BRB No. 05-0318 BLA

FLOYD SCHRADER	)	
	)	
Claimant-Petitioner	)	
v.	)	
	)	
P & M MINING COMPANY	)	DATE ISSUED: 10/12/2005
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	
	)	
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.

Thomas S. Cometa (Cometa and Cappellini), Kingston, Pennsylvania, for claimant.

Paul K. Patterson (Mascelli & Paterson), Scranton, Pennsylvania, for employer/carrier.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2004-BLA-06050) of Administrative Law Judge Robert D. Kaplan rendered on a subsequent claim filed, on May 20, 2003, 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 found that claimant established ten years of coal mine employment, based on the parties' stipulation, that employer, P&M Mining Company, was the responsible operator, and that the new evidence established total disability but failed to establish the existence of pneumoconiosis, that pneumoconiosis arose out of coal mine employment, or that pneumoconiosis was totally disabling. 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b), 718.204(c). Accordingly, benefits were denied.[1]

On appeal, claimant argues that the administrative law judge erred in finding that claimant failed to establish the existence of pneumoconiosis, and thereby, also failed to establish that pneumoconiosis arose out of coal mine employment or that pneumoconiosis was totally disabling. Specifically, claimant contends that the administrative law judge erred in his evaluation of the medical opinion evidence and in finding that the medical opinion evidence outweighed the x-ray evidence, which showed the existence of pneumoconiosis. In response, employer contends that the administrative law judge correctly found that the existence of pneumoconiosis was not established and that the administrative law judge's Decision and Order denying benefits is, therefore, affirmable. The Director, Office of Workers' Compensation Programs, (the Director) responds, asserting only that the administrative law judge correctly found Dr. Zlupko's opinion to be reasoned and documented, and that the Director had, therefore, provided claimant with a complete, credible pulmonary examination.

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 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3,

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[1] Claimant's first claim was filed with the Department of Labor on April 15, 1991. Director's Exhibit 1. That claim was denied by the district director on October 4, 1991 because claimant failed to establish any of the elements of entitlement. *Id.* Claimant took no further action on that claim and the denial became final.

718.201, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Claimant first contends that the administrative law judge erred in crediting the subjective evidence, *i.e.*, medical opinion evidence, which he found did not establish the existence of pneumoconiosis over the objective evidence, *i.e.*, x-ray evidence, which he found did establish the existence of pneumoconiosis. In support of this contention, claimant suggests that *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997) which was issued prior to the establishment of the new regulations allowed different types of evidence to be weighed together as a way of leveling the playing field between the amount of evidence submitted by employer and claimant and was not intended to replace objective evidence with subjective evidence. This argument is rejected.

The administrative law judge properly weighed together the x-ray and medical opinion evidence and could properly credit the medical opinion evidence over the x-ray evidence. *Williams*, 114 F.3d 22, 21 BLR 2-104. Contrary to claimant's suggestion, the Third Circuit in *Williams* never indicated that one type of evidence was more credible than another, nor was there any suggestion that the only reason *Williams* allowed the weighing of different types of evidence together was to level the playing field between the amount of evidence submitted by the parties. *Williams*, 114 F.3d 22, 21 BLR 2-104; *see* 30 U.S.C. §923(b) ("in determining the validity of claims under this part, all relevant evidence shall be considered).

Claimant next contends that the administrative law judge erred in finding that Dr. Levinson's opinion was reasoned and well-documented. In essence, claimant contends that Dr. Levinson improperly relied solely on his negative reading of an x-ray taken May 5, 2004 without considering other evidence, including the positive reading of a July 23, 2003 x-ray and the fact that the weight of the x-ray evidence was found to establish the existence of pneumoconiosis.

The administrative law judge found that Dr. Levinson, a Board-certified internist and pulmonologist, based his opinion on, in addition to his own x-ray reading, an examination, the x-ray readings of other physicians, a coal mine employment history of ten years, a smoking history of forty-three years, and the results of a blood gas test and pulmonary function test. The administrative law judge further noted: that Dr. Levinson found claimant's lungs to be clear and did not detect any abnormal breath sounds on examination; that Dr. Levinson found the x-ray evidence consisted with idiopathic or interstitial pulmonary fibrosis related to smoking, not pneumoconiosis; and that Dr. Levinson found the results of claimant's pulmonary function test and blood gas test were "reflective of interstitial pulmonary fibrosis" rather than pneumoconiosis. Decision and Order at 13; Employer's

Exhibit 1 at 14-17. Based on all of these factors, the administrative law judge found the opinion to be well-documented and reasoned. Thus, contrary to claimant's contentions, Dr. Levinson did not rely solely on a negative x-ray reading; nor, was Dr. Levinson's opinion entitled to less weight because the weight of the x-ray evidence was found to be positive. *See Church v. Eastern Assoc. Coal Corp.*, 21 BLR 1-52, 1-54 (1997); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fitch v. Director, OWCP*, 9 BLR 1-45, 1-47 n.2 (1986). Further, contrary to claimant's assertion, Dr. Levinson's opinion was not biased merely because he was hired by employer. *See Urgolities v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991); *Stanford v. Valley Camp Coal Co.*, 7 BLR 1-906 (1985). We affirm, therefore, the administrative law judge's determination to accord weight to Dr. Levinson's opinion as a reasoned and well-documented opinion.

Claimant also contends that the administrative law judge erred in accepting the opinion of Dr. Zlupko as reasoned and well-documented. Contrary to claimant's contention, the administrative law judge may accept a physician's opinion as to the existence of one of the elements of entitlement while rejecting it as to another. *See Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1. Thus, the administrative law judge could reasonably credit Dr. Zlupko's opinion that claimant did not have pneumoconiosis but had disabling congestive cardiomyopathy and coronary artery disease as it was based on examination, electrocardiogram, coal mine employment history, smoking history, pulmonary function study and blood gas study. *See Trumbo*, 17 BLR 1-85; *Clark*, 12 BLR 1-149, 1-155; *Fields*, 10 BLR 1-19.

Finally, claimant asserts that the opinion of Dr. Kirkowski, claimant's treating physician, establishes the existence of pneumoconiosis because Dr. Kirkowski indicated that claimant's pulmonary fibrosis could be associated with coal workers' pneumoconiosis and that claimant's heart condition was basically pulmonary in origin.

In considering Dr. Kirkowski's opinion, the administrative law judge noted that Dr. Kirkowski considered claimant's physical examination, medical history, chest x-rays, and pulmonary function and blood gas studies, but accorded diminished weight to Dr. Kirkowski's opinion because it appeared to credit claimant with more than the ten years of coal mine employment stipulated to by the parties. Specifically, the administrative law judge noted that Dr. Kirkowski stated that claimant's coal mine employment began in 1943 and that he stopped working in 1991, Claimant's Exhibit 3 at 19, but that Dr. Kirkowski did not explain whether he was crediting claimant with continued coal mine employment for all of these forty-eight years or only a portion of them. Thus, in light of the apparently large discrepancy between the length of coal mine employment stipulated to by the parties and found by the administrative law judge and that relied on by the physician and the lack of any

explanation by the physician as to what years between 1943 and 1991 were being counted, if not all, the administrative law judge acted reasonably in according diminished weight to Dr. Kirkowski's opinion diagnosing the existence of pneumoconiosis. Hearing transcript at 10-11; Decision and Order at 4; *see* 20 C.F.R. §718.104(d)(5); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985). As claimant has failed to establish the existence of pneumoconiosis, and could not, therefore, establish that his pneumoconiosis arose out of coal mine employment or that it was totally disabling, the administrative law judge correctly found that claimant failed to establish entitlement. 20 C.F.R. §§718.202(a), 718.203(b), 718.204(c); *Trent*, 11 BLR 1-26, 1-29; *Perry*, 9 BLR 1-1, 1-2.

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