

BRB No. 07-1001 BLA

B. R. A.)
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 Claimant-Petitioner)
)
 v.)
)
 CLINCHFIELD COAL COMPANY)
)
 and)
)
 PITTSTON COMPANY) DATE ISSUED: 08/21/2008
)
 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 William S. Colwell,
Administrative law Judge, United States Department of Labor.

B.R.A., Clintwood, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for
employer/carrier.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,¹ the Decision and Order
Denying Benefits (06-BLA-5462) of Administrative Law Judge William S. Colwell

¹ Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St.
Charles, Virginia, requested, on behalf of claimant, that the Board review the

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).² The administrative law judge credited claimant with twenty-one years and five months of coal mine employment.³ Decision and Order at 4. 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 that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), but did establish total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge further found that, assuming *arguendo* that the evidence had established the existence of pneumoconiosis, the evidence did not establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer/carrier responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to claimant's appeal.

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 Co.*, 12 BLR 1-176, 1-177 (1989). 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).

administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1985)(Order).

² Claimant filed her claim for benefits on November 8, 2004. Director's Exhibit 2. The district director issued a Proposed Decision and Order-Award of Benefits dated August 8, 2005 and a Revised Proposed Decision and Order-Award of Benefits dated November 18, 2005. Director's Exhibits 32, 35. Employer timely requested a hearing and the claim was referred to the Office of Administrative Law Judges on March 8, 2006. Director's Exhibit 45.

³ The record indicates that claimant's coal mine employment was in Virginia. Director's Exhibits 3, 5, 7. 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, 1-202 (1989)(*en banc*).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that she 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 v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered ten readings of five x-rays, and considered the readers' radiological qualifications. The administrative law judge accurately noted that five readings were positive for pneumoconiosis and five readings were negative. Specifically, an August 31, 2004 x-ray was read as positive for pneumoconiosis by Dr. Alexander, a B reader and Board-certified radiologist, and as negative by Dr. Scott, a B reader and Board-certified radiologist. Director's Exhibits 15, 17. The December 7, 2004 x-ray was read as positive for pneumoconiosis by Dr. Baker, a B reader, and as negative by Dr. Scatarige, a B reader and Board-certified radiologist.⁴ Director's Exhibits 13, 16. The March 8, 2005 x-ray was read as positive for pneumoconiosis by Dr. Pathak, a B reader and Board-certified radiologist, and as negative for pneumoconiosis by Dr. Scatarige. Director's Exhibits 15, 17. The April 19, 2005 x-ray was read as positive for pneumoconiosis by Dr. Alexander, and as negative for pneumoconiosis by Dr. Wheeler, who is also a B reader and Board-certified radiologist. Director's Exhibits 18, 19. Finally, the June 8, 2006 x-ray was read as positive for pneumoconiosis by Dr. Cappiello, a B reader and a Board-certified radiologist, and as negative for pneumoconiosis by Dr. Wheeler. Employer's Exhibit 3; Claimant's Exhibit 2.

In view of these conflicting readings on each x-ray by B readers and Board-certified radiologists, the administrative law judge reasonably found that "[t]he evidence is equally divided, without any basis for crediting the negative readings over the positive readings, or vice versa. For this reason . . . the x-ray evidence does not establish, by a preponderance of the evidence, the existence of pneumoconiosis." Decision and Order at 19; see *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-65-66 (4th Cir. 1992). Substantial evidence supports the administrative law judge's finding. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(2),(3), the administrative law judge accurately determined that the record contains no biopsy evidence and no evidence of complicated

⁴ Dr. Barrett read the December 7, 2004 x-ray for quality purposes only. Director's Exhibit 16.

pneumoconiosis. Decision and Order at 17. Therefore, claimant cannot establish the existence of pneumoconiosis by either of these methods.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered three medical reports and claimant's medical treatment records. Dr. Baker, who is Board-certified in Internal Medicine and Pulmonary Disease, examined and tested claimant and diagnosed coal workers' pneumoconiosis "1/1" based on an x-ray and claimant's history of coal dust exposure, and chronic obstructive pulmonary disease (COPD), chronic bronchitis, and hypoxemia, all due to both smoking and coal dust exposure. Director's Exhibit 13. By contrast, Drs. Castle and Fino, who are Board-certified in Internal Medicine and Pulmonary Disease, examined and tested claimant and reviewed her medical treatment records, and concluded that claimant does not have pneumoconiosis or any lung disease related to coal dust exposure, but suffers from severe COPD and pulmonary emphysema due to smoking. Director's Exhibit 20; Employer's Exhibits 3, 6, 7. In rendering his opinion, Dr. Fino stated that although emphysema can be associated with coal dust exposure, the degree of such emphysema is proportionate to the amount of coal dust that has been retained in the lungs. After reviewing the evidence, including a CT scan, Dr. Fino reported that there was no evidence of coal dust retention in claimant's lungs. Employer's Exhibit 3 at 11.

With respect to claimant's treatment records, the administrative law judge noted that Dr. Robinette, who is Board-certified in Internal Medicine and Pulmonary Disease, had diagnosed claimant with obstructive lung disease and asthma on several occasions, and on March 9, 2006, stated that he felt that claimant had evidence of coal workers' pneumoconiosis with airflow obstruction. Additionally, the administrative law judge noted that a nurse practitioner from Stone Mountain Health Services diagnosed coal workers' pneumoconiosis and severe COPD in a June 6, 2005 treatment note.⁵

The administrative law judge found that Dr. Baker's opinion diagnosing clinical pneumoconiosis was not well reasoned as the physician based his diagnosis only on an x-ray and coal mine employment history, without otherwise explaining the basis for his diagnosis. This finding was reasonable, as the administrative law judge had found that the x-ray evidence did not establish the existence of pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998). With respect to the

⁵ The administrative law judge noted accurately that several other treating physicians whose office notes were in the record did not diagnose pneumoconiosis. Decision and Order at 20-21; Employer's Exhibit 17; Claimant's Exhibit 3.

existence of legal pneumoconiosis,⁶ the administrative law judge acted within his discretion to find that the opinions of Drs. Castle and Fino, that claimant's lung disease is unrelated to coal dust exposure, were well-reasoned and entitled to greater weight. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). The administrative law judge reasonably considered that both physicians had reviewed additional medical evidence, including claimant's treatment records, and therefore had the most complete picture of claimant's health. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). Further, the administrative law judge permissibly found "persuasive Dr. Fino's judgment, supported by . . . medical literature he cited, that coal dust's role in causing an obstructive lung defect is proportionate to the amount of dust accumulation in the lungs," and Dr. Fino had explained that the medical evidence he reviewed showed that claimant does not have coal dust deposition in the lungs. Decision and Order at 21; *see Hicks*, 138 F.3d at 532, 21 BLR at 2-334; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Underwood*, 105 F.3d at 951, 21 BLR at 2-31-32.

Further, the administrative law judge permissibly found that Dr. Robinette's opinion was not as credible as those of Drs. Castle and Fino, because, although Dr. Robinette had examined claimant several times between 1997 and 2006, there was no explanation as to why Dr. Robinette did not discuss claimant's coal mine employment or diagnose pneumoconiosis until 2006, and because Dr. Fino explained that the findings Dr. Robinette described on an unspecified CT scan were not consistent with occupational lung disease. *See Hicks*, 138 F.3d at 532, 21 BLR at 2-334; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Underwood*, 105 F.3d at 951, 21 BLR at 2-31-32; Employer's Exhibit 6 at 22-23. Finally, the administrative law judge properly discounted the nurse practitioner's diagnosis of coal worker's pneumoconiosis, as it was not a diagnosis by a physician and was undocumented. *See* 20 C.F.R. §718.202(a)(4). Because substantial evidence supports 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), the finding is affirmed.

Moreover, substantial evidence supports the administrative law judge's finding that all the evidence weighed together did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Compton*, 211 F.3d at 211, 22 BLR at 2-174. Therefore, we affirm the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

⁶ "Legal" pneumoconiosis includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement under 20 C.F.R. Part 718, we affirm the denial of benefits. *See Anderson*, 12 BLR at 1-112.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge