

BRB No. 06-0627 BLA

GARY C. BLANKENSHIP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. STEEL CORPORATION	)	DATE ISSUED: 01/31/2007
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2004-BLA-6353) of Administrative Law Judge Richard A. Morgan 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). The administrative law judge credited claimant with thirty years of qualifying coal mine employment, and adjudicated this claim, filed on March 3, 2003, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found that the weight of the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and thus, even if total respiratory disability were established pursuant to 20 C.F.R. §718.204(b)(2), claimant

could not establish that his disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's weighing of the evidence and contends that the administrative law judge erred in failing to find that claimant had established every element of entitlement. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in 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 rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, 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 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Claimant maintains that the administrative law judge misapplied the holding in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), that all relevant evidence is to be considered together rather than merely within discrete subsections of 20 C.F.R. §718.202(a)(1)-(4), in finding that claimant failed to meet his burden of establishing the existence of pneumoconiosis by a preponderance of the evidence.<sup>1</sup> Specifically, claimant contends that the administrative law judge erred by first analyzing the evidence in each category separately, and then according determinative weight to the opinion of Dr. Crisalli, that there was no evidence of clinical or legal pneumoconiosis, on the ground that it was more consistent with the negative x-ray evidence and non-qualifying ventilatory tests.<sup>2</sup> Claimant asserts that Dr. Crisalli relied on the negative x-ray evidence to find that claimant did not have pneumoconiosis, and then

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<sup>1</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's last coal mine employment occurred in West Virginia. Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>2</sup> We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

attributed claimant's obstructive impairment to non-coal dust related factors, since claimant had never smoked. Claimant also maintains that the contrary opinion of Dr. Forehand was based on the most thorough evaluation of claimant's pulmonary condition, as the physician conducted both resting and exercise blood gas testing and based his diagnosis of pneumoconiosis on all available evidence.

Claimant's arguments are without merit, and essentially seek a reweighing of the evidence, which is beyond the scope of the Board's review. *See Anderson*, 12 BLR 1-111. The administrative law judge accurately reviewed the x-ray evidence of record, consisting of Dr. Forehand's positive interpretation of a film dated April 16, 2003, and Dr. Willis's negative interpretation of a film dated March 29, 2004. The administrative law judge determined that Dr. Forehand, a B reader, reported that the 2003 film quality was "2" due to "limited inspiration," and that Dr. Navani, a Board-certified radiologist and B reader who reviewed the 2003 film for quality purposes only, noted that the film quality was "3" due to "overexposed upper zones," whereas Dr. Willis, a B reader, indicated that the quality of his 2004 film was "1." After considering both the quality and quantity of the evidence, the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1), as Drs. Forehand and Willis possessed similar radiological credentials, but the more recent film of better quality was interpreted as negative for pneumoconiosis. Decision and Order at 4, 7; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

The administrative law then properly assessed the credibility of the conflicting medical opinions of record at Section 718.202(a)(4) in light of each physician's credentials, documentation and reasoning. Decision and Order at 5-8; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). The administrative law judge determined that Dr. Forehand, whose pulmonary qualifications are not reflected in the record, diagnosed "coal workers' pneumoconiosis (Hx, PE, CXR, PFS, ABG)," Director's Exhibit 10, and opined that this was the sole factor contributing to claimant's significant respiratory impairment resulting from exercise-induced hypoxemia, while Dr. Crisalli, Board-certified in internal medical and pulmonary diseases, found no chronic dust-related disease of the lungs, and opined that claimant's dyspnea and mild pulmonary impairment were caused by obstructive sleep apnea, obesity and chronic bronchitis, Employer's Exhibit 1. Decision and Order at 5-7. The administrative law judge noted that Dr. Forehand listed claimant's height and weight as 67 inches and 269 pounds, but did not comment upon whether claimant was overweight, whereas Dr. Crisalli diagnosed obesity based on claimant's height of 66.6 inches and weight of 292 pounds. Moreover, the administrative law judge acknowledged that Dr. Forehand obtained the only exercise blood gas study of record, while Dr. Crisalli conducted the only post-bronchodilator pulmonary function study. Decision and Order at 5, 6, 8. As Dr. Forehand diagnosed pneumoconiosis based in part on a positive x-ray of suboptimal quality, and attributed

claimant's respiratory impairment solely to coal workers' pneumoconiosis without addressing obesity as a possible alternative cause, the administrative law judge acted within his discretion in concluding that the contrary opinion of Dr. Crisalli was entitled to greater weight. In so finding, the administrative law judge determined that Dr. Crisalli possessed superior pulmonary qualifications and that his opinion was better reasoned and consistent with the more recent credible x-ray evidence, non-qualifying pulmonary function studies and normal resting blood gas results. Decision and Order at 8; *see Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). We reject claimant's suggestion that Dr. Crisalli was biased in attributing claimant's impairment to non-coal dust related conditions after finding no pneumoconiosis based on a negative x-ray, as it was neither raised before the administrative law judge nor is it supported by the record. *See generally Ellison v. Ranger Fuel Corp.*, 73 F.3d 357, 20 BLR 2-125 (4th Cir. 1995); *Urgolites v. BethEnergy Mines, Inc.*, 17 BLR 1-20 (1992); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985); *Chancey v. Consolidation Coal Co.*, 7 BLR 1-240 (1984).

Weighing all of the relevant evidence together, the administrative law judge properly found that claimant failed to meet his burden under 20 C.F.R. §718.202(a), since the weight of the x-ray and medical opinion evidence failed to establish the presence of pneumoconiosis. Decision and Order at 8; *Compton*, 211 F.3d 203, 22 BLR 2-162. As substantial evidence supports the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a), they are affirmed.

Claimant's failure to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), an essential element of entitlement, precludes an award of benefits under 20 C.F.R. Part 718. *Anderson*, 12 BLR 1-111. Consequently, we affirm the administrative law judge's denial of benefits.

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