BRB No. 07-0755 BLA

O. M., JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	DATE ISSUED: 05/23/2008
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 Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

O.M., Jr., Arneth, West Virginia, *pro se*.

Paul E. Frampton (Bowles, Rice, McDavid, Graff & Love), Charleston, West Virginia, for employer.

Before: McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order-Denying Benefits (2005-BLA-05488) of Administrative Law Judge Stephen L. Purcell rendered on a subsequent 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).[1]

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[1] Claimant initially filed a claim on September 8, 1994. Director's Exhibit 1. The district director denied benefits on February 3, 1995, finding the evidence insufficient to establish any of the requisite elements of entitlement pursuant to 20 C.F.R. Part 718. *Id.*

The administrative law judge found that employer is the responsible operator, credited claimant with thirty-five years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 4. The administrative law judge noted that the prior claim was denied because claimant failed to establish any of the requisite elements of entitlement. The administrative law judge found that the newly submitted evidence established the existence of a totally disabling respiratory impairment under 20 C.F.R. §718.204(b) and, therefore, demonstrated a change in an applicable condition of entitlement, as required under 20 C.F.R. §725.309(d). The administrative law judge further found, however, that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. In response, employer urges affirmance of the administrative law judge's finding that claimant did not prove the existence of pneumoconiosis as supported by substantial evidence. The Director Office of Workers' Compensation Programs, has filed a letter stating that he will not submit a response brief on the merits of this appeal.[2]

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 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 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).

Claimant took no further action until filing a subsequent claim on February 13, 2004. Director's Exhibit 3.

[2] The administrative law judge's length of coal mine employment finding and his findings that employer is the responsible operator, that claimant established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b) and, thus, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), are affirmed as they are not adverse to claimant and are unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 1, 5.

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(en banc). 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*).

Pursuant to Section 718.202(a)(1), the administrative law judge considered the x-ray evidence from claimant's prior claim, which consists of two readings of an x-ray dated October 17, 1994, and four readings of three newly submitted x-rays dated March 9, 2004, July 21, 2004 and December 21, 2005. The administrative law judge found that the x-ray evidence from the prior claim did not support a finding of pneumoconiosis because both interpretations were negative. Decision and Order at 12; Director's Exhibit 1. With respect to the newly submitted x-ray evidence, the administrative law judge noted correctly that all of the interpretations were performed by physicians who are dually qualified as B readers and Board-certified radiologists. Decision and Order at 12. The administrative law judge determined that the evidence relating to the March 9, 2004 x-ray was in equipoise, as Dr. Patel's positive reading was countered by Dr. Scatarige's negative reading. Decision and Order at 5, 12; Director's Exhibit 17; Employer's Exhibit 3. Because the remaining, newly submitted films, dated July 21, 2004 and December 12, 2005, were read as negative, the administrative law judge found that they did not support a finding of pneumoconiosis. Decision and Order at 12; Employer's Exhibits 1-2. The administrative law judge rationally concluded that claimant did not establish the existence of pneumoconiosis at Section 718.202(a)(1), as the preponderance of the x-ray evidence was negative. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); Decision and Order at 2. We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

The administrative law judge correctly found that because there are no biopsy results to be considered at 20 C.F.R. §718.202(a)(2), claimant could not establish the existence of pneumoconiosis under that subsection. The administrative law judge also determined correctly that the presumptions referenced in 20 C.F.R. §718.202(a)(3) are not applicable in this case, as the claim at issue was filed by a living miner after January 1, 1982, and the record contains no evidence of complicated pneumoconiosis. Accordingly, 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)(2), (a)(3). Decision and Order at 12.

Under 20 C.F.R. §718.202(a)(4), the administrative law judge considered the reports of Drs. Rasmussen, Mullins, Zaldivar, and Tuteur. Decision and Order at 12-13;

Director's Exhibits 1, 12; Employer's Exhibits 13-16. Dr. Rasmussen, whose opinion was considered in the prior claim, diagnosed "possible CWP-30 years employment in the coal mining industry, and x-rays suggestive, but not diagnostic of pneumoconiosis…pneumoconiosis cannot be established in this case, although certainly pneumoconiosis cannot be ruled out." Director's Exhibit 1. The administrative law judge rationally determined that Dr. Rasmussen's opinion was entitled to little weight because it was equivocal and had "little or no explanation." *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Decision and Order at 13; Director's Exhibit 1.

Regarding Dr. Mullins's opinion, the administrative law judge determined that Dr. Mullins diagnosed coal workers' pneumoconiosis based upon Dr. Patel's positive reading of the film dated March 9, 2004 and chronic obstructive pulmonary disease due to both smoking and coal workers' pneumoconiosis. Decision and Order at 12; Director's Exhibit 12. The administrative law judge permissibly accorded less weight to Dr. Mullins's opinion than to the contrary opinions of Drs. Zaldivar and Tuteur because her qualifications are not in the record and she did not explain her diagnosis of coal workers' pneumoconiosis beyond citing claimant's coal mine employment history and a positive x-ray reading that was outweighed by the other interpretations of record. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-09, 22 BLR 2-162, 2-169-70 (4th Cir. 2000); *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-88-89 and n.4 (1993); Decision and Order at 13. Similarly, the administrative law judge acted within his discretion as fact-finder in determining that Dr. Mullins did not adequately explain her conclusion that both coal workers' pneumoconiosis and cigarette smoking caused claimant's chronic obstructive pulmonary disease. *Id.*

The administrative law judge's finding that the opinions of Drs. Zaldivar and Tuteur, that claimant's pulmonary process is consistent with asthma unrelated to coal dust exposure, are more probative and entitled to greater weight is also rational and supported by substantial evidence. The administrative law judge noted that Dr. Zaldivar is a B reader, that Dr. Tuteur is Board-certified in internal medicine and pulmonary disease, that both have an active clinical practice treating patients with occupational and other pulmonary diseases, and that both are professors in their fields of medical expertise. Decision and Order at 13; Employer's Exhibits 13-16. The administrative law judge further found that Drs. Zaldivar and Tuteur explained why the test results from three examinations contained in the record ruled out any respiratory or pulmonary impairment caused by, or related to, claimant's coal dust exposure. *Id.* Specifically, the administrative law judge considered that Dr. Zaldivar examined claimant in 2005 and 2004 and explained that his diagnosis of asthma is consistent with negative x-rays, claimant's symptoms, breathing tests that showed moderate reversible airway obstruction, restrictions of vital capacity corrected by bronchodilators, normal diffusing capacity, normal lung capacity, and treatment history of asthma. Decision and Order at 7. Similarly, the administrative law judge found that Dr. Tuteur's medical review concluded

that claimant's pulmonary process was consistent with asthma unrelated to coal dust exposure based on claimant's pulmonary function studies, blood gas studies, x-rays and negative CT scans. Decision and Order at 7-8, 13. Thus, we affirm the administrative law judge's finding that the opinions of Drs. Zaldivar and Tuteur outweighed the opinions of Drs. Rasmussen and Mullins. *Compton*, 211 F.3d at 208-09, 22 BLR at 169-70; *Trumbo*, 17 BLR 1-85, 1-88-89 n.4; Decision and Order at 13-14; Employer's Exhibits 13-16. We also affirm therefore the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Pursuant to 20 C.F.R. §718.107(b), the administrative law judge also admitted and considered Dr. Scott's readings of CT scans dated July 21, 2004 and December 21, 2005. Decision and Order at 2 n.2, 8; Employer's Exhibits 4, 8. In light of the fact that Dr. Scott, a dually qualified physician, interpreted these scans as negative for silicosis or coal workers' pneumoconiosis, we affirm the administrative law judge's finding that they were insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

Lastly, we affirm, as supported by substantial evidence, the administrative law judge's finding that, when weighed together, the evidence relevant to 20 C.F.R. §718.202(a) is insufficient to establish the existence of pneumoconiosis. *Compton*, 211 F.3d at 208-09, 22 BLR at 2-169-70. Because we have affirmed the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis, a requisite element of entitlement, we must affirm the denial of benefits. *See Trent,* 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, we affirm the administrative law judge's Decision and Order – Denying Benefits.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge