BRB No. 01-0786 BLA

MALVERN FREDERICK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
OLD BEN COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
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 - Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson, Chicago, Illinois, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denying Benefits (98-BLA-0125) of Administrative Law Judge Donald W. Mosser with respect to 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] This is the second time that this case has been before the Board. In his initial Decision and Order, the administrative law

[1]Claimant is the miner, Malvern Frederick, who filed his application for benefits on August 3, 1993. Director's Exhibit 1.

judge credited claimant with twenty-two years of coal mine employment, based upon the stipulation of the parties, and considered the claim, filed on August 3, 1993, pursuant to the regulations set forth in 20 C.F.R. Part 718.[2] Director's Exhibit 1. The administrative law judge determined that the evidence of record was insufficient to establish either the existence of pneumoconiosis under 20 C.F.R. §718.202(a) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c) (2000).[3] Accordingly, benefits were denied.

Upon consideration of claimant's appeal, the Board affirmed the administrative law judge's findings with respect to the length of claimant's coal mine employment and those made pursuant to Sections 718.202(a)(2), (a)(3), 718.204(c)(2) and (c)(3) (2000). The Board vacated the administrative law judge's findings under Sections 718.202(a)(1), (a)(4), 718.204(b), (c)(1), and (c)(4) (2000), however, and remanded the case to the administrative law judge for reconsideration of the evidence relevant to these subsections. *Frederick v. Old Ben Coal Co.*, BRB No. 99-0711 BLA (Sept. 19, 2000)(unpub.). On remand, the administrative law judge again determined that claimant did not establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Accordingly, benefits were denied. Claimant argues on appeal that the administrative law judge did not properly weigh the x-ray evidence and the medical opinions of record. Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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[2]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 (2001). Unless otherwise noted, all citations are to the amended regulations.

[3]The regulations pertaining to the existence of a totally disabling respiratory or pulmonary impairment, previously set forth in 20 C.F.R. §718.204(c) (2000), are now set forth in 20 C.F.R. §718.204(b).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 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. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to Section 718.202(a)(1), the administrative law judge included Dr. Fisher's positive x-ray interpretation, which he had omitted from his prior Decision and Order, and found that the record contained six positive and twenty negative readings of six chest x-rays. Decision and Order on Remand at 3. The administrative law judge concluded, "[b]ased upon the majority of readings by the most highly qualified readers and the two most recent x-rays of record," that the x-ray evidence did not establish the existence of pneumoconiosis under Section 718.202(a)(1). Decision and Order on Remand at 4. Claimant argues that this finding must be vacated, as the administrative law judge "counted heads" to resolve the conflict in the x-ray evidence. Claimant's Brief at 8. This contention is without merit. In determining that the x-ray evidence was insufficient to support a finding of pneumoconiosis, the administrative law judge acted within his discretion in considering both quantitative and qualitative factors in weighing the x-ray readings. *See Ziegler Coal Co. v. Kelley*, 112 F.3d 839, 21 BLR 2-92, 2-100 (7th Cir. 1997). Thus, we affirm his finding under Section 718.202(a)(1), as it is rational and supported by substantial evidence.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Selby, Branscomb, Tuteur, Fino, Cohen, Combs, Krantz, and Kumar. Director's Exhibits 12, 31, 33; Employer's Exhibits 1, 3, 5, 7-10; Claimant's Exhibits 1, 3, 4. Drs. Selby, Branscomb, Tuteur and Fino generally concluded that claimant does not have a coal dust induced pulmonary condition and that any respiratory or pulmonary impairment suffered by claimant was attributable to conditions external to his lungs. Drs. Cohen, Combs, Krantz, and Kumar determined that claimant is suffering from a restrictive pulmonary impairment in which coal dust exposure has played a significant role. After reviewing each opinion in detail, the administrative law judge stated that:

> ...[I] continue to place great weight on the opinions of Drs. Selby, Branscomb, Tuteur, and Fino. Their explanations are bolstered by the underlying medical evidence, and they have thoroughly and logically explained why Mr. Frederick's other serious health conditions - his cardiac condition, back injury and pain, and obesity - play the major roles in his restrictive pulmonary defect. Although I have not completely discounted the opinions of Drs. Cohen, Combs, Krantz and Kumar, I continue to find the opinions of Drs. Tuteur, Branscomb, and Fino more persuasive. Accordingly, I find that Mr. Frederick has not established the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Decision and Order on Remand at 10-11.

Claimant argues that the administrative law judge should not have credited Dr. Tuteur's opinion, as contrary to the other physicians of record, Dr. Tuteur did not diagnose a restrictive impairment and did not take into account the valid pulmonary function study obtained in 1994. Claimant further asserts that the administrative law judge erred in finding that Dr. Tuteur attributed claimant's restrictive impairment to his nonrespiratory and nonpulmonary conditions and that Dr. Tuteur's identification of obesity as the sole source of claimant's breathing problems is not supported by the medical evidence of record. Finally, claimant contends that the opinions of Drs. Selby, Branscomb, and Fino with respect to the cause of the restrictive impairment cannot be credited, as they are not reasoned and documented on this issue.

These contentions are without merit. In his Decision and Order on Remand, the administrative law judge determined that upon consideration of all of the relevant medical reports of record, he was most persuaded by the consensus of opinion that any breathing problems suffered by claimant are caused by factors unrelated to dust exposure in coal mine employment. The administrative law judge did not rest his conclusion upon a finding that claimant is not suffering from a restrictive impairment. Thus, the administrative law judge's did not rely upon the portion of Dr. Tuteur's opinion in which the physician questioned the validity of the diagnosis of a restrictive defect based upon the pulmonary function studies of record.

Moreover, Dr. Tuteur did not exclude the possibility that claimant has a restrictive defect; rather, he acknowledged that some of the values produced in claimant's pulmonary function studies indicated the presence of a restrictive impairment, but that this conclusion was not supported by the remaining pulmonary function values, claimant's blood gas studies, and the chest x-ray interpretations of record. Claimant's Exhibit 4 at 15-20, 29; Employer's Exhibit 7 at 10-14. Dr. Tuteur also indicated that obesity and adhesions from claimant's cardiac procedures may have contributed to the apparent reduction in claimant's total lung capacity. Employer's Exhibit 1. Finally,

although Dr. Tuteur did not explicitly identify any other sources of claimant's putative restrictive impairment, he indicated that claimant's breathing difficulties and exercise limitations are caused by arteriosclerotic heart disease, hypertension, diabetes, morbid obesity, musculoskeletal pain, and chronic obstructive pulmonary disease attributable to cigarette smoking. Employer's Exhibits 1, 7; Claimant's Exhibit 4. The administrative law judge rationally determined that these findings were supported by numerous references in claimant's medical record. The administrative law judge acted within his discretion, therefore, in crediting Dr. Tuteur's opinion under Section 718.202(a)(4). *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

The administrative law judge also rationally determined that the opinions of Drs. Selby, Branscomb, and Fino were entitled to great weight with respect to the issue of the existence of pneumoconiosis pursuant to Section 718.202(a)(4) on the ground that their conclusions are based upon thorough examinations and/or broad reviews of the medical evidence of record, are well-supported by the objective evidence, and are thoroughly explained. Specifically, the administrative law judge reviewed these opinions in detail and identified the manner in which each of the physicians' diagnoses better accorded with the medical evidence and was better explained than the opinions which attributed claimant's breathing problems to coal dust exposure.[4] Decision and Order on Remand at 5-11; *see Clark*, *supra*; *Tanner*, *supra*. The administrative law judge also acted within his discretion in concluding that Drs. Branscomb, Fino, and Tuteur raised valid criticisms of a study cited by Dr. Cohen in support of his conclusion that claimant's obesity has not produced restriction in his ability to breathe.[5] Director's Exhibit 33 at 2; Claimant's Exhibit 1; *see Clark*, *supra*; *Kuchwara*, *supra*. The administrative law judge rationally concluded, therefore, that the opinions of Drs. Selby, Branscomb, Fino, and Tuteur were

[4]The administrative law judge referred to the comments Drs. Fino, Tuteur, and Branscomb made regarding the inconsistencies between the values produced on claimant's pulmonary function studies, the inadequacies of the diffusion method used to measure claimant's total lung capacity, the absence of evidence of fibrosis on claimant's chest x-rays, and the consistency between claimant's symptoms and the effects of his cardiac disease, diabetes, back injury, and obesity. *See* Decision and Order on Remand at 5-11.

[5]Drs. Branscomb, Fino, and Tuteur indicated that the conclusions in the study to which Dr. Cohen referred may not be applicable to claimant, as the subjects of the study were mostly young women with no significant health conditions other than their obesity. Employer's Exhibits 7 at 17, 8 at 17, 9 at 35.

entitled to greater weight than the contrary opinions of record and that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See Clark, supra*; *Tanner, supra*; *Kuchwara, supra*.

Consequently, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a). Because we have affirmed the administrative law judge's determination that claimant has not proven an essential element of entitlement, we must also affirm the denial of benefits.[6] *See Trent, supra*; *Gee, supra*; *Perry, supra*.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

[6]Because we have affirmed the denial of benefits on the ground that claimant did not establish the existence of pneumoconiosis, we need not address claimant's allegations of error regarding the issue of total disability pursuant to 20 C.F.R. §718.204(b). Error, if any, in the administrative law judge's findings is harmless, in light of our affirmance of the administrative law judge's findings under 20 C.F.R. §718.202(a). *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge