BRB No. 02-0855 BLA

JAMES B. JOHNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PRO-LAND, INCORPORATED/KEM COAL	)	DATE ISSUED: 07/21/2003
	)	
and	)	
	)	
TRANSCO ENERGY c/o ACCORDIA EMPLOYERS SERVICE CORPORATION	)	
	)	
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.

James D. Holliday, Hazard, Kentucky, for claimant.

Lois A. Kitts (Baird & Baird, PSC), Pikeville, Kentucky, for employer.

Timothy S. Williams (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (01-BLA-127) of Administrative Law Judge Daniel J. Roketenetz rendered on this 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 employer stipulated to, and the administrative law judge found, sixteen years of coal mine employment. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] Considering the evidence submitted subsequent to the prior denial of benefits, and comparing it to evidence submitted with the prior claim, pursuant to *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), the administrative law judge found that while it was sufficient to establish total disability, it was insufficient to establish the existence of pneumoconiosis or causation and concluded therefore that claimant failed to establish entitlement to benefits.

On appeal, claimant contends that Dr. Baker=s opinion was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and total disability due to pneumoconiosis pursuant to Section 718.204(c). Employer responds, urging affirmance of the denial of benefits. The Director responds, arguing that because the administrative law judge found that total disability was established, an element previously adjudicated against claimant, the administrative law judge should have found that a material change in conditions was established and then considered all of the evidence of record, instead of just the new evidence, on the issue of entitlement under the Act. Accordingly, the Director contends that because the administrative law judge erred by reviewing only the evidence submitted with the duplicate claim on the merits, remand of this case is required unless the Board determines that the administrative law judge=s error was harmless.

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

[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 September 7, 1995, which was denied on February 12, 1996 because claimant failed to establish any element of entitlement. Director=s Exhibit 25. Claimant filed this duplicate claim for benefits on February 17, 2000. Director=s Exhibit 1.

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*).

Claimant contends that Dr. Baker=s opinion is sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4) and that the administrative law judge erred in overlooking pertinent testimony on deposition by Dr. Baker which would support a finding of legal pneumoconiosis.

In considering both Dr. Baker=s written report and his subsequent testimony on deposition and the definition of pneumoconiosis, the administrative law judge concluded that while the opinion appeared to meet the legal definition of pneumoconiosis, it did not withstand closer scrutiny because it was Aequivocal at best@ and Avague@. Decision and Order at 11. He therefore concluded that Dr. Baker=s findings did not rise to the level of establishing that claimant=s pulmonary condition was significantly related to or substantially aggravated by coal mine employment. This was rational. *See* 20 C.F.R. '718.201; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). Further, since the administrative law judge found that none of the other medical opinions of record were sufficient to establish the existence of pneumoconiosis, and claimant has not challenged that finding, we affirm the administrative law judge=s conclusion that the medical opinion evidence of record failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986).[3]

The Director contends that the administrative law judge erred in considering only the new evidence in finding that pneumoconiosis was not established on the merits, rather than considering all the evidence of record, both old and new, pursuant to *Ross*, 42 F.3d 993, 19 BLR 2-10. Director concedes, however, that remand of the case is not required if the Board determines that this was harmless error.

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

A review of the administrative law judge=s decision indicates that he considered all the evidence of record in making his finding on the existence of pneumoconiosis. The administrative law judge specifically refers to the negative x-ray evidence and the opinion of Dr. Wicker, that claimant did not have pneumoconiosis, which were submitted with the prior claim for benefits.[4] Decision and Order at 6, 15. Further, the administrative law judge stated that he found that the medical opinion evidence of record did not establish the existence of pneumoconiosis. Decision and Order at 12. Accordingly, as the administrative law judge considered all the evidence of record when he determined that claimant did not establish the existence of pneumoconiosis, we reject the Director=s contention that remand is required pursuant to *Ross, supra*. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

The administrative law judge is empowered to weigh the evidence and to draw his own inferences therefrom, *see 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, *see 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.[5]

[4] The administrative law judge noted that in his 1995 report, Dr. Wicker found no evidence of pneumoconiosis, and opined that claimant had adequate respiratory capacity. Decision and Order at 15; Director=s Exhibit 26. The administrative law judge also noted that x-rays taken January 21, 1976, and June 16, 1980, were read negative by B-readers. Decision and Order at 6; Director=s Exhibit 15.

[5] The administrative law judge=s disability causation finding need not be addressed as we have affirmed the administrative law judge=s finding that the existence of pneumoconiosis was not established on the record. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge