

BRB No. 05-0920 BLA

JESSE CAROL WESTFALL)
)
 Claimant-Petitioner)
)
 v.)
)
 UNION CARBIDE CORPORATION) DATE ISSUED: 06/12/2006
)
 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.

Larry L. Rowe, Charleston, West Virginia, for claimant.

Ashley M. Harman, (Jackson Kelly PLLC), Morgantown, West Virginia,
for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (04-BLA-6018) of
Administrative Law Judge Richard A. Morgan (the administrative law judge) 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). The administrative law judge
found that claimant established a coal mine employment history of at least twenty-two
years and that “any discrepancy” regarding the exact number of years is
“inconsequential” in this claim. Decision and Order at 3-4. The administrative law judge
further found that while the instant claim was a subsequent claim pursuant to 20 C.F.R

§725.309,¹ he would nonetheless review all of the evidence of record in considering entitlement because the district director's "merger of the 'total disability' and 'causation' issues" was "muddled." Decision and Order at 5. Considering the evidence, the administrative law judge found that while the presence of a totally disabling respiratory impairment was established based on blood gas study and medical opinion evidence, 20 C.F.R. §718.204(b)(2)(ii), (iv), the evidence failed to establish the existence of pneumoconiosis, 20 C.F.R. §718.202(a)(1)-(4), or that claimant's total disability was due to pneumoconiosis, 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant contends that he has presented a "prima facie case" of entitlement as the evidence of record establishes the existence of clinical and legal pneumoconiosis which caused a totally disabling respiratory impairment. Claimant further argues that the evidence presented by employer is unconvincing and that the administrative law judge failed to address the bias of employer's physicians. Claimant, therefore, seeks reversal of the denial of benefits. Employer responds and urges that the administrative law judge's denial of benefits be affirmed. The Director, Office of Workers' Compensation Programs, (the Director) has not filed a brief in this appeal.²

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must affirmatively establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of

¹ Claimant first filed a claim on March 15, 1999 which was denied by district director on August 2, 1999 because claimant failed to establish the existence of pneumoconiosis or a totally disabling respiratory impairment due to pneumoconiosis. Director's Exhibit 1. No further action was taken until the filing of the instant claim on March 5, 2002. Director's Exhibit 2.

² The administrative law judge's length of coal mine employment determination as well as his determination that claimant established a totally disabling respiratory impairment pursuant to Section 718.204(b) are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After careful consideration of the arguments on appeal, the administrative law judge's Decision and Order, and the evidence of record, we conclude that the administrative law judge's Decision and Order-Denying Benefits is rational, supported by substantial evidence, and in accord with law. It is, therefore, affirmed.

In considering the x-ray readings of record, the administrative law judge found, giving due consideration to both the qualitative as well as the quantitative aspects of the x-ray evidence, that the weight of the x-ray evidence was negative for the existence of pneumoconiosis. This was proper. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see also Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Accordingly, the administrative law judge's finding that the existence of pneumoconiosis was not established by x-ray evidence is affirmed.

Next, claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). Specifically, claimant asserts that the pattern of impairment seen in this case is consistent with coal workers' pneumoconiosis and not, as the administrative law judge found, smoking-induced chronic obstructive pulmonary disease. Claimant argues that the administrative law judge erred in crediting the opinions of Drs. Zaldivar and Crisalli that claimant did not have legal pneumoconiosis over the contrary opinions of Drs. Rasmussen and Gaziano. Claimant asserts that Dr. Rasmussen's opinion establishes a *prima case* case of the existence of legal pneumoconiosis and that the administrative law judge erred in "sweep[ing]...aside [the opinion] by finding that tests and negative x-rays disprove his finding of legal pneumoconiosis." Claimant's Brief at 55; Claimant's Reply Brief at p. 8 (unpaginated). Claimant asserts that both Dr. Gaziano and Dr. Rasmussen address the two risk factors present, coal dust inhalation and smoking. Lastly, claimant asserts that the opinions of both Dr. Zaldivar and Dr. Crisalli are hostile to the Act as the physicians do not acknowledge that coal dust exposure can cause emphysema. Claimant contends that the physicians' bias renders their opinions incredible. Claimant's arguments are rejected.

The administrative law judge found that the medical opinion evidence did not support a finding of either clinical or legal pneumoconiosis. The administrative law judge permissibly found the opinion of Dr. Gaziano, diagnosing the existence of pneumoconiosis and finding that claimant's impairment was due to a combination of coal mine dust exposure and smoking, entitled to little weight as Dr. Gaziano's diagnosis of pneumoconiosis was based on his positive x-ray interpretation and his finding of rales on examination and the preponderance of the x-ray evidence was negative for

pneumoconiosis and the other physicians of record, did not report a finding of rales on claimant's more recent physical examinations. This was permissible. See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996)(credibility of medical opinion is for administrative law judge to determine); see also *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Turning to the opinions of Drs. Rasmussen, Zaldivar and Crisalli, the administrative law judge found that Dr. Rasmussen's opinion, that coal mine dust exposure played a significant role in claimant's respiratory impairment, was outweighed by the opinion of Dr. Zaldivar, who opined that claimant suffered from smoking-related emphysema unrelated to coal mine employment and the opinion of Dr. Crisalli, who opined that claimant did not suffer from any chronic dust disease of the lung arising from coal mine dust exposure. The administrative law judge's finding in this regard was a proper exercise of his discretion as the trier-of-fact. See *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). The administrative law judge found that Dr. Zaldivar and Dr. Crisalli were both board-certified in pulmonary diseases and that while Dr. Rasmussen had "extensive experience examining patients with lung disease," he was not board-certified. Decision and Order at 14-15. Thus, the administrative law judge permissibly accorded greater weight to the opinions of the physicians with superior credentials. See *Hicks*, 138 F.3d 524, 21 BLR 2-323, *Akers*, 131 F.3d 438, 21 BLR 2-269. Further, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Zaldivar and Crisalli as he found them better supported by underlying documentation. *Clark*, 12 BLR 1-149; *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). We reject claimant's assertion that the medical opinions of Drs. Zaldivar and Crisalli were hostile to the Act. The opinions of Drs. Zaldivar and Crisalli did not foreclose any possibility that pneumoconiosis/coal mine employment can cause obstructive disease, but rather, were based on the evidence in claimant's case. *Lane v. Union Carbide Corp.*, 105 F.3d 166 (4th Cir. 1997); *Stiltner*, 86 F.3d 337, 20 BLR 2-246; see *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). We, therefore, affirm the administrative law judge's determination that claimant failed to establish the existence of clinical or legal pneumoconiosis pursuant to Section 718.202(a)(4), see *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993) and his finding that the x-ray evidence and medical opinion evidence considered together failed to establish the existence of clinical or legal pneumoconiosis. See *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Since claimant was unable to establish the existence of pneumoconiosis, the administrative law judge also concluded that the evidence could not establish that his total disability was due to pneumoconiosis. Moreover, the administrative law judge

concluded that the opinions of Drs. Zaldivar and Crisalli, who found claimant's total disability unrelated to pneumoconiosis or occupational exposure, entitled to greater weight for the reasons given. Because we affirm the administrative law judge's finding that claimant failed to establish the existence of clinical or legal pneumoconiosis, an essential element of entitlement, we need not address claimant's assertions regarding the cause of pneumoconiosis at Section 718.203 or the cause of disability at Section 718.204(c) as such assertions are rendered moot by the administrative law judge's finding that the existence of pneumoconiosis was not established. *See Trent*, at 11 BLR 1-26 (1987); *Perry*, 9 BLR 1-1.

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