BRB No. 05-1007 BLA

WILBERT O. HOSEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
VALLEY CAMP COAL COMPANY	)	DATE ISSUED: 05/25/2006
	)	
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 – Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Wilbert O. Hosey, Wheeling, West Virginia, *pro se*.

William S. Mattingly (Jackson Kelly, PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denying Benefits (2004-BLA-6813) of Administrative Law Judge Daniel L. Leland 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). Claimant filed a subsequent claim on October 23, 2002.[1] Director's Exhibit 3. The district director issued

[1] Claimant filed his first claim for benefits on June 1, 1979, which was denied by the district director on December 18, 1979. Director's Exhibit 1. Claimant also filed a claim on February 24, 1988, which was denied by the district director on August 15, 1988. Director's Exhibit 2. In each instance, the district director denied benefits on the grounds that claimant failed to establish the existence of pneumoconiosis, that his

a Proposed Decision and Order awarding benefits on June 30, 2004. Director's Exhibit 43. Employer requested a hearing, which was held on September 1, 2004. In his Decision and Order, the administrative law judge found that the new evidence established that the miner was totally disabled by a respiratory or pulmonary impairment, and thus, that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[2] However, upon consideration of the evidence of record, the administrative law judge further found that claimant failed to establish that he suffered from pneumoconiosis. Accordingly, the administrative law judge denied benefits.

Claimant appeals, challenging the administrative law judge's denial of his claim. Employer responds, urging the Board to affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a). The Director, Office of Workers' Compensation, Programs, has declined to file a brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, are supported by substantial evidence, and are in accordance with 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).[3]

Based on our review of the evidentiary record, the administrative law judge's Decision and Order, employer's brief, and the issues raised on appeal, we affirm the

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pneumoconiosis arose out of coal mine employment, or that his total disability was due to pneumoconiosis. Director's Exhibits 1, 2.

[2] The administrative law judge mistakenly applied the prior regulation at 20 C.F.R. §725.309(d) (2000) in finding that claimant established a material change in conditions. We consider this error to be harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), as the parties do not contest the administrative law judge's finding that claimant is totally disabled. We further note that the administrative law judge's total disability finding is equally applicable under the revised regulation and warrants the conclusion that claimant established a change in an applicable condition of entitlement, thereby entitling claimant to consideration of his claim on the merits. *See* 20 C.F.R. §725.309; Decision and Order at 5-6.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant's last coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 1, 5.

administrative law judge's denial of benefits as it is supported by substantial evidence. Specifically, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis.

In weighing the x-ray evidence for pneumoconiosis at Section 718.202(a)(1), the administrative law judge properly noted that a November 12, 1979 x-ray, obtained in conjunction with claimant's first claim, had been read as positive for pneumoconiosis by Dr. Stuper, a Board-certified radiologist, but also as negative for pneumoconiosis by Dr. Cole, who was dually qualified as both a Board-certified radiologist and B-reader. Director's Exhibit 1; Decision and Order at 6. The administrative law judge found that claimant's second claim included an x-ray dated April 12, 1988, which had been read as negative for pneumoconiosis by Dr. Kennard, a dually qualified physician, and negative by Dr. Zaldivar, a B-reader. Director's Exhibit 2; Decision and Order at 6. Looking at the more recent x-rays, the administrative law judge found that there was only one positive reading for pneumoconiosis by Dr. Noble, a dually-qualified physician, of the x-ray dated December 20, 2002. Director's Exhibits 17, 19. This positive reading, however, was countered by a negative reading of the same film by Dr. Wiot, who was also dually qualified as a Board-certified radiologist and B-reader. Director's Exhibits 22, 29; Decision and Order at 3, 6. The administrative law judge further noted that a December 17, 2003 x-ray was read as negative by Dr. Renn, a B-reader, and an October 18, 2004 x-ray was read as negative for pneumoconiosis by Dr. Fino, a B-reader. Employer's Exhibits 3, 11; Decision and Order at 6. Because the administrative law judge analyzed both the quantity and quality of the x-ray readings, s*ee Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993), and he properly found that a preponderance of the x-ray evidence was negative for pneumoconiosis, we affirm as supported by substantial evidence the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

As there was no biopsy evidence of record, the administrative law judge properly found that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 6. Likewise, the administrative law judge properly determined that claimant could not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3) since he was unable to avail himself of the presumptions discussed therein. *Id*. We thus affirm the administrative law judge's findings pursuant to Sections 718.202(a)(2), (3).

The administrative law judge also properly found that claimant failed to establish the existence of pneumoconiosis based on the medical opinion evidence at 20 C.F.R. §718.202(a)(4). In this regard, the administrative law judge noted that there were two

physicians, Drs. Lenkey and Wayt, who opined that claimant has pneumoconiosis.[4] The administrative law judge permissibly assigned less weight to Dr. Lenkey's opinion because he found that the doctor did not adequately explain the basis for his diagnosis of pneumoconiosis,[5] *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*), and since Dr. Lenkey's qualifications were not of record. Decision and Order at 6. With regard to Dr. Wayt, although the administrative law judge acknowledged Dr. Wayt's status as claimant's treating physician, he likewise properly found Dr. Wayt's opinion to be insufficiently reasoned to warrant a finding of pneumoconiosis at Section 718.202(a)(4).[6] The administrative law judge specifically determined that Dr. Wayt's

[4] As noted by the administrative law judge, claimant was examined by Dr. Paal on November 12, 1979 and Dr. Burke on April 12, 1988, but neither physician diagnosed a cardiopulmonary disease. Director's Exhibits 1, 2; Decision and Order at 4.

[5] In her August 21, 2003 report, Dr. Lenkey opined that claimant was "100% disabled based on his marked hypoxemia and marked decrease of airflow." Director's Exhibit 21. Dr. Lenkey further stated that she attributed claimant's pulmonary process in part to coal dust exposure because there was "incontrovertible evidence in the medical literature that coal dust does cause in a very direct fashion this sort of impairment." *Id*. The administrative law judge was not persuaded by Dr. Lenkey's causation opinion, noting in particular, that she failed to identify what specific medical literature supported her findings. Decision and Order at 6.

[6] Section 718.104(d) allows an administrative law judge to accord greater weight to the opinion of a treating physician if certain requirements are satisfied. 20 C.F.R. §718.104(d)(1)-(4). In pertinent part, Section 718.104(d) requires the administrative law judge to examine:

> 1) the nature of the relationship between claimant and the physician, *i.e.*, whether the physician has treated claimant for respiratory or pulmonary conditions.
>
> 2) the duration of the relationship between claimant and the physician, *i.e.*, the length of time the physician has treated claimant.
>
> 3) the frequency of physician's treatment of claimant, *i.e.*, whether the physician has observed claimant often enough to reach medical conclusions.
>
> 4) the extent of the physician's treatment of claimant, *i.e.*, the types of treatment and examinations conducted by the physician.

opinion was entitled to little weight because the doctor did not cite to any objective test results to support his opinion or otherwise explain why x-ray findings such as hyperextension of the lungs supported a diagnosis of pneumoconiosis. Moreover, the administrative law judge properly rejected Dr. Wayt's diagnosis of legal pneumoconiosis since Dr. Wayt failed to discuss claimant's "extremely lengthy smoking history" in relation to the etiology of claimant's respiratory impairment. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Stark*, 9 BLR at 1-36; Decision and Order at 7.

In contrast, the administrative law judge noted that both Drs. Renn and Fino opined that claimant did not have clinical or legal pneumoconiosis, attributing claimant's respiratory impairment to smoking and heart disease. Besides noting their expertise in pulmonary medicine,[7] *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988), the administrative law judge permissibly credited the opinions of Drs. Renn and Fino because he found their opinions to be well documented and better reasoned as compared to the other physicians of record. *See King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Because the administrative law judge has broad discretion to assess the evidence of record and draw his own conclusions and inferences therefrom, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark*, 9 BLR at 1-36, the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge if rational and supported by substantial evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Insofar as the administrative law judge's credibility determinations are rational, and supported by substantial evidence, we affirm his finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Since claimant failed to establish the existence of

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Section 718.104 also requires an administrative law judge to examine the "credibility of the [treating] physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

[7] The administrative law judge noted that Dr. Wayt had "no demonstrated experience in pulmonary diseases," Decision and Order at 6, while Drs. Fino and Renn were Board-certified in pulmonary medicine, Decision and Order at 7. Dr. Wayt's credentials do not appear in the record although his letterhead references his practice in family medicine. Claimant's Exhibit 1.

pneumoconiosis, a requisite element of entitlement, benefits are precluded.[8] *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 – Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[8] In order to establish entitlement to benefits in a living miner's claim, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arises out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§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*.