

BRB No. 06-0979 BLA

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| J. M. |) | |
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| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS’ |) | DATE ISSUED: 08/28/2007 |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Respondent |) | DECISION and ORDER |

Appeal of the Decision and Order – Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Barry H. Joyner (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers’ Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (05-BLA-5381) of Administrative Law Judge Daniel L. Leland 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 found fourteen

¹ Claimant filed his first claim for benefits on August 7, 1980, which was denied by Administrative Law Judge Giles J. McCarthy on December 24, 1987. That denial was affirmed by the Board on June 29, 1990. Director’s Exhibit 1. Claimant filed a second claim for benefits on August 30, 2001. That claim was denied by the district director on

years of coal mine employment. Based on the date of filing, the administrative law judge adjudicated this subsequent claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability pursuant to 20 C.F.R. §718.204(b), elements of entitlement previously adjudicated against claimant, and thus failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to award benefits since the new evidence established the existence of pneumoconiosis and total disability. The Director, Office of Workers' Compensation Programs, responds, contending that the administrative law judge's Decision and Order - Denying Benefits is supported by substantial evidence and should be affirmed.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 living 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*).²

Claimant first contends that the administrative law judge erred in finding that the new evidence did not establish the existence of pneumoconiosis. Specifically, claimant contends that the administrative law judge erred in relying upon the negative x-ray evidence to find that claimant failed to establish the existence of pneumoconiosis. Claimant also contends that the administrative law judge erred in relying on the opinion

October 21, 2002, because the evidence did not establish any of the elements of entitlement. Director's Exhibit 2. The present claim was filed on January 26, 2004.

² The record indicates that claimant was last employed in the coal mine industry in West Virginia. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

of Dr. Zaldivar that claimant did not have pneumoconiosis. See 20 C.F.R. §§718.202(a)(1), (4); 725.309(d).

After careful consideration of the arguments on appeal, the administrative law judge's decision, and the evidence of record, we conclude that the administrative law judge's decision denying benefits is rational, supported by substantial evidence, and in accordance with law. It is, accordingly, affirmed. The administrative law judge properly found that the readings of the March 22, 2004 x-ray were in equipoise, as Dr. Patel, a dually qualified Board-certified radiologist and B reader, read the x-ray as positive for pneumoconiosis, while Dr. Wheeler, a dually qualified Board-certified radiologist and B reader, read the x-ray as negative. The administrative law judge properly concluded that the July 14, 2004 x-ray was negative for pneumoconiosis, as it was read negative by both Drs. Zaldivar and Wheeler. The administrative law judge properly found the readings of the March 13, 2006 x-ray to be in equipoise and, therefore, insufficient to establish the existence of pneumoconiosis as Drs. Miller and Ahmed, dually qualified Board-certified radiologists and B readers, read the x-ray as positive and Drs. Wiot and Meyer, dually qualified Board-certified radiologists and B readers, read the x-ray as negative.³ Thus, the administrative law judge properly concluded that the new x-ray evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(1). See 20 C.F.R. §718.202(a)(1); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'd sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Considering the medical opinion evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge rationally rejected the opinion of Dr. Porterfield because it was based on Dr. Porterfield's positive x-ray reading, which was contrary to the weight of the x-ray evidence. See *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir 2000). The administrative law judge therefore properly rejected the opinion of Dr. Porterfield, on pneumoconiosis, as unreasoned. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge credited the opinions of Drs. Zaldivar and Castle, who, he found, reviewed all of the evidence of record and provided well-reasoned and documented opinions concluding that the miner did not have either clinical or legal pneumoconiosis. Because the administrative law judge rationally discredited the opinion

³ The administrative law judge also found that pneumoconiosis could not be established at 20 C.F.R. §718.202(a)(2), (3) because there was no biopsy evidence and the presumptions contained at 20 C.F.R. §718.202(a)(3) were inapplicable. This finding is affirmed as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Additionally, claimant has not challenged the administrative law judge's finding that the May 12, 2005 CT scan was negative. See 20 C.F.R. §718.202(a)(4); *Skrack*, 6 BLR at 1-711.

of Dr. Porterfield, the only new opinion that could support a finding of pneumoconiosis at Section 718.202(a)(4), we need not consider claimant's argument as to whether the administrative law judge properly credited the opinion of Dr. Zaldivar, that claimant did not have pneumoconiosis. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Accordingly, the administrative law judge's finding that the newly submitted evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(4) is affirmed.

Contrary to claimant's argument, the administrative law judge did not rely solely on negative x-ray evidence to find that claimant failed to establish the existence of pneumoconiosis. Rather, the administrative law judge properly weighed together the newly submitted evidence relevant to the existence of pneumoconiosis at Section 718.202(a), as required pursuant to *Compton*, 211 F.3d at 210, 22 BLR at 2-172, and found that it failed to establish the existence of pneumoconiosis and, therefore, a change in an applicable condition of entitlement at Section 725.309.

The administrative law judge's finding that the new evidence failed to establish total respiratory disability at Section 718.204(b)(2) is likewise affirmed. The administrative law judge properly found that none of the new pulmonary function studies produced qualifying results⁴ and that while the results of the March 22, 2004 blood gas study were qualifying, the results of two subsequent blood gas studies were non-qualifying. The administrative law judge also found that there was no evidence of cor pulmonale [with right-sided congestive heart failure] in the record. Accordingly, the administrative law judge found the new evidence insufficient to establish the existence of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii).⁵ The administrative law judge properly rejected Dr. Porterfield's finding of total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv) as the administrative law judge found that Dr. Porterfield relied exclusively on claimant's qualifying blood gas study results to make his finding, and did not consider that subsequent blood gas studies were non-qualifying and normal. *Clark*, 12 BLR at 1-155. Accordingly, the administrative law judge rationally found that Dr. Porterfield's opinion was unreasoned and did not establish total respiratory disability at Section 718.204(b)(2)(iv). Because the administrative law judge properly found that the

⁴ A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. See 20 C.F.R. §718.204(b)(2) (i), (ii).

⁵ The administrative law judge's finding that total respiratory disability was not established at 20 C.F.R. §718.204(b)(2)(i)-(iii) is affirmed as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

only opinion that supported claimant's case was unreasoned, we need not consider claimant's argument as to whether the administrative law judge properly credited the opinion of Dr. Zaldivar that claimant did not have a totally disabling respiratory impairment. *See Larioni*, 6 BLR at 1-1278.

The administrative law judge's findings that the new evidence failed to establish the existence of pneumoconiosis and total disability at Section 718.202(a) and Section 718.204(b) are therefore affirmed. Likewise, because claimant failed to establish pneumoconiosis and total disability based on the new evidence, he could not establish a change in an applicable condition of entitlement at Section 725.309(d), and thus, entitlement to benefits is precluded. 20 C.F.R. §725.309(d).

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