BRB No. 08-0374 BLA

J. C.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
VALLEY CAMP COAL COMPANY	)	
	)	
and	)	
	)	
ACORDIA EMPLOYERS SERVICE	)	DATE ISSUED: 01/28/2009
	)	
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 Larry W. Price, Administrative Law Judge, United States Department of Labor.

J. C., Jodie, West Virginia, *pro se*.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order-Denying Benefits (07-BLA-5035) of Administrative Law Judge Larry W. Price rendered 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). This case came before the administrative law judge pursuant to claimant's request for modification of the

district director's denial of a claim filed on April 5, 2004.[1] Director's Exhibit 3. The administrative law judge credited claimant with 25.5 years of coal mine employment.[2] Decision and Order at 3. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence did not establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). The administrative law judge therefore determined that claimant did not establish a change in conditions or mistake in fact to justify modification pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, indicated that he will not file a substantive response to claimant's appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[1] Claimant filed an earlier claim for benefits on May 7, 2001, but timely withdrew it on October 17, 2002, prior to a hearing scheduled before an administrative law judge. Director's Exhibit 1. That claim is therefore considered not to have been filed. 20 C.F.R. §725.306(b). Claimant filed his current claim on April 5, 2004, and the district director denied benefits on January 21, 2005. Director's Exhibit 20. Claimant timely requested modification of the denial and submitted additional medical evidence. Director's Exhibits 22-25. The district director denied modification on June 13, 2006, finding that claimant failed to establish the existence of pneumoconiosis or total disability. Director's Exhibit 28. Claimant timely requested a hearing, and the case was transferred to the Office of Administrative Law Judges on October 3, 2006. Director's Exhibits 22, 30, 34.

[2] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

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, 1-112 (1989).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered five readings of two x-rays along with the readers' qualifications. The administrative law judge accurately found that one x-ray was read as positive for pneumoconiosis. Specifically, the administrative law judge considered that Dr. Patel, a Board-certified radiologist and B reader, classified the July 7, 2004 x-ray[3] as "1/0," a reading that the administrative law judge correctly noted is the lowest positive classification for pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(1), 718.102(b); Director's Exhibit 13. Further, the administrative law judge noted that Drs. Wheeler and Scott, both of whom are also Board-certified radiologists and B readers, read the same x-ray as negative for pneumoconiosis. Employer's Exhibits 3, 5. Considering Dr. Patel's use of the "1/0" classification, the administrative law judge reasonably chose to accord more weight to the negative readings by Drs. Wheeler and Scott than to the single positive reading by Dr. Patel, and determined that the July 7, 2004 x-ray was negative for pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). The administrative law judge correctly found that the May 2, 2005 x-ray received only negative readings by Drs. Wiot and Willis, both of whom are Board-certified radiologists and B readers. *See* 20 C.F.R. §725.310(b); Director's Exhibit 27; Employer's Exhibit 2. The administrative law judge's finding that the existence of pneumoconiosis was not established was based on a proper qualitative analysis of the x-ray evidence, and substantial evidence supports his conclusion. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge considered a biopsy report submitted by claimant, dated October 13, 2004. In the gross description, Dr. Barreta, whose qualifications are not of record, stated that the "pleural surface demonstrates a smooth glistening gray focally anthracotic surface." Director's Exhibit 22. In a consultative report dated April 8, 2006, Dr. Naeye, who is Board-certified in Anatomical and Clinical Pathology, reviewed the biopsy slides, and diagnosed "centrilobular emphysema which varies from moderate to severe from one piece of lung tissue to another." Director's Exhibit 27. Dr. Naeye opined that there was no evidence of coal workers' pneumoconiosis in the lung tissue and that the emphysema was

[3] Dr. Binns read the July 7, 2004 x-ray for quality purposes only. Director's Exhibit 13.

attributable to cigarette smoking. *Id*. The administrative law judge properly found that Dr. Barreta's mention of an "anthracotic surface," without more, did not establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(2). Further, the administrative law judge permissibly found Dr. Naeye's opinion, that pneumoconiosis was absent, to be persuasively explained, and supported by Dr. Naeye's credentials. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(2), as it is supported by substantial evidence.

Pursuant to 20 C.F.R. §718.202(a)(3), the administrative law judge correctly determined that none of the presumptions listed at 20 C.F.R. §718.202(a)(3) was applicable in this living miner's claim filed after January 1, 1982, in which the record contained no evidence of complicated pneumoconiosis. We therefore affirm the administrative law judge's findings pursuant to Section 718.202(a)(3).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered four medical opinions. Dr. Rasmussen, who is Board-certified in Internal Medicine, examined and tested claimant and diagnosed coal workers' pneumoconiosis based on a chest x-ray, and chronic bronchitis due to coal dust exposure and smoking, based on a history of a chronic productive cough. Director's Exhibit 13. Dr. Crisalli, who is Board-certified in Internal Medicine and Pulmonary Disease, examined and tested claimant and reviewed the medical evidence of record, and opined that he does not have pneumoconiosis, but has a mild impairment due to smoking, and suffers from heart disease. Director's Exhibit 27; Employer's Exhibit 8. Drs. Castle and Hippensteel, both of whom are also Board-certified in Internal Medicine and Pulmonary Disease, reviewed the medical evidence of record and reached the same conclusion. *See* 20 C.F.R. §725.310(b); Employer's Exhibits 1, 4, 7, 9.

The administrative law judge accorded greater weight to the opinions of Drs. Zaldivar, Crisalli, and Hippensteel because he found that these physicians "provide[d] very persuasive explanations regarding why the objective medical evidence d[id] not support a diagnos[is] of any condition caused by coal dust exposure." Decision and Order at 15. The administrative law judge then discussed several areas in which he concluded that Drs. Zaldivar, Crisalli, and Hippensteel had rendered better reasoned opinions. *Id*. This finding was within the administrative law judge's discretion and it is supported by substantial evidence. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Further, the administrative law judge found that, in contrast, Dr. Rasmussen did not adequately explain his opinion or point to specific findings to support his conclusions. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985). Additionally, the administrative law judge permissibly accorded more weight to the opinions of Drs.

Zaldivar, Crisalli, and Hippensteel based on the doctors' superior qualifications as Board-certified pulmonologists. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Because substantial evidence supports the administrative law judge's finding that the existence of pneumoconiosis was not established by the medical opinion evidence, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(4).[4]

Therefore, 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). As the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement under Part 718, entitlement thereunder is precluded. *Anderson*, 12 BLR at 1-112. Thus, we need not consider the administrative law judge's additional finding that claimant did not establish total disability, as any error therein would be harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[4] Because the administrative law judge based his credibility determinations upon the physicians' respective credentials and the quality of their reasoning and explanation concerning the medical evidence that was generated in this claim, we conclude that any error by the administrative law judge in not discussing the fact that Drs. Zaldivar and Hippensteel also reviewed some medical data that was not designated as evidence in this claim, was harmless. *See* 20 C.F.R. §725.414(a)(3)(i); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Exhibits 1, 4.

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