BRB No. 00-0793 BLA

ROBERT B. HAMILTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FOUNTAIN BAY MINING COMPANY	)	
	)	DATE ISSUED:
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

Bobby Steve Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

Sean B. Epstein (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer.

Sarah M. Hurley (Judith E. Kramer, Acting Solicitor of Labor; 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, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order (1997-BLA-01065) of Administrative Law Judge Lawrence P. Donnelly awarding 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] This case involves a duplicate claim. The administrative law judge found that claimant[2] established at least fifteen years of qualifying coal mine employment, the existence of a totally disabling respiratory impairment and, consequently, a material change in conditions pursuant to 20 C.F.R. §725.309 (1999).[3] The administrative law judge

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[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant is Robert B. Hamilton, the miner, whose initial claim for benefits was filed on April 8, 1986 and denied on September 29, 1986 because claimant failed to establish the existence of pneumoconiosis, causation and total respiratory disability. Director's Exhibit 40. Claimant filed the instant claim for benefits on May 28, 1996. Director's Exhibit 1.

[3]The amendments to the regulation at 20 C.F.R. §725.309 do not apply to claims, such as this, which were pending on January 19, 2001; rather, the version of this regulation as published in the 1999 Code of Federal Regulations is applicable. *See* 20 C.F.R. §725.2(c), 65 Fed. Reg. 80,057 (2000).

then considered the entire record and found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, benefits were awarded.

In the instant appeal, employer contends that the administrative law judge erred in failing to provide sufficient rationale for his weighing of the medical opinion evidence pursuant to Sections 718.202(a)(4) and 718.204(b) (2000). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, responds, declining to submit a brief on appeal.[4]

[4]We affirm the administrative law judge's findings regarding the length of the miner's coal mine employment, the existence of a totally disabling respiratory impairment and the establishment of a material change in conditions, as well as findings made pursuant to 20 C.F.R. §§718.202(a)(1)-(3), as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 9, 2001, to which claimant and the Director have responded.[5] Employer has not responded to the Board's order.[6] Based on the briefs submitted by claimant and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

[5]In a brief dated March 28, 2001, the Director, Office of Workers' Compensation Programs, asserted that the regulations at issue in the lawsuit do not affect the outcome of the case. However, in a brief dated March 14, 2001, claimant asserted that the amended regulations would affect the outcome of the case. Although claimant argues that 20 C.F.R. §718.201(a)(2), as amended, explicitly recognizes that obstructive respiratory disease is now included in the definition of pneumoconiosis and that 20 C.F.R. §718.201(c), as amended, explicitly recognizes that pneumoconiosis is a latent and progressive disease, claimant has not demonstrated, and we cannot discern, how the administrative law judge's analysis and weighing of the evidence would be impacted by application of the revised regulations.

[6]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 9, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

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 (2000), 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 (2000); *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*. Additionally, all elements of entitlement must be established by a preponderance of the evidence. *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Employer contends that the administrative law judge erred in failing to provide specific reasons for his finding that Dr. Robinette's medical opinion outweighs Dr. Castle's medical opinion.[7] Employer's Brief at 4-7. Dr. Robinette, who is Board-certified in internal and pulmonary medicine, opined that claimant has pneumoconiosis and that he is totally disabled due to pneumoconiosis. Claimant's Exhibits 1, 2. Dr. Castle, who is also Board-certified in internal and pulmonary medicine, opined that claimant does not have pneumoconiosis. Employer's Exhibit 1. In his Decision and Order, the administrative law judge stated:

> Having fully considered the above medical evidence, I give greatest weight to the report and testimony of Dr. Robinette. His opinion is thorough, documented, and well-reasoned. I am particularly persuaded by his testimony concerning the significance of the reversibility seen following the administration of bronchodilators. Dr. Robinette concluded that the obstruction was due to both coal dust and cigarette smoking, despite the reversibility, as even individuals with a coal dust related condition can have

[7]Employer initially stated the administrative law judge "failed to provide adequate explanation for the rejection of the opinions of Drs. Castle and Fino." Employer's Brief at 4. However, inasmuch as employer subsequently specifically discusses only the administrative law judge's failure to adequately discuss his weighing of Dr. Castle's opinion, we will not consider the administrative law judge's treatment of Dr. Fino's opinion.

> muscle spasms. I further note that the pulmonary function studies also show total disability following the administration of bronchodilators, indicating that the greater part of the Claimant's impairment is not reversible. As such, I find that Dr. Robinette's opinion outweighs those of Drs. Castle and Fino.

Decision and Order at 8. The administrative law judge further noted that no physician countered Dr. Robinette's testimony regarding the difficulty of reading x-rays for pneumoconiosis in the presence of significant emphysema and that Dr. Robinette's opinion is supported by the opinion of Dr. Paranthaman, who related claimant's obstruction to both cigarette smoking and coal dust, despite a negative x-ray for pneumoconiosis. *Id.*

While the administrative law judge does not specifically discredit Dr. Castle's opinion, he acted within his discretion in finding that Dr. Robinette's opinion is entitled to greater weight than Dr. Castle's opinion because Dr. Robinette persuasively explained why claimant's response to the administration of bronchodilators does not rule out the presence of a relationship between claimant's obstruction and his coal dust exposure, his opinion is thorough, documented, well-reasoned, and supported by the Dr. Paranthaman's opinion, and because both Dr. Robinette and Dr. Paranthaman are well-qualified in the field of pulmonary medicine. Decision and Order at 8; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Hutchens v. Director*, OWCP, 8 BLR 1-16 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). As a result, we affirm the administrative law judge's findings that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000) and total disability due to pneumoconiosis pursuant to Section 718.204(b) (2000), as well as the award of benefits.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge