BRB No. 00-0858 BLA

SCOTT FRASURE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
HOPE MINING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION AND ORDER
Party-in-Interest		

Appeal of the Decision and Order on Remand Denying Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

John Earl Hunt, Allen, Kentucky and Stephen A. Sanders (Appalachian Research and Defense Fund of Kentucky, Inc.), Prestonburg, Kentucky, for claimant.

Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

Edward Waldman (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 and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denying Benefits (94-BLA-1242) of Administrative Law Judge Paul H. Teitler 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 is before the Board for the third time. In his original decision, the administrative law judge found the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (1999)[2] and, thus, considered claimant's 1993 claim on the merits pursuant to 20 C.F.R. Part 718 (2000).[3] After crediting claimant with fourteen and one-half years of coal mine employment, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal

[1] Subsequent to the filing of claimant's Petition for Review and brief, John Earl Hunt submitted a Motion to Withdraw as Attorney of Record dated August 14, 2000. Mr. Hunt's motion was granted by the Board and since the case was fully briefed prior to Mr. Hunt's Motion, the Board held that a decision would be issued based on the briefs submitted. *Frasure v. Hope Mining Co., Inc.*, BRB No. 00-0858 BLA (Sep. 19, 2000)(Order)(unpub.) and *Frasure v. Hope Mining Co., Inc.*, BRB No. 00-0858 BLA (Oct. 18, 2000)(Order) (unpub.). By Motion dated October 23, 2000, Stephen A. Sanders submitted a Notice of Appearance on behalf of claimant.

[2]The amendments to the regulations at 20 C.F.R. §§725.309 and 725.409 do not apply to claims, such as this, which were pending on January 19, 2001; rather, the version of these regulations as published in the 1999 Code of Federal Regulations are applicable. *See* 20 C.F.R. §725.2(c), 65 Fed. Reg. 80,057 (2000).

[3] 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.

mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b) (2000). The administrative law judge further found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000) and that claimant's total respiratory disability was due, at least in part, to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge awarded benefits.

On appeal, the Board vacated the administrative law judge's award of benefits and remanded the case for further consideration of the relevant evidence. Initially, the Board held that the administrative law judge properly considered this claim on the merits because 20 C.F.R. §725.409 (1999)[4] provides that once a claim has been deemed abandoned, a new claim may be filed at any time and new evidence submitted. The Board then affirmed the administrative law judge's finding that total respiratory disability was established under Section 718.204(c) (2000). However, the Board vacated the administrative law judge's finding that the x-ray evidence and medical opinion evidence were sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4) (2000), remanding the case to the administrative law judge for further consideration of the relevant evidence. Furthermore, the Board vacated the administrative law judge's Section 718.204(b) (2000) finding and remanded the case for the administrative law judge to provide a more detailed analysis of his findings pursuant to Section 718.204(b) (2000). *Frasure v. Hope Mining Co., Inc.*, BRB No. 96-0947 BLA (May 23, 1997)(unpub.).

On remand, the administrative law judge found the x-ray evidence of record insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) (2000). However, he found the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000). The administrative law judge further found that the medical evidence was sufficient to establish that claimant's total disability, which was determined

[4] Claimant filed his initial claim on May 29, 1984. Director's Exhibit 55. On July 16, 1984, the district director issued an Order to Show Cause ordering claimant within thirty days to show cause why his claim should not be denied by reason of abandonment. *Id*. In the absence of further contact by claimant, the Order noted that it would serve as the district director's final notice of denial. *Id*. A "Memo to File" dated September 18, 1984 indicates that the claim was considered abandoned inasmuch as no response was received within the time period specified in the Order to Show Cause. *Id.* Claimant subsequently filed a second claim on June 28, 1993. Director's Exhibit 1.

previously, was due, at least in part, to his pneumoconiosis pursuant to Section 718.204(b) (2000). Accordingly, the administrative law judge awarded benefits payable from June 1, 1993.

Pursuant to employer's second appeal, the Board vacated the administrative law judge's award of benefits and remanded the case to the administrative law judge for further consideration of the medical opinion evidence. The Board vacated the administrative law judge's finding that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000), and also sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b) (2000). The Board remanded the case for reconsideration of the evidence relevant to these issues. *Frasure v. Hope Mining Co., Inc.*, BRB No. 98-0417 BLA (Sep. 13, 1999)(unpub.).

On remand, the administrative law judge noted his prior findings and the Board's remand instructions and found that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000). The administrative law judge, therefore, found that claimant failed to establish entitlement under Part 718 (2000). Accordingly, the administrative law judge denied benefits.

In the current appeal, claimant initially contends that the administrative law judge failed to state any findings of fact or conclusions of law. Claimant further generally contends that the evidence of record is sufficient to establish the existence of pneumoconiosis and also sufficient to establish total disability due to pneumoconiosis. In response, employer contends that claimant has not challenged the administrative law judge's finding that the medical evidence was insufficient to establish the existence of pneumoconiosis with sufficient specificity and, therefore, the Board should affirm this finding and the denial of benefits. In the alternative, employer urges affirmance of the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that he will not file a response brief in this appeal.

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 amended 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 all the parties have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Employer also argues that the amended regulations should not be applied retroactively. Based on the briefs submitted by the parties, 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.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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 challenging the administrative law judge's denial of benefits, claimant contends that the administrative law judge erred in failing to adequately discuss the relevant evidence of record. In particular, claimant set forth the medical evidence supportive of his burden and contends that the x-ray evidence and medical opinion evidence is sufficient to establish the existence of pneumoconiosis and, therefore, argues that the existence of pneumoconiosis has been established by a preponderance of the evidence. These arguments lack merit.

Contrary to claimant's contention, the administrative law judge's most recent finding regarding the x-ray evidence of record was not a finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1) (2000).[5] Rather, after reviewing all of the x-ray readings of record, the administrative law judge found that the x-ray evidence was in equipoise and, therefore, that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) (2000). *See* [1997] Decision and Order on

[5] Within his initial Decision and Order issued on April 2, 1996, the administrative law judge found the x-ray evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). [1996] Decision and Order at 8. However, the Board in its Decision and Order dated May 23, 1997, vacated the administrative law judge's finding that the x-ray evidence was sufficient to establish the existence of pneumoconiosis and remanded the case for him to reconsider the x-ray evidence under Section 718.202(a)(1) (2000). *Frasure v. Hope Mining Co., Inc.,* BRB No. 96-0947 BLA, slip op. at 4 (May 23, 1997)(unpub.).

Remand at 2-7. Inasmuch as claimant does not otherwise challenge the administrative law judge's weighing of the x-ray evidence of record, we affirm his decision to accord greater weight to the x-ray readings by physicians possessing superior professional qualifications, *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-710 (1990), and, thus, his finding that claimant failed to establish the existence of pneumoconiosis by a preponderance of the x-ray evidence.[6] [1997] Decision and Order on Remand at 5-7; *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Woodward, supra*.

[6] The parties do not challenge the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3) (2000), *see* [1997] Decision and Order on Remand at 7, therefore, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Moreover, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000). Contrary to claimant's contention, the administrative law judge provided sufficient findings of fact and conclusions of law supporting his determination that the weight of the medical opinion evidence was insufficient to establish the existence of pneumoconiosis. [2000] Decision and Order on Remand at 2-3. As the administrative law judge correctly stated, the record contains the medical opinions of seventeen physicians, of which, Drs. Ameji, Ladaga, Bangundi, Wright, deGuzman, El-Amin, Mettu, Myers and Sundaram, provided diagnoses of pneumoconiosis, with the remainder of the physicians stating that claimant was not suffering from pneumoconiosis. [2000] Decision and Order on Remand at 2; *see* [1997] Decision and Order at 7-14; *compare* Director's Exhibits 17, 21, 50; Claimant's Exhibits 3, 7, 19 *with* Director's Exhibits 13-16, 18-20, 51, 52; Employer's Exhibits 1, 2, 4, 7, 8, 10, 17-19. In considering the medical opinions, the administrative law judge again stated that the more recent medical opinions of record were a more reliable and accurate indication of claimant's current condition, and, therefore, accorded these opinions more weight than the earlier medical opinions.[7] [2000] Decision and Order on Remand at 3. The administrative law judge also reiterated his prior finding, which was affirmed by the Board, that Dr. Vuskovich's opinion was entitled to little weight because the physician relied upon an inaccurate smoking history, one that was significantly greater than the history relied upon by the other physicians of record. [2000] Decision and Order on Remand at 3; *see* [1997] Decision and Order on Remand at 14; *Frasure*, BRB No. 98-0417 BLA, slip op. at 5; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

[7] In its prior Decision and Order, the Board affirmed the administrative law judge's determination that the older medical opinions, those dated 1985 and before, were entitled to little weight as they were not reflective of claimant's current condition. *Frasure v. Hope Mining Co., Inc.*, BRB No. 98-0417 BLA, slip op. at 5 (Sep. 13, 1999)(unpub.); *see Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

In weighing the remainder of the medical opinions of record, the administrative law judge found these opinions to be well reasoned and documented. [2000] Decision and Order on Remand at 2-3. Nonetheless, the administrative law judge rationally exercised his discretion as trier-of-fact in according greater weight to the opinions of Drs. Anderson, Broudy, Dahhan and Fino, that claimant was not suffering from pneumoconiosis, over the contrary opinions of Drs. Mettu, Myers and Sundaram, based on the physicians' superior professional qualifications as Board-certified in Internal Medicine and Pulmonary Diseases.[8] [2000] Decision and Order on Remand at 2-3; Director's Exhibits 51, 52; Employer's Exhibits 2, 4; *see Woodward, supra*; *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston, supra*. Inasmuch as claimant does not further challenge the administrative law judge's findings pursuant to Section 718.202(a)(4) (2000), other than to state that the medical opinions of record are sufficient to establish entitlement to benefits, *see* Claimant's Brief at 38, and the Board is not empowered to reweigh the evidence of record or substitute its own judgment for that of the administrative law judge, we affirm his finding that the medical opinion evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000). *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *see also 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).

Claimant's failure to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (2000) or 65 Fed. Reg. 80,048-80,049, an essential element of entitlement, precludes an award of benefits under 20 C.F.R. Part 718 (2000). *Anderson, supra; Perry, supra*.

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

SO ORDERED.

[8] The administrative law judge found that Dr. Myers was Board-certified in Internal Medicine, [2000] Decision and Order on Remand at 2; Claimant's Exhibit 19, and that Dr. Mettu's qualifications were not in the record, [2000] Decision and Order on Remand at 3. A review of the record indicates that Dr. Sundaram's qualifications are also not in the record.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge