BRB No. 96-1499 BLA

ARVIS TOLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	DATE ISSUED:
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 on Remand of Christine McKenna, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle), Pineville, West Virginia, for claimant.

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

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

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand (94-BLA-281) of Administrative Law Judge Christine McKenna 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). In the initial Decision and Order, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Accordingly, benefits were denied. On appeal, the Board affirmed the administrative law judge's findings regarding

[1]Claimant is Arvis Toler, the miner, who filed a claim for benefits on February 4, 1993. Director's Exhibit 1.

length of coal mine employment, responsible operator status and pursuant to 20 C.F.R. §§ 725.308, 718.202(a)(1)-(3), vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(4), and remanded the case for the administrative law judge to reconsider the medical opinions of Drs. Tuteur and Zaldivar in light of the holding of the United States Court of Appeals for the Fourth Circuit in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995) and to reweigh Dr. Rasmussen's opinion. *Toler v. Eastern Assoc. Coal Corp.*, BRB No. 95-0434 BLA (Jan. 29, 1996)(unpub.).

On remand, the administrative law judge again found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Accordingly, benefits were denied. In the instant appeal, claimant contends that the administrative law judge again erred in relying on the opinions of Drs. Tuteur and Zaldivar and in weighing Dr. Rasmussen's opinion. Employer responds urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), responds declining to participate in this appeal.

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 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 pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Failure to prove any of these requisite elements compels a denial of benefits. *See Anderson*, *supra*; *Baumgartner*, *supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence and contain no reversible error therein. Claimant contends that the administrative law judge erred in crediting the opinions of Drs. Zaldivar and Tuteur because their opinions, that claimant does not have pneumoconiosis, are based on negative x-rays and the obstructive nature of his impairment. Claimant's Brief at 8-9. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, in *Warth*, *supra,* held that an administrative law judge may not rely on an opinion where the physician based that opinion on the erroneous assumption that obstructive disorders cannot be caused by coal mine employment. *Warth, supra.*

Dr. Rasmussen, in reports dated March 3, 1993 and August 6, 1993, opined that claimant has pneumoconiosis. Director's Exhibit 10, 18. Dr. Tuteur, in a report dated June 3, 1994, states:

> The pattern of a severe obstructive defect associated with exercise induced hypoxemia is typical of and regularly occurs with advanced emphysema. When coal workers' pneumoconiosis is sufficiently advanced to produce impairment of pulmonary function, one expects to find a restrictive ventilatory defect (not present here) and/or impairment of gas exchange. Though the impairment of gas exchange does occur during exercise, it is best explained by the cigarette-smoke-induced advance emphysema. Emphysema does not occur with coal workers' pneumoconiosis unless progressive massive fibrosis is present. This clearly is not the case.

Employer's Exhibit 5. Dr. Tuteur further states:

> In summary, Mr. Toler does not have clinically-significant, physiologically-significant, or radiographically-significant coal workers' pneumoconiosis. With reasonable medical certainty, his clinical symptoms, physical examination findings, physiologic impairment, and serial chest radiographs are totally explained by the advanced tobacco-smoke-caused chronic obstructive pulmonary disease and the advanced arteriosclerotic heart disease manifested clinically by angina pectoris and myocardial infarctions as well as progressive breathlessness.

Employer's Exhibit 5.

The administrative law judge permissibly found that Dr. Tuteur did not base his opinion upon the assumption that coal dust can not result in obstructive lung disease, but in fact stated that "coal dust can result in obstructive impairment when massive fibrosis from coal dust inhalation is present." Decision and Order on Remand at 6; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). The administrative law judge also permissibly found that Dr. Tuteur's opinion is well documented, well reasoned and persuasive. Decision and Order on Remand at 6; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Dr. Zaldivar, who examined claimant on September 23, 1993, stated:

> Mr. Toler is obviously still smoking as judged by the high carboxyhemoglobin level obtained by Dr. Rasmussen and also obtained in my office. Mr. Toler also complains of cardiac disease. Mr. Toler has severe emphysema caused by his life-long history of smoking. Mr. Toler does not have any evidence of pneumoconiosis. Individuals who smoke as much as Mr. Toler has and still does, develop just as severe emphysema as Mr. Toler has developed without ever stepping into a coal mine. . .Mr. Toler is severely impaired due to

> emphysema caused by smoking. Mr. Toler does not have coal workers' pneumoconiosis.

Employer's Exhibit 1. In a record review dated June 2, 1994, Dr. Zaldivar stated:

> In conclusion, my opinion after reviewing all of these records remains the same as given on my report of October 20, 1993. Mr. Toler has continued to smoke in spite of his assertion to the contrary. He has shown a progressive decrement of his breathing tests with more airway obstruction present at this time than in 1989. This progression of the disease is a result of his ongoing smoking habit. From the pulmonary standpoint he is impaired and impairment is due to the smoking. Mr. Toler does not have coal workers' pneumoconiosis.

Employer's Exhibit 6.

The administrative law judge permissibly found that Dr. Zaldivar's opinion is not invalid under *Warth* and noted that Dr. Zaldivar relied heavily on the negative x-ray evidence, the laboratory data documenting a purely obstructive disease, and the presence of the "premiere" cause of emphysema, long-term and continued cigarette smoking. Decision and Order on Remand at 6; *see Warth, supra; Lafferty, supra.* The administrative law judge concluded by stating:

> Dr. Rasmussen's opinion is clearly the most favorable to the claimant and the most "friendly" to the notion that obstructive lung impairments can arise from coal dust exposure. Nevertheless, the question here is whether *this* patient's obstructive lung disease arose from coal mine employment. Claimant bears the burden of proving by a preponderance of the evidence that his illness comes within the definition. . .Given the paucity of positive x-ray evidence, Dr. Rasmussen's opinion must amount to a preponderance of the evidence in order for claimant to prevail.

Decision and Order on Remand at 7. The administrative law judge then permissibly found that Dr. Rasmussen's opinion, that claimant has pneumoconiosis, does not constitute a preponderance of the evidence. Decision and Order on Remand at 7; *Edmiston v. F & R Coal Co.,* 14 BLR 1-65 (1990); *Lafferty, supra.*

The administrative law judge, within his discretion as finder-of-fact, properly considered all the relevant evidence of record and permissibly found that the preponderance of the medical opinion evidence did not support a finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order on Remand at 7-8; Director's Exhibits 10, 18; Employer's Exhibits 1, 5, 6; *Edmiston, supra*; *Lafferty, supra*; *Piccin v. Director, OWCP,* 6 BLR 1-616 (1983). 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 Clark,*

supra; *Anderson*, *supra.* Thus, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and the denial of benefits.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge