BRB No. 12-0277 BLA

ALEXANDER P. ROMEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FIRST CENTURY CORPORATION	)	DATE ISSUED: 02/26/2013
	)	
and	)	
	)	
STATE WORKERS' INSURANCE FUND	)	
	)	
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 Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

George E. Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for claimant.

Daniel A. Miscavige (Gillespie, Miscavige, Ferdinand & Baranko, LLC), Hazleton, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2010-BLA-05717) of Administrative Law Judge Theresa C. Timlin, rendered on a miner's claim filed on August 23, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The administrative law judge credited

claimant with four years of coal mine employment, as stipulated by the parties, and adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] Although the administrative law judge found that claimant established total disability pursuant to 20 C.F.R. §718.204(b), he determined that the evidence was insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202, 718.203, and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in failing to address his objection to the admission of employer's evidence in this case. On the merits, claimant asserts that the administrative law judge erred in finding that the x-ray and medical opinion evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4). Claimant also contends that the administrative law judge erred in rendering his causation findings pursuant to 20 C.F.R. §§718.203, 718.204(c). Employer/carrier (employer) responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence and in accordance with applicable law.[3] 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).

[1] Because claimant has less than fifteen years of coal mine employment, he is not eligible for the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).

[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

I. Evidentiary Issue

At the June 17, 2011 hearing, claimant objected to the admission of Employer's Exhibits 1-4 on the ground that they were not timely filed. Hearing Transcript at 8. Citing to 20 C.F.R. §§725.411 and 725.412, claimant specifically argued that, because employer did not respond to the initial findings of entitlement by the district director, employer waived its right to contest liability for benefits and to introduce evidence. *Id*. at 10. Claimant asserted that employer also waived its "right to develop any medical evidence." *Id*. at 11. At employer's request, the administrative law judge gave the parties the opportunity to file post-hearing briefs addressing the evidentiary issue and presenting arguments with respect to claimant's entitlement to benefits. *Id*. at 11-12. Claimant and employer each filed a brief. Thereafter, the administrative law judge issued her Decision and Order on February 9, 2012, which is the subject of this appeal.

Initially we reject claimant's allegation on appeal that the administrative law judge "failed to address the objections [claimant] made to the proffer of evidence" from employer. Claimant's Brief in Support of Petition for Review at 4. The administrative law judge specifically overruled claimant's objection to the admission of employer's evidence in her Decision and Order, and explained:

> At the hearing, Claimant's counsel objected to Employer's exhibits, arguing that Employer's failure to timely respond to the District Director's "Schedule for the Admission of Additional Evidence" precluded Employer from introducing medical evidence on appeal under 20 C.F.R. § 725.412(a). However, this provision of the regulations refers only to the Employer's response to its designation as the liable responsible operator, which Employer does not challenge. Accordingly, the objection is overruled.

Decision and Order at 4 n. 4.

With regard to the propriety of the administrative law judge's ruling, we agree that the applicable regulations do not preclude employer from introducing medical evidence in this case.[4] The regulation at 20 C.F.R. §725.412(a), governing the obligation of the

[4] On January 28, 2010, the district director issued a Schedule for the Submission of Additional Evidence pursuant to 20 C.F.R. §725.410. Director's Exhibit 12. The district director made preliminary findings that employer was the responsible operator liable for benefits and that "claimant would be entitled to benefits if we issued a decision at this time[.]" *Id*. The district director informed the parties that they "may now submit to this office additional medical evidence as to the claimant's entitlement." *Id.* Neither claimant nor employer responded to the Schedule for the Submission of Additional Evidence. On April 29, 2010, the district director issued its Proposed Decision and Order

parties to respond to the Schedule for the Submission of Additional Evidence states as follows:

> (a) (1) Within 30 days after the district director issues a schedule pursuant to § 725.410 of this part containing a designation of the responsible operator liable for the payment of benefits, that operator shall file a response with regard to its liability. The response shall specifically indicate whether the operator agrees or disagrees with the district director's designation.
>
> (2) If the responsible operator designated by the district director *does not file a timely response, it shall be deemed to have accepted the district director's designation with respect to its liability*, and to have waived its right to contest its liability in any further proceeding conducted with respect to the claim.

20 C.F.R. §725.412(a) (emphasis added).

By not responding to the Schedule for the Submission of Additional Evidence, employer conceded liability as the responsible operator in this case, but it did not waive its right to submit evidence relevant to the issues of entitlement. The regulation at 20 C.F.R. §725.412(b) specifically addresses the effect that employer's failure to respond to the Schedule for the Submission of Additional Evidence has with regard to the liability for benefits:

> (b) The responsible operator designated by the district director may also file a statement accepting claimant's entitlement to benefits. If that operator fails to file a timely response to the district director's designation, the district director shall, upon receipt of such a statement, issue a proposed decision and order in accordance with § 725.418 of this part. *If the operator fails to file a statement accepting the claimant's entitlement to benefits within 30 days after the district director issues a schedule pursuant to § 725.410 of this part, the operator shall be deemed to have contested the claimant's entitlement.*

20 C.F.R. §725.412(b) (emphasis added). Thus, contrary to claimant's assertion, the fact that employer did not respond to the district director's Schedule for the Submission of Additional Evidence does not equate to an acceptance of claimant's entitlement to

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awarding benefits. On May 12, 2010, employer timely requested a formal hearing. Director's Exhibit 14.

benefits. Rather it has the opposite effect. Employer is deemed to have contested claimant's entitlement to benefits. We therefore reject claimant's assertion that employer was precluded from submitting evidence in this case. [5]

