BRB No. 05-0538 BLA

BLAIN RUSSELL Claimant-Petitioner v. ARCH OF WYOMING, L.L.C. c/o ARCH COAL, INCORPORATED and UNDERWRITERS SAFETY AND CLAIMS Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/28/2006 DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Keith S. Burron (Associated Legal Group, LLC), Cheyenne, Wyoming, for claimant.

Catherine MacPherson (MacPherson, Kelly and Thompson, LLC), Rawlins, Wyoming, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (04-BLA-05201) of Administrative Law Judge Richard K. Malamphy 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).[1] The parties stipulated to, and the administrative law judge found, twenty-two years of coal mine employment. 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 the x-ray evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), but that the relevant evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2)-(a)(4). The administrative law judge also found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), but insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in his weighing of the medical opinions of record and, thus, the medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant argues that "although the ALJ found pneumoconiosis to be established pursuant to 20 C.F.R. §718.202(a)(1), he did not find it to be established under §718.202(a)(4) (well reasoned medical opinion). Therefore, to the extent that respondent or the Board question whether the element of existence of pneumoconiosis has been established, Petitioner challenges the ALJ's findings concerning the existence of the disease under §718.202(a)(4)." Claimant's Brief at 3. 20 C.F.R. §718.202(a) provides four alternative methods by which a claimant may establish the existence of pneumoconiosis. They are: 1) chest x-

[1]Claimant filed his claim for benefits on May 2, 2001, which was granted by the Director, Office of Workers' Compensation Programs, in a proposed Decision and Order on March 7, 2003. Director's Exhibits 2, 20. Employer filed a request for a formal hearing, which was held on June 23, 2004. Director's Exhibits 22, 26.

rays; 2) biopsy or autopsy; 3) the presumptions contained in Sections 718.304, 718.305 or 718.306; or 4) a physician's medical judgment, notwithstanding negative x-rays, that a claimant suffers from pneumoconiosis. Establishing pneumoconiosis under one of the four methods obviates the need to do so under any of the other methods. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Thus, the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) meets claimant's burden to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a).[2] We, therefore, need not address any of claimant's arguments challenging the administrative law judge's findings at Section 718.202(a)(4), including claimant's contention regarding the administrative law judge's consideration of the CT scan by Dr. Rose.[3]

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The United States Court of Appeals for the Tenth Circuit, within whose jurisdiction this case arises, has held that claimant must establish that his pneumoconiosis was at least a contributing cause of his total disability. *Mangus v. Director, OWCP*, 882 F.2d 152, 13 BLR 2-9 (10th Cir. 1989). The evidence upon which claimant relies to carry his burden at 20 C.F.R. §718.204(c), and which the administrative law judge rejected, consists of the medical opinions of Drs. Rose and Hunter. In her report dated April 28, 2004, Dr.

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[2]No party specifically contests the administrative law judge's finding of pneumoconiosis at Section 718.202(a)(1), and we therefore affirm it. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We need not address claimant's arguments concerning the administrative law judge's consideration of Dr. Rose's x-ray interpretation because any error in the administrative law judge's finding therein would not alter his finding that pneumoconiosis has been established at Section 718.202(a)(1). Further, as the administrative law judge found, subsections 718.202(a)(2) and (a)(3) are not applicable in this case. *See* Decision and Order at 16.

[3]Employer argues that the administrative law judge should have weighed all the evidence at 20 C.F.R. §718.202(a)(1)-(a)(4) before making a determination as to the existence of pneumoconiosis. However, employer cites to no binding authority from the United States Court of Appeals for the Tenth Circuit within whose jurisdiction this case arises, in support of its position. The Board has long held that Section 718.202 provides four alternative methods for establish pneumoconiosis and has declined to extend the holding in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997) and *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000) outside of the Third and Fourth Circuits, respectively.

Rose found claimant totally disabled based on a combination of "abnormal arterial blood gas analysis, pulmonary function study testing showing obstruction with a reduced diffusing capacity, and cor pulmonale with right sided heart enlargement." Claimant's Exhibit 5. Dr. Rose found that claimant was unable to perform his usual coal mine job and that his disability was "significantly related to and substantially caused by coal dust exposure." *Id.* In her deposition, Dr. Rose opined that claimant was totally disabled from performing his usual job duties due in part to his underlying respiratory disease. Claimant's Exhibit 9. Dr. Rose concludes that claimant's coal workers' pneumoconiosis is a "substantially contributing factor in his respiratory disability." *Id.*[4] Dr. Hunter found that claimant "does have a significant smoking history of 25 pack years but quit smoking at age 53. It is therefore my opinion that this patient has pneumoconiosis based upon mining experience and exposure as well as his resting ABG and chest x-ray and PFT. I feel he meets criteria for total disability." Director's Exhibit 8.

Claimant specifically contends that the administrative law judge failed to provide a valid basis for discrediting the opinions of Drs. Rose and Hunter and, therefore, finding them insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). In determining that the medical opinions of Drs. Rose and Hunter were insufficient to carry claimant's burden at Section 718.204(c), the administrative law judge found, *inter alia*, that,

> both physicians fail to adequately explain how they are able to determine the etiology of the pulmonary impairment, or more specifically, that coal mine dust was a factor, and in the case of Dr. Rose, that tobacco use was only a 'probable' factor.

Decision and Order at 21.

The administrative law judge concluded,

> While the Claimant has twenty-two years of coal mine dust exposure he also has a significant history of tobacco abuse and other conditions, which it has been plausibly explained, can cause the respiratory symptoms from which he suffers. It is the failure to adequately explain and document how these symptoms can be linked to coal mine dust exposure as opposed to those other conditions from

[4]Dr. Rose also opined that the claimant "had a history of significant tobacco abuse that *probably* contributed to his chronic respiratory symptoms and physiologic abnormalities, though he has avoided smoking for the past fourteen years." Claimant's Exhibit 5 (emphasis added).

> which he suffers that render the opinions of Drs. Hunter and Rose deficient.

Decision and Order at 22.

We find no error in the administrative law judge's determination that the medical opinions of Drs. Rose and Hunter are insufficient to support claimant's burden at Section 718.204(c). The administrative law judge rationally determined that Dr. Rose failed to adequately explain how the symptoms she identified can be linked to coal dust exposure, and not smoking and other conditions from which claimant suffers. *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983) (in making credibility determinations, the administrative law judge must examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical opinion is based); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). In addition, a review of the record reveals that Dr. Hunter never made an assessment on the issue of disability causation, and thus his opinion cannot support a finding of disability causation, as a matter of law. *See* Director's Exhibit 8. As the administrative law judge rationally found that the opinions of Drs. Rose and Hunter are insufficient to carry claimant's burden to establish disability causation at 20 C.F.R. §718.204(c), a finding of disability causation, and entitlement to benefits, are precluded. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge