BRB No. 08-0418 BLA

C. L. D.	)	
Claimant-Petitioner	)	
v.	)	
	)	DATE ISSUED: 02/06/2009
LEECO, INCORPORATED	)	
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 William S. Colwell, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (06-BLA-5064) of Administrative Law Judge William S. Colwell 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] Claimant filed his claim for

[1] Claimant's previous claim, filed on April 15, 1993, was denied by Administrative Law judge Rudolf L. Jansen in a Decision and Order dated February 21, 1995, based on claimant's failure to establish either the existence of pneumoconiosis or total disability. Director's Exhibit 1 at 792. Pursuant to claimant's appeal, the Board

benefits on November 1, 2004. Director's Exhibit 3. The administrative law judge credited claimant with nineteen years of coal mine employment.[2] Decision and Order at 3; Hearing Transcript at 6. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. In considering this subsequent claim, the administrative law judge determined that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), because the medical evidence developed since the prior denial of benefits established total disability pursuant to 20 C.F.R. §718.202(b)(2), an element of entitlement previously adjudicated against claimant. *See* 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). In considering the claim on the merits, however, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis or total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues specifically that the administrative law judge erred in finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) or total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[3] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to participate in this appeal.

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affirmed the denial of benefits. Director's Exhibit 1 at 758. Claimant timely requested modification, which was denied by Judge Jansen on May 27, 1998. Director's Exhibit 1 at 749. The Board affirmed the denial on June 1, 1999. Director's Exhibit 1 at 607. Claimant timely requested modification, which Administrative Law Judge Joseph E. Kane denied in a Decision and Order dated February 3, 2003, finding that although claimant established the existence of pneumoconiosis, he failed to establish total disability. Director's Exhibit 1 at 55. The Board affirmed the denial of benefits. [*C.L.D.*] *v. Leeco, Inc.*, BRB No. 03-0486 BLA (Oct. 24, 2003)(unpub.); Director's Exhibit 1 at 2.

[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 1989)(*en banc*).

[3] Because claimant does not challenge the administrative law judge's findings that the existence of pneumoconiosis was not established at 20 C.F.R. §718.202(a)(2), (3), we affirm them. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We need not address claimant's arguments regarding total disability as the administrative found that total disability had been established. Decision and Order at 14.

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).

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

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered three new medical opinions in conjunction with the medical opinions that were submitted in claimant's previous claim. Dr. Rasmussen diagnosed claimant with both clinical and legal pneumoconiosis,[4] while Drs. Repsher and Rosenberg concluded that claimant does not have clinical or legal pneumoconiosis. Director's Exhibit 15; Employer's Exhibits 1-3. Although all three physicians opined that claimant has diffuse, linear interstitial fibrosis, only Dr. Rasmussen opined that claimant's interstitial fibrosis was related to his coal mine dust exposure. Director's Exhibit 15. Drs. Rosenberg and Repsher opined that claimant has a form of interstitial fibrosis that is unrelated to coal mine dust exposure. Employer's Exhibits 1-3.

The administrative law judge chose to accord more weight to the opinions of Drs. Rosenberg and Repsher than to Dr. Rasmussen's contrary opinion, because he found that they were better reasoned and documented. Specifically, the administrative law judge found that Dr. Rosenberg explained that the characteristics and location of the interstitial lung disease ruled out coal mine dust exposure as a cause because claimant had linear scarring in the mid and lower lung zones rather than rounded micronodules in the upper lung zones. Decision and Order at 21; Employer's Exhibit 3 at 26-28. The administrative law judge also considered that, although Dr. Rasmussen cited medical studies to support his opinion that diffuse interstitial fibrosis may be linked to coal dust exposure, Dr. Rosenberg explained that the medical studies making this assertion were not controlled for other factors that can cause diffuse interstitial fibrosis. Decision and Order at 21. The administrative further noted that Dr. Rosenberg's opinion was "echoed by Dr. Repsher's reasoning" and that Dr. Repsher "cited the absence of radiographic and pulmonary function study evidence typical of CWP," explaining that claimant's normal

[4] "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).

FEV1/FVC ratio was not indicative of an obstructive defect. Decision and Order at 21. The administrative law judge further explained that Dr. Rosenberg was in the best position to assess claimant's condition as he relied on a "wider array of evidence." *Id*. Moreover, the administrative law judge found that the CT scan readings of record, which were "more sensitive than x-rays," better supported the opinions of Drs. Rosenberg and Repsher.[5] *Id*. Additionally, the administrative law judge accorded Dr. Rosenberg's and Dr. Repsher's opinions greater weight based on the physicians' superior qualifications. *Id.* Finally, the administrative law judge reviewed the prior medical opinion evidence and found that it did not establish the existence of pneumoconiosis. *Id.* He therefore found that the medical opinions did not establish the existence of pneumoconiosis.

Claimant contends that the administrative law judge erred in discounting Dr. Rasmussen's opinion as based on a positive x-ray reading that was "contrary to the [administrative law judge's] findings." Claimant's Brief at 3. Contrary to claimant's contention, the administrative law judge permissibly found Dr. Rasmussen's opinion outweighed by the contrary opinions of Drs. Rosenberg and Repsher, which he found to be better reasoned, and supported by the objective evidence. *See Gray v. SLC Coal Co*., 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR at 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Claimant additionally contends that the opinion of Dr. Rasmussen was reasoned and documented and should not have been discredited. Claimant's Brief at 3. Claimant also asserts that the administrative law judge "appears to have" substituted his opinion for that of a medical expert.[6] *Id.* Claimant essentially requests a reweighing of the evidence, which we are not authorized to do. *Anderson*, 12 BLR at 1-113. Substantial evidence supports the administrative law judge's permissible determination

[5] The administrative law judge found that high-resolution CT scan readings submitted by employer were medically acceptable and relevant to establishing or refuting claimant's entitlement to benefits, *see* 20 C.F.R. §718.107(b), and he credited Dr. Rosenberg's testimony that such CT scans are a more accurate diagnostic tool than are conventional chest x-rays. Decision and Order at 7. The administrative law judge further determined that the negative CT scans documenting idiopathic pulmonary fibrosis were more sensitive than x-rays and "bolster[ed] the x-ray readings that also demonstrated" idiopathic pulmonary fibrosis. Decision and Order at 20. None of these findings has been challenged on appeal. They are therefore affirmed. *Skrack*, 6 BLR at 1-711.

[6] We reject claimant's assertion that the administrative law judge substituted his opinion for that of a medical expert pursuant to 20 C.F.R. §718.202(a)(4) in the absence of any supporting evidence.

that the opinion of Dr. Rasmussen was not as well-reasoned and documented as the contrary opinions of Drs. Repsher and Rosenberg. Consequently, we affirm 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).

In the closing section of his brief, claimant generally and briefly contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R.§718.202(a)(1). Claimant's Brief at 6. However, claimant does not cite to any relevant case law or specifically challenge the administrative law judge's determination that, although the x-rays considered alone "tend[ed] to establish" pneumoconiosis, the more sensitive CT scans and more reliable medical opinions merited greater weight than the x-rays, and that the evidence therefore did not establish the existence of pneumoconiosis. Decision and Order at 7, 19-22. We therefore affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a). *See Skrack*, 6 BLR at 1-711; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a miner's claim under Part 718, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

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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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge