BRB No. 02-0258 BLA-A

JOHN E. SHEPPARD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLUE SPRINGS COAL COMPANY	)	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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Crane, L.C.), Charleston, West Virginia, for claimant.

Ann B. Rembrandt (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order (00-BLA-1093) of Administrative Law Judge Richard A. Morgan 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).[2] In this duplicate claim, the administrative law judge credited

[1] Claimant died on September 5, 2002. His widow notified the Board on October 18, 2002 that she would be pursuing his pending claim.

[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, 725 and 726 (2002). All citations

claimant with thirty-three years of coal mine employment, and found that the newly submitted evidence established a totally disabling respiratory impairment, one of the elements previously adjudicated against claimant, and, therefore, established a material change in conditions. Considering the evidence of record, however, the administrative law judge found that it failed to establish the existence of pneumoconiosis and causation. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in not excluding all of employer's evidence as unnecessary, duplicative and non-probative. Claimant also contends that the administrative law judge erred in finding that the x-ray and medical opinion evidence did not establish the existence of pneumoconiosis. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence because claimant did not allege with specificity any error committed by the administrative law judge in denying claimant's motion to exclude all of employer's evidence; in finding that the x-ray evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1); in finding that total disability due to pneumoconiosis was not established pursuant to 20 C.F.R. §718.204(c); and in finding that the medical opinion evidence failed to establish the existence of legal pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.[3]

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 to benefits under Part 718 in this living miner's claim,

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to the regulations, unless otherwise noted, refer to the amended regulations.

[3] We affirm the administrative law judge's findings on the length of coal mine employment, on the designation of employer as the responsible operator and at 20 C.F.R. §718.202(a)(2)-(3) as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

claimant must prove that he suffered from pneumoconiosis, that the pneumoconiosis arose 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*.

Claimant first asserts generally that the administrative law judge erred in not excluding all of employer's evidence as it was "unnecessary duplicative non-probative volume." Claimant's Brief at 3. The record shows that claimant submitted both a motion to the administrative law judge to exclude employer's excessive and duplicative medical evidence and a pre-hearing memorandum where he again moved to exclude evidence cited in his earlier motion. At the hearing, the administrative law judge ordered the parties to submit arguments regarding the evidentiary issues. Employer responded arguing that the admission of the challenged evidence was supported. Claimant reasserted his position that said evidence should be excluded.

The administrative law judge, citing *Underwood v. Elkay*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997), recognized that "unduly repetitious" evidence has little or no probative value and does not fall within the statutory mandate to consider all relevant evidence. The administrative law judge noted, however, that the court added in *Underwood* that in excluding evidence the administrative law judge must conclude that the evidence has little useful value other than to expand the record, impose additional cost, or repeat that which is already well established in the record. *Underwood* at 950, 2-31. Hence, considering the arguments made by the parties, the administrative law judge concluded that claimant failed to establish either that the evidence at issue had no probative value, or that it merely repeated what was already established. The administrative law judge accepted employer's argument that the evidence at issue was relevant and probative, and neither duplicative nor cumulative, because several of the physicians submitted supplemental reports addressing the contested issues in light of newly discovered evidence. Thus, the administrative law judge denied claimant's motion to exclude excessive and duplicative evidence on the ground that claimant failed to show that the exclusion of this evidence was warranted. Administrative Law Judge's Order dated October 26, 2001.

While claimant alleges that the administrative law judge erred in not excluding employer's evidence, which he asserts was unnecessary and duplicative, he does not specifically discuss how he suffered undue prejudice. The Board, therefore, may not review this issue on appeal. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Likewise, claimant's contention, that it is not easy to deny the existence of coal workers' pneumoconiosis in this claim because "one of the x-rays dated February 11, 2000, had more positive than negative readings," Claimant's Brief at 3, is merely an assertion of favorable evidence which fails to allege or identify an error made by the administrative law judge with sufficient specificity to warrant review by the Board. *Cox*, *supra*; *Sarf*, *supra*; *Fish*, *supra*. Moreover, in finding that the x-ray evidence did not establish the existence of pneumoconiosis, the administrative law judge correctly relied on the fact that the preponderance of the x-rays read by dually qualified Board-certified, B-readers was negative for the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(4); *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995). Further the administrative law judge rationally concluded that because the readings of the most recent x-ray taken, May 10, 2000, were in equipoise, (they were interpreted by comparably qualified readers as both positive and negative for the existence of pneumoconiosis), Decision and Order at 18, they could not establish the existence of pneumoconiosis. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Accordingly, the administrative law judge's finding that the existence of pneumoconiosis was not established at Section 718.202(a)(1) is affirmed.

Claimant next asserts that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis. Claimant has not, however, more than generally challenged the administrative law judge's finding that the medical opinion evidence fails to establish causation, *i.e.*, that claimant's pneumoconiosis "substantially" contributed to his disability pursuant to 20 C.F.R. §718.204(c). Because claimant has failed to challenge this finding, which involves a necessary element of entitlement, we must affirm the denial of benefits, *Cox*, *supra*; *Sarf*, *supra*; *Fish*, *supra*, and need not consider claimant's argument as to whether the medical opinion evidence established the existence of legal pneumoconiosis. *Trent*, *supra*; *Perry*, *supra*.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge