BRB No. 00-0886 BLA

JOSEPH LOHIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
READING ANTHRACITE COMPANY	)	
	)	
and	)	DATE ISSUED:
	)	
ENGELKING SERVICE	)	
	)	
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 Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Frank L. Tamulonis, Jr. (Zimmerman, Lieberman & Derenzo, LLP), Pottsville, Pennsylvania, for employer.

Barry H. Joyner (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: HALL, Chief Administrative Appeals Judge, DOLDER, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits (99-BLA-1245) of Administrative Law Judge Robert D. Kaplan 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] Adjudicating the claim pursuant to 20 C.F.R. Part 718 (2000), the administrative law judge credited claimant with fifty years of qualifying coal mine employment and found that claimant failed to establish the existence of pneumoconiosis and total respiratory disability. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erroneously found that claimant failed to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating her intention not to participate in this appeal.[3]

[1] Claimant is Joseph Lohin, the miner, who filed his application for benefits on November 18, 1998. Director's Exhibit 1.

[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 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.

[3] We affirm the administrative law judge's findings regarding length of coal mine employment and pursuant to Sections 718.202(a)(2)-(3) (2000) inasmuch as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 3, 6.

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 all the parties have responded asserting that the regulations at issue do not affect the outcome of this case.[4] 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, we will proceed to adjudicate the merits of 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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant argues that the administrative law judge erred by finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis inasmuch as the positive x-ray interpretations of Drs. Mathur, Malnar, and Smith are sufficient to establish the existence of pneumoconiosis. Furthermore, claimant contends that the administrative law judge impermissibly relied on the numerical superiority of the negative x-ray readings and failed to provide a rationale for his finding. We disagree. The administrative law judge examined all of the readings of the three chest x-ray films of record and properly found that the readings of the x-ray film dated December 9, 1998 are "overwhelmingly negative" for the existence of pneumoconiosis and that the readings of the films taken on June 13, 1999 and

[4] In a letter dated March 13, 2001, claimant asserts that the revised regulations will not affect the disposition of this case. The Director's brief, dated March 29, 2001, asserts that the outcome of this case will not be affected by application of the revised regulations set forth at 20 C.F.R. §§718.201, 718.204. Likewise, employer's letter, dated May 10, 2001, states that the new regulations will not affect the Board's adjudication of this case.

October 29, 1999 are "evenly balanced." *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 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); Decision and Order at 5; Director's Exhibits 13, 14; Claimant's Exhibits 1, 2, 9; Employer's Exhibits 1, 4, 8, 12. Hence, the administrative law judge, within a proper exercise of his discretion, determined that the x-ray evidence as a whole is insufficient to affirmatively establish the existence of pneumoconiosis by a preponderance of the evidence. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 5. Inasmuch as it is within the discretion of the administrative law judge to find that the preponderance of the x-ray interpretations is negative for the existence of pneumoconiosis, *see Ondecko, supra*; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986), and therefore, more credible and probative than the positive x-ray readings of record, we affirm the administrative law judge's finding that the x-ray evidence failed to establish the existence of pneumoconiosis.

Claimant also contends that the administrative law judge irrationally rejected the medical opinion of Dr. Kraynak inasmuch as Dr. Kraynak submitted a well reasoned and documented opinion, conducted several physical examinations of claimant, administered pulmonary function studies at six month intervals, and reviewed virtually all of the medical reports developed in this claim. Claimant's argument lacks merit. The administrative law judge reasonably determined that the opinion of Dr. Kraynak, who opined that claimant suffers from coal worker's pneumoconiosis contracted during coal mine employment, was undermined based on Dr. Kraynak's reliance upon pulmonary function studies that were subsequently found to be invalid and a faulty analysis of the arterial blood gas studies. *See Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); Decision and Order at 7; Claimant's Exhibits 5, 8. Therefore, the administrative law judge properly found that Dr. Kraynak's opinion was outweighed by the opinions of Drs. Rashid and Dittman, physicians who have superior pulmonary expertise. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985); *see also Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); Decision and Order at 7; Employer's Exhibits 1, 4, 13, 14. Consequently, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis as this determination is rational and supported by substantial evidence. *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

Inasmuch as claimant has failed to satisfy his burden of affirmatively establishing the existence of pneumoconiosis, a requisite element of entitlement under Part 718, we affirm the

administrative law judge's finding that claimant is not entitled to benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).[5]

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[5] Claimant's failure to affirmatively establish the existence of pneumoconiosis, a requisite element of entitlement, obviates the need to address claimant's argument regarding the administrative law judge's treatment of the pulmonary function study evidence. *See Trent, supra; Perry, supra.*