lung disease with a mild obstructive component suspected, organic heart disease, recent syncope and osteoarthritis of the knees, and further opined that the etiology of these conditions was ischemic heart disease and exogenous obesity. However, Dr. Foglesong stated with regard to the degree of severity of any pulmonary impairment "pneumoconiosis - mild to minimal" and restrictive lung disease, but also stated "exogenous obesity causing restrictive lung disease." Director's Exhibit 27.

[5] The administrative law judge found that Dr. Foglesong stated that he "suspect[ed] pneumoconiosis," Director's Exhibit 28, and Dr. Bontrager "assume[d] that [the miner's] COPD was secondary to a type of pneumoconiosis," Director's Exhibit 20. 1997 Decision and Order at 14.

pneumoconiosis, because these opinions were best supported by the evidence of record. Decision and Order at 7; Director's Exhibit 5; Employer's Exhibit 1; *Lafferty, supra; Clark, supra; Lucostic, supra*; *see also Pastva v. The Youghiogheny & Ohio Coal Co.*, 7 BLR 1-829 (1985). The administrative law judge further found that Dr. Grodner's opinion was entitled to greater weight based on his superior professional qualifications, as Board-certified in Internal Medicine and Pulmonary Diseases. Decision and Order at 7; Employer's Exhibit 1; *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Inasmuch as the administrative law judge considered all of the relevant medical opinion evidence and the Board may not reweigh the evidence or substitute its own inferences on appeal, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we affirm the administrative law judge's finding that the medical opinion evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Since claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), a necessary element of entitlement under Part 718, an award of benefits in the miner's claim is precluded.[6] *See Trent, supra; Perry, supra*.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

[6] In light of our affirmance of the administrative law judge's finding that the medical evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), a necessary element of entitlement, *see* discussion*, supra*, error, if any, in the administrative law judge's findings pursuant to Section 725.309(d) is harmless. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge