BRB No. 07-0611 BLA

G.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WEST VIRGINIA SOLID ENERGY	)	DATE ISSUED: 04/28/2008
	)	
and	)	
	)	
AMERICAN BUSINESS & MERCANTILE INSURANCE MUTUAL, INCORPORATED	)	
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2006-BLA-5134) of Administrative Law Judge Richard A. Morgan 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] The administrative law judge accepted the parties' stipulation that claimant worked at least twelve years in coal mine employment and considered claimant's subsequent claim pursuant to 20 C.F.R. Part 718. The administrative law judge noted that the newly submitted arterial blood gas study evidence was qualifying for total disability, and that a finding of total disability would constitute a "material change in condition" pursuant to 20 C.F.R. §725.309. Decision and Order at 14 n.9. In considering the merits of entitlement, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's findings pursuant to Sections 718.202(a)(1), (4) and 718.204(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to respond, unless specifically requested to do so by the Board.[2]

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.[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, 363 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson*

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[1] Claimant filed a prior claim for benefits on August 13, 1986, which was denied by the district director on January 22, 1987, because the evidence was insufficient to establish any of the requisite elements of entitlement. Director's Exhibit 1.

[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit as claimant's most recent coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 1.

v. Valley Camp of Utah, Inc., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*).

If a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc*., 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's last claim was denied because he failed to establish any of the requisite elements of entitlement. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing either that he suffered from pneumoconiosis or was totally disabled in order for the administrative law judge to proceed to the merits of his claim. 20 C.F.R. §725.309(d)(2), (3); *see also Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) (*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). Although the administrative law judge found that the newly submitted arterial blood gas study evidence was qualifying for total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge did not make a specific finding as to whether claimant established a totally disabling respiratory impairment based on the newly submitted evidence at 20 C.F.R. §718.204(b), and thereby satisfied his burden to show a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. However, the administrative law judge denied benefits in this case because he determined that the record, as a whole, did not establish the existence of pneumoconiosis. In so finding, the administrative law judge determined that the new medical evidence, developed in conjunction with the subsequent claim, was more probative of claimant's current condition than the evidence developed in the prior claim, which was significantly outdated. Decision and Order at 14 n.9. Reviewing the claim on the merits, the administrative law judge found that claimant failed to establish, *inter alia*, the existence of pneumoconiosis pursuant to Section 718.202(a). Decision and Order at 12-14.

Claimant contends that the administrative law judge erred in weighing the x-ray evidence for pneumoconiosis pursuant to Section 718.202(a)(1), because he ignored the fact that all of the negative readings for pneumoconiosis were by Dr. Wiot.[4] Claimant's Brief at 10. Claimant's assertion of error is without merit.

[4] Contrary to claimant's assertions, because Dr. Wiot's x-ray readings were proffered by employer in accordance with the evidentiary limitations at 20 C.F.R. §725.414, the administrative law judge was not required to give those readings less weight as "cumulative or repetitious" evidence. Claimant's Brief at 10-11; *see generally Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (*en banc*).

Under Section 718.202(a)(1), the administrative law judge properly noted that the record contains twelve newly submitted readings of six x-rays dated September 8, 2004, October 20, 2004, May 31, 2005, August 20, 2005, November 2, 2005, and November 23, 2005. Decision and Order at 5-6; Director's Exhibits 1, 14, 15; Claimant's Exhibits 1, 2, 3; Employer's Exhibits 1, 3, 4, 9, 10. Of those twelve readings, ten were classified in accordance with the ILO system, as required by 20 C.F.R. §718.102(b).[5] Of the ten ILO-classified x-ray readings, five were positive for pneumoconiosis and five were negative for pneumoconiosis. Two of the positive readings for pneumoconiosis were by Drs. Forehand and Rasmussen, who are B readers; three of the positive readings were by Drs. Alexander and DePonte, who are dually qualified Board-certified radiologists and B readers; and the five negative readings were by Dr. Wiot, also a dually qualified radiologist and B reader.[6] Claimant's Exhibits 1, 2, 3; Director's Exhibits 14, 15; Employer's Exhibits 1, 3, 4, 9, 10.

In weighing the conflicting evidence at Section 718.202(a)(1), the administrative law judge found that while "a majority of the *physicians*" read claimant's x-rays as positive for pneumoconiosis, "the majority of the *interpretations*" by a dually qualified physician was negative for pneumoconiosis. Decision and Order at 6 (emphasis in the original). Moreover, the administrative law judge found that "the overall number of positive and negative B readings are equal (five positive and five negative)." *Id*. Contrary to claimant's assertion, because the administrative law judge considered both the quality and quantity of the conflicting x-ray evidence and found it to be equally

[5] There was one quality reading of the September 8, 2004 x-ray by Dr. Binns. Director's Exhibit 15. Dr. Wagenfuhr interpreted an October 20, 2004 x-ray as showing chronic obstructive pulmonary disease. Claimant's Exhibit 5. As noted by the administrative law judge, Dr. Wagenfuhr's reading is not probative as he did not prepare an ILO classification of the x-ray as either positive or negative for pneumoconiosis as required by 20 C.F.R. §718.102(b).

[6] The September 8, 2004 x-ray was read by Dr. Forehand, a B reader, and Dr. Alexander, a Board-certified radiologist and B reader as positive for pneumoconiosis, and as negative by Dr. Wiot, a Board-certified radiologist and B reader. Director's Exhibits 14, 15; Employer's Exhibit 3. Dr. Alexander read the May 31, 2005 x-ray as positive for pneumoconiosis, while Dr. Wiot read that film as negative. Claimant's Exhibit 3; Employer's Exhibit 4. Dr. Deponte, a Board-certified radiologist and B reader, read the August 20, 2005 x-ray as positive, while Dr. Wiot read the film as negative. Claimant's Exhibit 2; Employer's Exhibit 9. The November 2, 2005 x-ray was read as positive by Dr. Rasmussen, a B reader, and as negative by Dr. Wiot. Claimant's Exhibit 1; Employer's Exhibit 10. Lastly, the November 23, 2005 x-ray had one reading, by Dr. Wiot, which was negative for pneumoconiosis. Employer's Exhibit 1.

divided between positive and negative readings, he permissibly concluded that claimant failed to establish the existence of pneumoconiosis by a preponderance of the evidence. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *see Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-65-66 (4th Cir. 1992); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989); Decision and Order at 6. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).[7]

Claimant also argues that the administrative law judge erred in failing to find that he established the existence of pneumoconiosis pursuant to Section 718.202(a)(4), based on the medical opinions of Drs. Forehand and Rasmussen. Claimant's Brief at 12-17. Claimant maintains that the administrative law judge failed to properly explain the bases for his credibility findings as required by the Administrative Procedure Act. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a). We disagree.

Under Section 718.202(a)(4), the administrative law judge properly considered the medical reports of Drs. Forehand, Rasmussen, Renn and Castle. Decision and Order at 13. Drs. Forehand and Rasmussen opined that claimant suffers from pneumoconiosis while Drs. Renn and Castle opined that claimant does not have pneumoconiosis or any coal-dust related lung disease. Director's Exhibits 15, 16; Claimant's Exhibit 1; Employer's Exhibits 2, 6, 7, 8. Contrary to claimant's contention, in weighing the conflicting medical opinion evidence, the administrative law judge permissibly gave Dr.

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[7] Claimant asserts that the administrative law judge erred in his consideration of Dr. Deponte's positive x-ray reading. We disagree. Dr. Deponte interpreted claimant's August 20, 2005 x-ray as 1/1, p/s. Claimant's Exhibit 2. The administrative law judge noted that Dr. Deponte's positive reading was "somewhat undermined by her written x-ray report," wherein the doctor "raised the question" as to whether claimant's x-ray findings were due to pneumoconiosis or an idiopathic pulmonary fibrosis. Decision and Order at 6; Employer's Exhibit 6. Contrary to claimant's assertion, although Dr. DePonte's narrative comments are relevant to the issue of disease causation at 20 C.F.R. §718.203, and not the issue presented at Section 718.202(a)(1), *see Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999) (*en banc on recon.*), we consider the administrative law judge's error in referencing Dr. Deponte's written report at Section 718.202(a)(1) to be harmless, since he properly weighed Dr. Deponte's reading as positive in his consideration of the evidence under Section 718.202(a)(1). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Forehand's opinion, that claimant suffers from pneumoconiosis, less weight because Dr. Forehand, unlike Drs. Renn and Castle, is not Board-certified in pulmonary medicine.[8] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (*en banc*); Decision and Order at 13. The administrative law judge also permissibly determined that Dr. Forehand's opinion was unpersuasive since he reported physical findings of "crackles" that were not found on subsequent examinations by "better credentialed pulmonary specialists" and, because Dr. Forehand failed to adequately explain why claimant's respiratory condition was attributable solely to coal dust exposure and "could not be [attributable] to claimant's extensive smoking history, obesity, and/or heart disease."[9] Decision and Order at 14; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc).*

With regard to Dr. Rasmussen, the administrative law judge properly determined that because Dr. Rasmussen's diagnosis of coal workers' pneumoconiosis (clinical pneumoconiosis) was based primarily on claimant's history of coal dust exposure, and a "questionable" positive x-ray reading for pneumoconiosis, his opinion was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4). Decision and Order at 14; *see Cornett v. Benham Coal Co.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-123 (6th Cir. 2000). The administrative law judge also properly noted that while Dr. Rasmussen diagnosed moderate resting hypoxemia based on a qualifying arterial blood gas study, Dr. Rasmussen specifically stated that he was unable to determine whether claimant's test

[8] Claimant also argues that the administrative law judge ignored the fact that Dr. Rasmussen has gained national recognition as an expert in the field of black lung. Claimant's Brief at 16; Claimant's Exhibit 1. The administrative law judge, however, specifically stated that he considered Dr. Rasmussen's credentials to be comparable to those of Drs. Renn and Castle, even though Dr. Rasmussen was not Board-certified in pulmonary medicine. Decision and Order at 13.

[9] Claimant asserts that in rejecting Dr. Forehand's opinion, the administrative law judge erroneously required him "to disprove all other conditions that could potentially contribute to a finding of pulmonary disease" other than coal dust exposure. Claimant's Brief at 15-16. Contrary to claimant's assertion, the administrative law judge reasonably rejected Dr. Forehand's opinion as to the etiology of claimant's respiratory condition because the doctor failed to explain the basis for his diagnosis. Decision and Order at 14. Such a credibility determination was within the discretion of the administrative law judge as the trier of fact. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999); *Underwood v Elkay Mining Inc*., 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997).

results were due to a lung condition or obesity, thus precluding a finding of legal pneumoconiosis. *See* 20 C.F.R. §718.201; *Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); Decision and Order at 14. Furthermore, the administrative law judge rationally determined that the opinions of Drs. Forehand and Rasmussen were entitled to less weight since "[they] relied almost entirely upon their own evaluation of [c]laimant, whereas Drs. Renn and Castle also considered other medical evidence." Decision and Order at 13-14; *see Clark*, 12 BLR at 1-155.

In contrast to Drs. Forehand and Rasmussen, the administrative law judge permissibly determined that the opinions of Drs. Renn and Castle were reasoned and documented, and therefore, entitled to determinative weight. The administrative law judge specifically stated:

> More significantly, I find that the opinions of Drs. Renn and Castle regarding the absence of clinical or legal pneumoconiosis are more consistent with the credible, objective medical data, including the preponderance of the negative x-ray evidence, the near normal pulmonary function studies, and the improvement shown on arterial blood gas studies, which is inconsistent with the progressive and irreversible nature of pneumoconiosis.[10]

Decision and Order at 14; *see Clark*, 12 BLR at 1-155; *Fields*,10 BLR at 1-22. Because the administrative law judge properly set forth the rationale underlying his conclusions, s*ee Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989), and the credibility of the medical experts is a determination within his discretion as the trier of fact, *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999); *Underwood v Elkay Mining Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-2-28 (4th Cir. 1997), we affirm his finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

We also affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, based on a review of all of the evidence, pursuant to Section 718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-177 (4th Cir. 2000). Because claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement, benefits are precluded. *Perry*, 9 BLR at 1-2.

[10] The administrative law judge specifically determined that Dr. Renn explained why claimant's variable arterial blood gas test results were more consistent with heart disease and not coal dust exposure. Decision and Order at 13; Director's Exhibit 16.

Accordingly, the Decision and Order – Denying Benefits of the administrative law judge 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