BRB No. 02-0509 BLA

VITO CERULLO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AUSTIN POWDER COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
and	)	
	)	
PAGNOTTI ENTERPRISES o/b/o LEHIGH VALLEY ANTHRACITE	)	
	)	
and	)	
	)	
CONSTITUTION STATE 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 of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Harry T. Coleman, Scranton, Pennsylvania, for claimant.

Stephen F. Moore (Peters & Wasilefski), Harrisburg, Pennsylvania, for Austin Powder Company.

Ross A. Carrozza (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania, for Pagnotti Enterprises/Lehigh Valley Anthracite and Constitution State Service Company.

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

PER CURIAM:

Claimant appeals the Decision and Order (01-BLA-0796) of Administrative Law Judge Ainsworth H. Brown 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).[1] The administrative law judge initially designated Austin Powder Company (Austin Powder) as the responsible operator and dismissed Pagnotti Enterprises/Lehigh Valley Anthracite (Pagnotti) as a putative responsible operator. After crediting claimant with twenty years and ten months of coal mine employment, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Austin Powder responds in support of the administrative law judge's denial of benefits. Pagnotti also responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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).

[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.

Claimant contends that the administrative law judge erred in failing to find Dr. Navani's positive interpretation of claimant's May 16, 2000 x-ray sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). We disagree. After noting that nineteen of the twenty x-ray interpretations of record were rendered by equally qualified physicians (physicians dually qualified as B readers and Board-certified radiologists),[2] the administrative law judge noted that Dr. Navani, a B reader and Board-certified radiologist, rendered the only positive x-ray interpretation of record. Decision and Order at 9; Director's Exhibit 9. Although Dr. Navani rendered a positive interpretation of claimant's May 16, 2000 x-ray, six equally qualified physicians, Drs. Laucks, Duncan, Soble, Jagannath, Gayler, Scott and Wheeler, interpreted this x-ray as negative for pneumoconiosis. Director's Exhibits 24, 34. Claimant's other x-rays taken on August 8, 1990, March 11, 1990, December 21, 1990 and April 20, 2001 were uniformly interpreted as negative for pneumoconiosis by physicians dually qualified as B readers and Board-certified radiologists. Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Claimant also argues that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Although Drs. Fogley and Talati opined that claimant suffered from pneumoconiosis, Director's Exhibit 8; Claimant's Exhibit 1; Drs. Levinson and Dittman opined that claimant did not suffer from the disease. Director's Exhibit 31; Employer's Exhibit 1-1, 1-3, 1-16, 2-6. The administrative law judge acted within his discretion in discrediting Dr. Fogley's opinion because he failed to explain the basis for his finding that claimant suffered from pneumoconiosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 11; Claimant's Exhibit 1. The administrative law judge also properly accorded less weight to Dr. Talati's diagnosis of pneumoconiosis because it was based upon Dr. Navani's positive interpretation of claimant's May 16, 2000 x-ray, an x-ray interpretation that the administrative law judge found outweighed by the other x-ray evidence of record. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); Decision and Order at 13; Director's Exhibits 8, 9. The remaining physicians of record, Drs. Levinson and Dittman, opined that claimant did not suffer from pneumoconiosis. Director's Exhibit 31; Employer's Exhibit 1-1, 1-3, 1-16, 2-6. Inasmuch as it is supported by substantial

[2]Dr. Levinson, an A reader, rendered the only other interpretation of record, a negative interpretation of claimant's December 21, 2000 x-ray. Director's Exhibit 31.

evidence, we affirm the administrative law judge's finding the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Since claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), an essential element of entitlement, the administrative law judge properly denied benefits under 20 C.F.R. Part 718. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *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.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge