BRB No. 08-0486 BLA

N.M.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CANYON FUEL COMPANY, LLC	)	DATE ISSUED: 02/20/2009
	)	
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 Denying Benefits of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

N.M., East Carbon, Utah, *pro se*.

Catherine MacPherson (MacPherson, Kelly & Thompson, LLC), Rawlins, Wyoming, for employer.

Michelle S. Gerdano (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, Acting Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2005-BLA-5446) of Administrative Law Judge Jennifer Gee rendered

[1] Claimant was represented by counsel before the administrative law judge.

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). Upon stipulation of the parties, the administrative law judge credited claimant with at least twenty-eight and one-half years of coal mine employment, and adjudicated this claim, filed on April 28, 2003, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found the evidence of record sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), but insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, challenging the administrative law judge's crediting of Dr. Farney's medical opinion at Section 718.202(a)(4).

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law.[2] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hichman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901, 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. In her consideration of the evidence at Section 718.202(a)(1), the administrative law judge

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[2] The Board will apply the law of the United States Court of Appeals for the Tenth Circuit, as the miner was last employed in the coal mining industry in Utah. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

accurately determined that the February 26, 2003 x-ray was interpreted as negative for pneumoconiosis by Dr. Hale, a B reader, and that the July 9, 2003 x-ray, contained within claimant's treatment records, did not conform with the classification requirements of 20 C.F.R. §718.102(b). Claimant's Exhibit 11; Decision and Order at 4. While the February 11, 2004 x-ray was read as positive by Drs. Miller and Ahmed, both dually-qualified Board-certified radiologists and B readers, the administrative law judge determined that it was read as negative by Drs. Vedal and Repsher, both B readers, and by Dr. Morrison, a dually-qualified physician. Director's Exhibits 12, 14; Employer's Exhibit B; Claimant's Exhibits 1, 3. The administrative law judge also determined that the most recent x-ray of November 7, 2005 was read as negative by Dr. Morrison, and as positive by Dr. Ahmed. Claimant's Exhibit 4; Employer's Exhibit C. Based on a preponderance of negative interpretations by highly qualified physicians, the administrative law judge permissibly concluded that the weight of the x-ray evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), and we affirm her findings thereunder, as supported by substantial evidence. Decision and Order at 11; *see Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007)(*en banc*); *White v. New White Coal Co.*, 23 BLR 1-1 (2004).

Further, we affirm the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis at Section 718.202(a)(2), (3), as the record contains no autopsy or lung biopsy evidence, and the presumptions at 20 C.F.R. §§718.304, 718.305, and 718.306 are not applicable.[3]

At Section 718.202(a)(4), the administrative law judge reviewed the reports of Drs. Pacheco, Kanner and Farney, and noted that all of the physicians diagnosed claimant as having a significant pulmonary or respiratory impairment caused in part by smoking. Decision and Order at 7-10, 12. The administrative law judge evaluated the opinions in light of their documentation and reasoning, and found that although Dr. Pacheco diagnosed chronic obstructive pulmonary disease (COPD) and pneumoconiosis, and listed smoking and coal dust exposure as the etiologies of claimant's cardiopulmonary diagnoses, the physician noted an eighty pack-year smoking history and forty years of coal dust exposure, and failed to provide a rationale and explain how the underlying documentation supported the diagnoses. Decision and Order at 12; Director's Exhibit 9. Similarly, the administrative law judge determined that although Dr. Kanner opined that

[3] The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 because the miner filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, because this claim is not a survivor's claim, the presumption at 20 C.F.R. §718.306 is also inapplicable. *See* 20 C.F.R. §718.306.

"it is reasonable to assume" that industrial dusts contributed "as much as 20%" to claimant's airway problems, in view of claimant's occupational history and "medical literature" showing that industrial dusts, such as silica and coal dust, "can aggravate pre-existing airways disease and can cause an industrial bronchitis," the physician failed to specify the medical literature relied upon or the clinical test results that supported his conclusions. Decision and Order at 12; Claimant's Exhibit 8. Consequently, the administrative law judge acted within her discretion in finding that the opinions of Drs. Pacheco and Kanner were neither well-reasoned nor well-documented. Claimant's Exhibit 8; Decision and Order at 12-13; s*ee Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Because the administrative law judge permissibly discredited the only opinions of record that could support claimant's burden, we need not reach the Director's argument that the administrative law judge failed to closely scrutinize Dr. Farney's reasoning before crediting his opinion, that claimant's respiratory condition was unrelated to coal dust exposure, as well-reasoned and well-documented. Director's Brief at 1-2; Employer's Exhibit A. Accordingly, we affirm, as supported by substantial evidence, the administrative law judge's finding that the medical opinion evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4).

Because claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits. *See Anderson*, 12 BLR at 1-112.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge