BRB No. 98-0186 BLA

EAF McKNIGHT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Eaf McKnight, Jackson, Kentucky, *pro se*.

Jeffrey S. Goldberg (Marvin Krislov, Deputy Solicitor for National Operations; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (97-BLA-194) of Administrative Law Judge Alfred Lindeman denying modification and 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).[1]

[1] Claimant filed his initial claim for benefits on August 28, 1979, which was repeatedly denied by the district director. Director's Exhibits 1, 21, 22, 24, 26. Claimant requested a formal hearing which was held on April 13, 1989 before Administrative Law Judge Rudolph L. Jansen. The administrative law judge credited claimant with eight years of coal mine employment, but denied benefits finding that

The administrative law judge credited claimant with eight years and three months of

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claimant had not established invocation of the presumptions contained at 20 C.F.R. §410.490, or entitlement pursuant to 20 C.F.R. Part 410, Subpart D. On appeal, the Board affirmed the administrative law judge's findings regarding claimant's years of coal mine employment and at Section 410.490, but vacated the administrative law judge's findings pursuant to Part 410, Subpart D, and remanded the case for the administrative law judge to provide findings pursuant to 20 C.F.R. Part 718. *McKnight v. Director, OWCP*, BRB No. 89-3119 BLA (Mar. 11, 1993)(unpub.). On remand, the case was transferred back to the district director for consideration of claimant's newly submitted evidence pursuant to the provisions of 20 C.F.R. §725.310. Benefits were again denied and claimant requested a hearing which was held on October 18, 1995 before Administrative Law Judge Thomas M. Burke who remanded the claim again to allow claimant to obtain a medical examination, and to retain legal counsel. Claimant however, was unable to obtain counsel, and without obtaining a medical examination, requested another hearing. This hearing was held on May 29, 1996 before Administrative Law Judge Ralph A. Romano who again remanded the claim to the district director to enable claimant to receive a physical examination, and to allow the Director, Office of Workers' Compensation Programs, to obtain a re-reading of claimant's x-ray. The district director again denied benefits and claimant requested another hearing.

coal mine employment, and found that claimant was unable to establish invocation of the presumptions contained at 20 C.F.R. §410.490, and that the evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Accordingly, benefits were denied. In the instant appeal, claimant generally contends that he is entitled to benefits. The Director, Office of Workers' Compensation Programs (the Director), responds conceding that claimant's new evidence establishes more than ten years of coal mine employment, and requests a remand to allow the administrative law judge to consider the claim pursuant to 20 C.F.R. Part 727, but further contends that the presumption has been rebutted pursuant to 20 C.F.R. §727.203(b)(4), and that substantial evidence supports the finding of no pneumoconiosis at Section 718.202(a).

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. *McCall v. Jewel Ridge Coal Corp.*, 12 BLR 1-176 (1989); *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, 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 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).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we agree that the Director's concession that claimant has now established more than ten years of qualifying coal mine employment requires that the instant case be considered pursuant to 20 C.F.R. Part 727, rather than the provisions contained at Section 410.490. Accordingly, we vacate the administrative law judge's Section 410.490 findings, and remand the case for the administrative law judge to consider the evidence relevant to the interim presumption contained at Section 727.203(a). *See Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 15 BLR 2-155 (1991), *aff'g sub nom*. *BethEnergy Mines, Inc. v. Director, OWCP*, 890 F.2d 1295, 13 BLR 2-162 (3d Cir. 1989). Furthermore, we decline to accept the Director's argument that the administrative law judge's findings pursuant to Section 410.490 preclude claimant from establishing invocation of the interim presumption pursuant to Section 727.203(a)(1)-(3), and hold that the administrative law judge must reconsider the evidence relevant to those subsections, in addition to Section 727.203(a)(4). *Peabody Coal Co. v. Greer*, 62 F.3d 801, 19 BLR 2-235 (6th Cir. 1995); *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990).

With respect to the merits pursuant to 20 C.F.R. Part 718, the administrative law judge's finding that claimant failed to establish the presence of pneumoconiosis at Section 718.202(a) is supported by substantial evidence. The administrative law judge permissibly weighed all the x-ray readings of record and rationally credited the greater number of negative readings by those physicians with superior qualifications. *See Parulis v. Director, OWCP*, 15 BLR 1-28 (1991); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.,* 10 BLR 1-24 (1987). The administrative law judge also properly determined that the only biopsy evidence of record was negative for the presence of pneumoconiosis, and that none of the presumptions contained at 20 C.F.R. §§718.304, 718.305, 718.306 are applicable to the present claim. *See* 20 C.F.R. §718.202(a)(2)-(3).

Moreover, the administrative law judge considered all the relevant medical reports pursuant to Section 718.202(a)(4), and rationally rejected the reports of Drs. Biggs and Varghese as equivocal, and the reports of Drs. Cornett, Baker and Clarke as undocumented and unreasoned since they relied on x-rays re-read as negative

by more qualified physicians, objective tests found invalid by reviewing physicians, and failed to adequately explain their diagnoses. *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). The administrative law judge also rationally concluded that the reports of Drs. Williams, Nye, Shine, Judge, Cooper and Wicker failed to diagnose any lung disease arising out of coal dust exposure, and were therefore insufficient to satisfy claimant's burden of proof on this issue. *Trent, supra; Perry, supra; Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge is empowered to weigh the medical 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 Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) as it is supported by substantial evidence and accords with law.

Accordingly, the administrative law judge's Decision and Order is affirmed in part, vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge