BRB No. 07-0517 BLA

J. D. M.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 04/15/2008
	)	
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.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Douglas A. Smoot and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2005-BLA-6165) of Administrative Law Judge Stephen L. Purcell 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). The administrative law judge credited claimant with at least twenty-five years of coal mine employment, and adjudicated the

claim pursuant to 20 C.F.R. Part 718.[1] The administrative law judge found that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find that he established the existence of pneumoconiosis based on the x-ray and medical opinion evidence. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this appeal.

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 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 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; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000);[2] *Gee v. W.G. Moore & 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*).

Claimant contends the administrative law judge erred in finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis. Claimant asserts that the administrative law judge erroneously resolved the conflict among the various x-ray readings by relying on the mere numerical superiority of the negative readings. In this regard, claimant argues that the administrative law judge did not substantively evaluate or discuss the radiographic evidence with any specificity.

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[1] We affirm the administrative law judge's finding of at least twenty-five years of coal mine employment as that finding is unchallenged by the parties on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in West Virginia. *See* Director's Exhibits 1, 2; *Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

We reject claimant's contention. In this case, the record contains a total of nine readings of five x-rays dated October 4, 2004, February 23, 2005, March 16, 2005, September 15, 2005, and December 6, 2005. The October 4, 2004, x-ray was interpreted as positive for pneumoconiosis by Drs. Alexander and Patel, but negative for pneumoconiosis by Dr. Wiot. Director's Exhibits 11, 16; Employer's Exhibit 6. The February 23, 2005, x-ray and the March 16, 2005, x-ray were each read as negative for pneumoconiosis by Dr. Spitz and Dr. Meyer. Employer's Exhibit 3. Dr. Rasmussen read the x-rays dated September 15, 2005, and December 6, 2005, as positive for pneumoconiosis. Claimant's Exhibits 1, 2. In contrast, Dr. Wiot interpreted the September 15, 2005, x-ray, and Dr. Wheeler interpreted the December 6, 2005, x-ray as negative for pneumoconiosis. Employer's Exhibits 10, 11.

In weighing the conflicting x-ray evidence at Section 718.202(a)(1), the administrative law judge found that a slight majority of interpretations rendered by B readers, and that a significant majority of interpretations made by dually qualified B readers and Board-certified radiologists, were negative for pneumoconiosis.[3] In this regard, the record contains five negative and four positive x-ray interpretations rendered by B readers, and five negative and two positive interpretations rendered by dually qualified B readers and Board-certified radiologists. The administrative law judge thus concluded that a preponderance of the x-ray evidence was negative for pneumoconiosis. Decision and Order at 5. As the administrative law judge performed a qualitative and quantitative analysis of the x-ray evidence, and his finding that the x-rays do not establish the existence of pneumoconiosis is supported by substantial evidence, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1). *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *White v. New White Coal Co.*, 23 BLR 1-1 (2004).

With respect to Section 718.202(a)(4), claimant asserts that the administrative law judge did not supply an adequate reason for rejecting the opinion of Dr. Rasmussen, that claimant suffers from pneumoconiosis, in favor of opinions of Drs. Hippensteel and Castle, that claimant does not suffer from the disease. Claimant's contention is without merit.

Dr. Rasmussen examined claimant on October 4, 2004, September 15, 2005, and on December 16, 2005. Director's Exhibit 11; Claimant's Exhibits 1, 2. On each occasion, he reported an x-ray that was positive for coal workers' pneumoconiosis, a pulmonary function study showing some obstructive ventilatory impairment, and an

[3] The administrative law judge found that each physician is a B reader and that all but Dr. Rasmussen also are Board-certified radiologists. Decision and Order at 5.

arterial blood gas study showing some impairment in oxygen transfer during very light exercise. Dr. Rasmussen diagnosed coal workers' pneumoconiosis based on his positive x-ray reading and claimant's thirty-plus years of coal mine employment. He also indicated each time that claimant has a moderate loss of lung function due to his cigarette smoking and coal dust exposure that prevents him from performing his last regular coal mine job. Citing several medical journal articles, Dr. Rasmussen stated that claimant's coal mine dust exposure is the major contributing factor in his disabling lung disease.

Dr. Castle's February 23, 2005, examination of claimant resulted in his report dated June 27, 2005, wherein he concluded, based on claimant's subjective complaints, physical examination, x-ray, pulmonary function and arterial blood gas studies, and medical, social and occupational histories, that claimant does not suffer from coal workers' pneumoconiosis. Employer's Exhibit 1. He, however, opined that claimant may be disabled from returning to his previous coal mine employment as a result of his smoking-induced chronic lung disease. In a supplemental report dated November 29, 2005, Dr. Castle reiterated, based on additional testing, as well as a review of Dr. Rasmussen's reports, that claimant does not suffer from coal workers' pneumoconiosis, and that claimant's variable lung impairment is due to a smoking-induced chronic airway obstruction that is unrelated to claimant's coal mine employment. Employer's Exhibit 4. Dr. Castle again opined, in his deposition dated December 19, 2005, that claimant does not suffer from legal or medical pneumoconiosis. Employer's Exhibit 8, Dep. at 17.

Dr. Hippensteel opined, based on the physical examination and objective studies he conducted on claimant on March 16, 2005, that claimant does not have coal workers' pneumoconiosis or any lung impairment related to his coal mine employment. Employer's Exhibit 5. Dr. Hippensteel also stated that he disagreed with Dr. Rasmussen's assessment that claimant has coal workers' pneumoconiosis, since, like Dr. Castle, Dr. Hippensteel believed that claimant's minimal lung function abnormalities revealed by the objective tests conducted by Dr. Rasmussen are not the type one would expect to be referable to coal workers' pneumoconiosis.

In weighing the conflicting medical opinion evidence on the issue of the existence of pneumoconiosis at Section 718.202(a)(4), the administrative law judge first stated that the relative qualifications of the physicians are not determinative, since Dr. Rasmussen's "extensive experience in the field" of pulmonary medicine compensates for the fact that, unlike Drs. Castle and Hippensteel, he is not Board-certified in Pulmonary Disease.[4]

[4] Dr. Rasmussen is Board-certified in Internal Medicine and Forensic Medicine. Director's Exhibit 11. Drs. Castle and Hippensteel are Board-certified in Internal Medicine as well as Pulmonary Disease. Employer's Exhibit 1, 2.

Decision and Order at 6, 13. The administrative law judge, however, rationally found that the opinions of Drs. Castle and Hippensteel are better reasoned and documented than that of Dr. Rasmussen. Decision and Order at 13; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). In this regard, he found that the conclusion reached by Drs. Castle and Hippensteel, that claimant does not have clinical or legal pneumoconiosis, is "consistent with the credible, objective clinical test results," which include the preponderance of the x-ray evidence, the reversibility seen on some post-bronchodilator pulmonary function studies and the variability and improvement seen on arterial blood gas studies, which Drs. Castle and Hippensteel opined are "inconsistent with the progressive and irreversible nature of pneumoconiosis." Decision and Order at 13. The administrative law judge observed that, in contrast, Dr. Rasmussen's opinion that claimant suffers from pneumoconiosis is largely premised upon, and limited to, "questionable positive x-ray interpretations," as well as claimant's history of coal mine employment. *Id.* Moreover, the administrative law judge found that although Dr. Rasmussen cited medical literature in support of his position, the physician did not explain how that literature supported his opinion in this case.

Claimant's assertions of error are tantamount to a request that the Board reweigh the medical opinion evidence of record, a role outside its scope of review. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). It is within the purview of the administrative law judge to weigh the evidence and to draw inferences therefrom. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). Therefore, as it is rational and supported by substantial evidence, we affirm the administrative law judge's weighing of the evidence and resultant determination that claimant did not establish the existence of pneumoconiosis based on the medical opinion evidence pursuant to Section 718.202(a)(4). We also affirm, as supported by substantial evidence, the administrative law judge's finding, following a weighing of all the relevant evidence together pursuant to Section 718.202(a), that claimant did not establish the existence of pneumoconiosis under that provision.[5] Decision and Order at 13-14; *Compton*, 211 F.3d 203, 22 BLR 2-162. As claimant did not establish the existence of pneumoconiosis, a requisite element of entitlement, benefits were properly denied. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[5] The administrative law judge properly found that claimant cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) as the record does not contain any biopsy evidence and properly found that none of the presumptions at 20 C.F.R. §718.202(a)(3) is applicable in this case.

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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REGINA C. McGRANERY
Administrative Appeals Judge