BRB No. 11-0842 BLA

ELMER R. PRUITT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COBRA MINING, INCORPORATED	)	
	)	
and	)	
	)	
KNOX CREEK COAL CORPORATION	)	DATE ISSUED: 08/28/2012
	)	
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 Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Elmer R. Pruitt, Raven, Virginia, *pro se*.

Ronald E. Gilbertson (Husch Blackwell), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order Denying Benefits (2009-BLA-05611) of Administrative Law Judge Pamela J. Lakes

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the

rendered on a claim filed on July 18, 2008, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge found that claimant established twelve years of coal mine employment, but failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found that claimant was not entitled to the Section 411(c)(4) presumption of total disability due to pneumoconiosis as he alleged, and the record supported, only twelve years of coal mine employment.[2] *See* 30 U.S.C. §921(c)(4). Accordingly, the administrative law judge denied benefits.

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, has not filed a substantive brief in response to the appeal.

In an appeal by a claimant filed without the assistance of counsel, the Board will consider 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 Corp.*, 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 rational, supported by substantial evidence, and in accordance with applicable law.[3] 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is

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administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), provides a rebuttable presumption of total disability due to pneumoconiosis if a miner establishes at least *fifteen* years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment.

[3] Because claimant's last coal mine employment was in West Virginia, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Decision and Order at 2; Director's Exhibit 3.

totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one 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).

With respect to the administrative law judge's finding that the evidence is insufficient to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge properly found that the x-ray evidence was in equipoise because it was read as both positive and negative for the existence of pneumoconiosis by equally qualified readers.[4] *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). The administrative law judge, therefore, properly found the x-ray evidence insufficient to establish the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(1), and that finding is affirmed.

Turning to 20 C.F.R. §718.202(a)(2) and (3), the administrative law judge properly found that the existence of pneumoconiosis was not established thereunder, as there was no biopsy evidence in the record and the presumptions contained in Section 718.202(a)(3) are not applicable in this case. 20 C.F.R. §718.202(a)(2) and (3).

Considering the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge found that it did not establish the existence of either clinical or legal pneumoconiosis. The administrative law judge found that, while the opinion of Dr. Rasmussen contained a diagnosis supportive of a finding of both clinical and legal pneumoconiosis, the opinions of Drs. Fino and Castle were not supportive of a finding of either clinical or legal pneumoconiosis. The administrative law judge credited the opinions of Drs. Fino and Castle, over the opinion of Dr. Rasmussen, as she found them better reasoned and documented. Specifically, the administrative law judge noted that "Dr. Rasmussen's opinion was based upon the results of a single examination while Drs. Fino and Castle were able to review additional evidence." Decision and Order at 8. In addition, the administrative law judge noted that "Dr. Rasmussen's explanation is based upon general principles … while … Dr. Castle's report was more case specific and he was able to explain his conclusion in more detail at his deposition." *Id*. Consequently, the administrative law judge provided valid bases for finding the opinions of Drs. Fino

[4] Specifically, the administrative law judge found that the September 30, 2008 x-ray was read as positive for the existence of pneumoconiosis by a B reader and as negative for pneumoconiosis by a dually-qualified Board-certified radiologist and B reader. The administrative law judge found that the x-rays taken on March 3, 2008 and February 2, 2009 were read as both positive and negative for pneumoconiosis by dually-qualified radiologists. Decision and Order at 7.

and Castle better reasoned and documented than the opinion of Dr. Rasmussen. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). We, therefore, affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of either clinical or legal pneumoconiosis pursuant to Section 718.202(a)(4).

Further, in considering the other evidence pursuant to 20 C.F.R. §718.107, the administrative law judge properly found that the two digital x-rays in the record "weigh[ed] in favor of a finding of clinical pneumoconiosis," as the February 26, 2009 x-ray was read as negative for pneumoconiosis by a B reader, but as positive by a dually-qualified radiologist, and the November 11, 2009 x-ray was read as negative by a B reader, but as positive by a dually-qualified radiologist. The administrative law judge further noted that Dr. Castle "indicated [on deposition] that most hospitals and medical centers use digital images for their x-rays and the digital x-rays that he reviewed were of sufficient quality for him to determine whether [c]laimant had radiographic evidence of pneumoconiosis." Decision and Order at 9; Claimant's Exhibits 4, 5; Employer's Exhibits 1, 4; *see* 20 C.F.R. §718.107; *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(en banc)(McGranery and Hall, JJ., concurring and dissenting), *aff'd on recon*. 24 BLR 1-13 (2007)(en banc)(McGranery and Hall, JJ., concurring and dissenting). The administrative law judge also properly found that the CT scan evidence did not establish the existence of pneumoconiosis because, "[a]s a whole, the CT scan evidence tends to weigh against a finding of clinical pneumoconiosis and to not resolve the legal pneumoconiosis issue."[5] Decision and Order at 9. In addition, the administrative law

[5] Specifically, regarding the CT scan evidence, the administrative law judge noted the following:

> Dr. Scott explained that CT scans were medically acceptable tools for investigation of all important chest disorders including occupational lung disease. Employer's Exhibit 12. There was a single CT scan of the chest, abdomen and pelvis, taken with contrast, on April 3, 2009 that was read by the hospital radiologist, Daniel Shook, M.D. as showing (with respect to the lungs) bi-apical pleural thickening with nonspecific emphysematous change, upper zone predominant; the impression was pulmonary emphysema. Claimant's Exhibit 8. That CT scan was reread by Dr. Scott as showing a few blebs in the apices, no small opacities to suggest silicosis/CWP, and other findings; he did not comment upon whether the CT scan showed other forms of pneumoconiosis, emphysema, or [chronic obstructive pulmonary disease]. Employer's Exhibit 12.

Decision and Order at 9.

judge properly found that claimant's treatment records did not establish the existence of clinical or legal pneumoconiosis because they either diagnosed the existence of coal workers' pneumoconiosis based on the miner's history alone, or, when they diagnosed the existence of a chronic obstructive pulmonary disease, they did not address its etiology. *See* 20 C.F.R. §718.201(a)(2)(b); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

Finally, in weighing all of the relevant evidence together, the administrative law judge properly determined that it failed to establish the existence of either clinical or legal pneumoconiosis pursuant to Section 718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). As the administrative law judge properly considered all of the relevant evidence on the issue of pneumoconiosis, and properly concluded that it failed to establish the existence of pneumoconiosis, an essential element of entitlement, her denial of benefits is affirmed. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 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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BETTY JEAN HALL
Administrative Appeals Judge