II. Merits of Entitlement

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Claimant argues that the administrative law judge erred in finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis. Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered readings of two x-rays dated September 25, 2009 and March 3, 2011. The administrative law judge found that the September 25, 2009 x-ray had one only reading, by Dr. Gaia, a Board-certified radiologist, which was positive for pneumoconiosis. Decision and Order at 4; Director's Exhibit 8. Based on Dr. Gaia's uncontroverted reading, the administrative law judge found that the September 25, 2009 x-ray was positive for pneumoconiosis. *Id.* The administrative law judge also found that the March 3, 2011 x-ray had only one reading, by Dr. Wheeler, dually qualified as a Board-certified radiologist and B reader, which was negative for pneumoconiosis.[6] *Id*. Based on the uncontroverted reading of Dr. Wheeler,

[5] In the preamble to the final rules, issued December 20, 2000, which included the regulations at issue, the Department of Labor (DOL) specifically explained that, under the DOL's first proposal, an employer, would have been required to develop all of its evidence regarding both its liability as an operator and the claimant's eligibility while the case was pending before the district director. The DOL's second notice of proposal rulemaking, however, proposed a substantial alteration in procedures that would permit parties to maintain their current practice of deferring the development of medical evidence until after a case has been referred to the Office of Administrative Law Judges. 64 Fed. Reg. 54,993 (Oct. 8, 1999). The DOL has adopted this second proposal in these final regulations. 65 Fed. Reg. 79,984 (December 20, 2000).

[6] Claimant argues that Dr. Wheeler "does not read the film as completely negative; rather he reads the film as 0/0." Claimant's Brief in Support of Petition for Review at 8. Contrary to claimant's argument, the regulation at 20 C.F.R. §718.102(b) specifically states that "a chest x-ray classified as category 0, including sub-categories 0---, 0/0, or 0/1 does not constitute evidence of pneumoconiosis." 20 C.F.R. §718.102(b).

a Board-certified radiologist and B reader, the administrative law judge found that the March 3, 2011 x-ray was negative for pneumoconiosis. *Id.* Relying on Dr. Wheeler's credentials as a dually qualified radiologist, the administrative law judge found that the March 3, 2001 x-ray was the most credible and "outweighs the positive x-ray evidence." *Id*. at 4-5.

Claimant asserts that the administrative law judge's decision to assign greater weight to Dr. Wheeler's x-ray reading is "contrary to the remedial nature of [the Act] and the fact that pneumoconiosis is not a disease that goes into remission, but a progressive disease." Claimant's Brief in Support of Petition for Review at 8. To the extent that claimant suggests that the administrative law judge's analysis is contrary to *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), we reject claimant's allegation of error. The administrative law judge did not resolve the conflict in the x-ray evidence based on an improper application of the more recent evidence rule, in contravention of *Adkins*. Instead, the administrative law judge resolved the conflict based on consideration of the credentials of the radiologists. The regulation at 20 C.F.R. §718.202(a)(1) specifically provides that "where two or more [x]-ray reports are in conflict, in evaluating such x-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such [x]-rays." 20 C.F.R. §718.202(a)(1); Because the administrative law judge acted within her discretion in giving greater weight to Dr. Wheeler's negative x-ray reading, based on his credentials as a dually qualified radiologist, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[7] *See Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (en banc).

Claimant also challenges the administrative law judge's finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis. Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge weighed the conflicting medical opinions of Drs. Talati and Levinson. She noted that Dr. Talati diagnosed pneumoconiosis attributable to coal dust exposure, based on Dr. Gaia's positive reading of the September 25, 2009 x-ray and claimant's "reported work history of eight to nine years in the coal industry." Decision and Order at 6; *see* Director's Exhibit 8. Contrary to claimant's argument on appeal, the administrative law judge permissibly assigned less weight to Dr. Talati's diagnosis of clinical pneumoconiosis because it was based on a positive x-ray reading, which was inconsistent with the administrative law judge's

[7] Contrary to claimant's assertion, the fact that Dr. Wheeler was hired by employer does not, by itself, demonstrate partiality or partisanship on the part of the physician. *See Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992).

finding that "the radiographic evidence as a whole does not conclusively establish the presence of pneumoconiosis." Decision and Order at 7; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); *Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226 (2002) (en banc); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). The administrative law judge also rationally found that "Dr. Talati's opinion is entitled to less weight to the extent that his etiological determinations were based upon an inaccurate coal mine employment history." Decision and Order at 7; *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc).

Because Dr. Talati's opinion is the only opinion supportive of claimant's burden of proof, we affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[8] We further affirm, as supported by substantial evidence, the administrative law judge's overall finding that claimant did not prove the existence of pneumoconiosis under 20 C.F.R. §718.202(a). *See Dixie Fuel Co. v. Director, OWCP* [*Hensley*], No. 11-4298, 2012 WL 5935574 (6th Cir. Nov. 28, 2012).

Claimant has the burden to establish entitlement to benefits and bears the risk of non-persuasion if his evidence does not establish a requisite element of entitlement. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267,18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988). Because claimant failed to establish pneumoconiosis, a requisite element of entitlement, we affirm the administrative law judge's finding that claimant is not entitled to benefits.[9] *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[8] The administrative law judge found that Dr. Levinson's opinion, that claimant does not have pneumoconiosis, was not sufficiently reasoned. Decision and Order at 7; *see* Employer's Exhibit 2. It is not necessary that we address the propriety of that finding since Dr. Levinson's opinion does not assist claimant in satisfying his burden of proof.

[9] Because claimant failed to establish the existence of pneumoconiosis, the administrative law judge properly found that claimant was unable to establish that his pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203, or total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Decision and Order at 10.

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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JUDITH S. BOGGS
Administrative Appeals Judge