

BRB No. 07-0859 BLA

A.C.)
(o/b/o A.S.))
)
Claimant-Petitioner)
)
v.)
)
ARCH OF WEST VIRGINIA / APOGEE)
COAL COMPANY) DATE ISSUED: 07/24/2008
)
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 Richard A. Morgan,
Administrative Law Judge, United States Department of Labor.

A.C. (o/b/o A.S.), Belmont, Ohio, *pro se*.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia,
for employer.

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

PER CURIAM:

Claimant¹ appeals, without the assistance of counsel, the Decision and Order
Denying Benefits (06-BLA-5654) of Administrative Law Judge Richard A. Morgan on a

¹ Because claimant is unable to pursue his claim due to illness, his daughter, A.C.,
filed and is pursuing his appeal before the Board.

subsequent claim² filed on August 16, 2004 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). The administrative law judge credited claimant with fifteen and one-quarter years of coal mine employment³ and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Because claimant's previous claims were denied for failure to establish any element of entitlement, and because employer conceded the existence of a totally disabling pulmonary impairment in the instant claim, the administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). On the merits of entitlement, the administrative law judge found that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), or total disability due to pneumoconiosis under 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's Decision and Order. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this 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 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, 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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

² Claimant filed three previous claims for benefits on June 25, 1973, December 19, 1984, and October 23, 1992, all of which were finally denied for failure to establish any element of entitlement. Director's Exhibits 1, 2, 3.

³ The law of the United States Court of Appeals for the Fourth Circuit is applicable as claimant was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge accurately noted that the record contained nine readings of four x-rays dated September 17, 1973, October 31, 1992, July 14, 2005, and March 15, 2006.⁴ Weighing only the 2005 and 2006 x-ray evidence, the administrative law judge concluded that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Specifically, the administrative law judge determined that the evidence was in equipoise, because the July 14, 2005 and March 15, 2006 x-rays were both read as negative by a highly qualified physician and as positive by a highly qualified physician, and thus were “evenly balanced.” See 20 C.F.R. §718.202(a)(1); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-41, 21 BLR 2-269, 2-274 (4th Cir. 1997); Decision and Order at 10. Substantial evidence supports this finding. Further, although the administrative law judge did not weigh the readings of the x-rays dated September 17, 1973, and October 31, 1992, this error is harmless. Because the negative interpretation of the September 17, 1973 x-ray was uncontradicted, and the conflicting interpretations of the October 31, 1992 x-ray – two negative readings and one positive reading – were rendered by highly qualified physicians, this evidence could only have supported the administrative law judge’s finding that the x-ray evidence failed to establish the existence of pneumoconiosis, since “equally qualified physicians reach[ed] contradictory conclusions” See *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and

⁴ Dr. Pelaez, a physician of no known radiological qualifications, interpreted the September 17, 1973 x-ray as negative for pneumoconiosis. Director’s Exhibit 1. The October 31, 1992 x-ray was interpreted by three readers. Dr. Francke, a Board-certified radiologist and B reader, read the x-ray as negative for pneumoconiosis; Dr. Gaziano, a B reader, also read the x-ray as negative for pneumoconiosis; and, Dr. Ranavaya, a B reader, interpreted the x-ray as positive for pneumoconiosis. Director’s Exhibit 3. The July 14, 2005 x-ray was interpreted by three readers. Dr. Barrett read the x-ray for quality purposes only; Dr. Gaziano read the x-ray as positive for pneumoconiosis; and Dr. Wiot, a Board-certified radiologist and B reader, interpreted the x-ray as negative for pneumoconiosis. Director’s Exhibit 19; Employer’s Exhibit 1. Lastly, the March 15, 2006 x-ray was interpreted by Drs. Zaldivar and Meyer. Dr. Zaldivar, a B reader, interpreted the x-ray as positive for pneumoconiosis but additionally noted that the changes may be due to radiation therapy, while Dr. Meyer, a Board-certified radiologist and B reader, interpreted the x-ray as negative for pneumoconiosis. Employer’s Exhibits 2, 4.

Order at 10. Consequently, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Substantial evidence supports the administrative law judge's finding that claimant did not establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), because the biopsy evidence of record did not address the existence of pneumoconiosis. Decision and Order at 9. The administrative law judge also properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3).⁵ Decision and Order at 9. Consequently, we affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2), (3).

The administrative law judge next considered whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4). Although claimant's treating physician, Dr. Stolling, initially diagnosed coal workers' pneumoconiosis, upon reviewing claimant's subsequent biopsy report, Dr. Stolling withdrew his diagnosis.⁶ Employer's Exhibit 8 at 16-21. Further, Drs. Ranavaya and Gaziano diagnosed claimant with pneumoconiosis,⁷ while Drs. Zaldivar and

⁵ Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, because the instant claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

⁶ Dr. Stolling stated that he would not diagnose clinical coal workers' pneumoconiosis, based on claimant's x-rays, pulmonary function studies, and biopsy. *Id.* at 14-17. Additionally, Dr. Stolling stated at his deposition that claimant's lung cancer and tobacco abuse constituted a large component of his lung disease, that coal dust "could be," or "probably" was, a contributing factor, but he also stated that he did not know whether claimant's exposure to coal dust made his impairment any worse. Employer's Exhibit 8 at 17-21.

⁷ Dr. Ranavaya examined claimant on October 31, 1992. He diagnosed clinical pneumoconiosis "[b]ased on a 15 year long history of occupational exposure to dust in coal mining and radiological evidence of it." Director's Exhibit 3.

Dr. Gaziano examined claimant on July 14, 2005. He diagnosed clinical pneumoconiosis, lung cancer, and COPD due to smoking and coal mining. Director's Exhibit 19.

Hippensteel concluded that claimant does not have pneumoconiosis.⁸ Director's Exhibits 3, 19; Employer's Exhibits 2, 3, 6, 7. In considering this evidence, the administrative law judge credited the opinions of Drs. Zaldivar and Hippensteel as the most persuasive. Decision and Order at 11. The administrative law judge explained that these physicians' opinions were better supported by claimant's treatment records than were the contrary opinions of Drs. Gaziano and Ranavaya, because Dr. Stolling's treatment records indicated that claimant's respiratory problems did not develop until 2005, more than twenty years after claimant was last exposed to coal dust, but while claimant had been actively smoking.⁹ See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998); *Akers*, 131 F.3d at 440-41, 21 BLR at 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order at 11. Substantial evidence supports these findings. See *Underwood v. Elkay*

⁸ Specifically, Dr. Zaldivar examined claimant on March 15, 2006, and diagnosed bullous emphysema and cancer as the causes of claimant's totally disabling pulmonary impairment. Employer's Exhibit 2. He opined that claimant's pulmonary impairment was caused entirely by smoking, because coal workers' pneumoconiosis does not cause lung cancer or bullous emphysema. Employer's Exhibit 7 at 24, 25, 30.

Dr. Hippensteel submitted a consultative report dated December 7, 2006. He stated that claimant was totally disabled from a pulmonary standpoint, but "he has no evidence of either medical or legal coal workers' pneumoconiosis." Employer's Exhibit 3. Dr. Hippensteel explained that he ruled out coal dust exposure as a cause of claimant's COPD because, although claimant had a fifteen year history of coal mine employment, he had a more significant smoking history, and was actively smoking when his progressive impairment developed in 2005, long after he left the mines in 1984. Employer's Exhibit 6 at 9-12, 19.

⁹ Although the administrative law judge did not explicitly state the weight he assigned to Dr. Stolling's opinion, he accurately found that Dr. Stolling retracted his diagnosis of clinical pneumoconiosis. Moreover, to the extent Dr. Stolling's testimony can be interpreted as offering a tentative diagnosis of legal pneumoconiosis, he also testified that he did not know whether claimant's exposure to coal dust made his impairment any worse. The administrative law judge found that the opinions of Drs. Zaldivar and Hippensteel were supported by Dr. Stolling's treatment records showing the onset of pulmonary problems around the time of the cancer diagnosis, and after claimant had continued to smoke for years after his coal dust exposure ended. Consequently, we conclude that a remand for the administrative law judge to explicitly state the weight accounted to Dr. Stolling's opinion is unnecessary because it would not affect the disposition of the case. See *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Mining, Inc., 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997). Consequently, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4).

Substantial evidence supports the administrative law judge's additional finding that all of 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 210-11, 22 BLR at 2-172-74. It is therefore affirmed.

Because claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a necessary element of entitlement under 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

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge