

BRB No. 07-0478 BLA

R.H. )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 APOGEE COAL COMPANY/ARCH OF ) DATE ISSUED: 02/27/2008  
 KENTUCKY )  
 )  
 and )  
 )  
 ARCH COAL COMPANY, c/o )  
 UNDERWRITERS SAFETY & CLAIMS )  
 )  
 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 – Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

R.H., Benham, Kentucky, *pro se*.

Ralph D. Carter (Barret, Haynes, May & Carter P.S.C.), Hazard, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals, without the assistance of legal counsel, the Decision and Order – Denial of Benefits (2004-BLA-6849) of Administrative Law Judge Thomas F. Phalen, Jr., 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).<sup>1</sup> Based on the filing date of March 17, 2003, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge credited claimant with seventeen years of coal mine employment, finding that the record supported the parties' stipulation. The administrative law judge determined that the evidence of record was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2), but insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a) or total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, employer urges affirmance of the administrative law judge's denial of benefits, as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has indicated that he will not submit a response unless requested to do so by the Board.<sup>2</sup>

In an appeal filed by a claimant without the assistance of counsel, the Board will consider 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).

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; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-

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<sup>1</sup>On behalf of claimant, Jerry Murphree of Stone Mountain Health Services requested that the Board review the 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 (1995) (Order).

<sup>2</sup> We affirm the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2), as this determination is not adverse to claimant and has not been challenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

26 (1987).<sup>3</sup> Failure to establish any one of these elements precludes entitlement. *Trent*, 11 BLR at 1-27.

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and does not contain any error requiring remand or reversal. Pursuant to Section 718.202(a)(1), the administrative law judge considered nine readings of four x-rays. The administrative law judge found that the film obtained on January 29, 2002 was positive for pneumoconiosis, as the positive interpretations by Drs. Aycoth and Ahmed, both dually qualified as B readers and Board-certified radiologists, outweighed the negative interpretation by Dr. Wiot, also a dually qualified physician. Decision and Order at 13; Director's Exhibit 19; Employer's Exhibit 1. The administrative law judge determined that the x-ray dated September 17, 2002, was negative for pneumoconiosis based upon Dr. Wiot's uncontradicted, negative interpretation. Decision and Order at 13; Employer's Exhibit 2. With respect to the film obtained on June 26, 2003, the administrative law judge found it to be inconclusive, as Dr. Wiot read it as negative for pneumoconiosis, and Dr. Pathak, who is also a dually qualified physician, read it as positive. Decision and Order at 13; Director's Exhibits 17, 23, 24. The administrative law judge determined that the x-ray dated July 10, 2003 was negative for pneumoconiosis, as the negative readings by Dr. Wiot and Dr. Paranthaman, a B reader, outweighed the positive reading by Dr. Pathak. Decision and Order at 13; Director's Exhibits 13, 19; Employer's Exhibit 1. The administrative concluded:

I have determined that one x-ray is positive for the disease, one is inconclusive, and two x-rays are negative for pneumoconiosis. Weighing the x-ray evidence as a whole, I find that the preponderance of the chest x-ray evidence establishes that there is no pneumoconiosis. Therefore, I find that [c]laimant has failed to establish the presence of pneumoconiosis under subsection (a)(1).

*Id.* We affirm the administrative law judge's finding, as the administrative law judge conducted an appropriate qualitative and quantitative analysis of the x-ray evidence, and rationally concluded that the preponderance of the evidence was negative for pneumoconiosis pursuant to Section 718.202(a)(1). *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990).

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<sup>3</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment was in Kentucky. Director's Exhibit 2; see *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

The administrative law judge correctly found that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(2)-(3), as the record contains no biopsy or autopsy results demonstrating the presence of pneumoconiosis and the presumptions set forth at 20 C.F.R. §§718.304, 718.305, and 718.306 are not available to claimant.<sup>4</sup> Decision and Order at 13; *see* 20 C.F.R. §718.202(a)(2)-(3); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). This finding, therefore, is affirmed.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Paranthaman, Jarboe, and Cruz and various treatment records. Decision and Order at 14-16. Drs. Paranthaman and Jarboe indicated that claimant does not suffer from pneumoconiosis. Director's Exhibits 13, 16, 18, 22. Dr. Cruz, a treating physician, diagnosed both clinical and legal pneumoconiosis. Claimant's Exhibit 2.

The administrative law judge rationally concluded that the treatment records did not support a finding of pneumoconiosis, as the diagnoses of a pulmonary impairment set forth in these documents did not link the condition to coal dust exposure. Decision and Order at 16; 20 C.F.R. §718.201(a)(2); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 509, 22 BLR 2-625, 2-633 (6th Cir. 2003). With respect to Dr. Cruz's opinion, the administrative law judge rationally determined that despite her status as a treating physician, Dr. Cruz's diagnosis of clinical pneumoconiosis was entitled to little weight, as the x-ray evidence upon which she relied does not appear in the record and she identified no other objective evidence in support of her diagnosis. Decision and Order at 15; 20 C.F.R. §§718.104(d)(5), 725.414(a)(2)(i); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

Similarly, the administrative law judge acted within his discretion as fact-finder in discrediting Dr. Cruz's diagnosis of legal pneumoconiosis on the ground that she did not provide a rationale for attributing claimant's respiratory condition to coal dust exposure and, in contrast to Drs. Paranthaman and Jarboe, did not account for obesity as a potential causal factor. Decision and Order at 15; *Williams*, 338 F.3d at 514, 22 BLR at 2-649; *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994). Because the administrative law judge rationally found that the sole medical opinion supporting claimant's burden of proof was entitled to little weight, we affirm the

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<sup>4</sup>The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 because this claim was filed after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, as this claim is not a survivor's claim filed before June 30, 1982, the presumption at 20 C.F.R. §718.306 is also inapplicable.

administrative law judge's finding that claimant did not establish the existence of pneumoconiosis under Section 718.202(a)(4).

As we have affirmed the administrative law judge's determination that the existence of pneumoconiosis was not established pursuant to Section 718.202(a), an essential element of entitlement, we must also affirm the denial of benefits. *Trent*, 11 BLR at 1-27. We need not address, therefore, the administrative law judge's findings that claimant failed to establish that his total disability was due to pneumoconiosis under Section 718.204(c).

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge