BRB No. 06-0863 BLA

KENNETH R. LOHR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WRIGHT COAL COMPANY, INCORPORATED	)	DATE ISSUED: 06/29/2007
	)	
and	)	
	)	
INSERVCO INSURANCE COMPANY/ PENNSYLVANIA SECURITY FUND	)	
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Kenneth R. Lohr, Evans City, Pennsylvania, *pro se*.

Gregory J. Fischer (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Claimant appeals, without the assistance of legal counsel, the Decision and Order – Denying Benefits (2005-BLA-5645) 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).[1] Based on claimant's filing date of May 26, 2004, the administrative law judge adjudicated this claim pursuant to 20 C.F.R Part 718. The administrative law judge found the evidence of record supports the parties' stipulations to 17.42 years of coal mine employment and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2).[2] Decision and Order at 3, 14; Hearing Transcript at 7, 9. However, the administrative law judge found the medical evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). In addition, he found the evidence insufficient to establish that claimant's total respiratory disability was 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 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 filed a letter stating that he will not file a response unless requested to do so by the Board.

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. Failure to establish any

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[1]Lynda D. Glagola, Program Director of Lungs at Work in McMurray, Pennsylvania, requested on behalf of claimant that the Board review the administrative law judge's decision, but Ms. Glagola is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was last employed in the coal mine industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 5.

one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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 contains no reversible error. Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered the seven readings of the three x-rays dated June 22, 2004, February 14, 2005 and March 15, 2005, in light of the readers' radiological qualifications. Decision and Order at 5-6. The administrative law judge found that the June 22, 2004 film was read as positive for the existence of simple pneumoconiosis by Drs. Colella and Gohel, who are Board-certified radiologists and B readers, but negative for pneumoconiosis by Dr. Duncan, who possesses the same qualifications. Decision and Order at 5; Director's Exhibit 19; Claimant's Exhibit 4; Employer's Exhibit 1. Dr. Colella also read the February 14, 2005 film as positive for pneumoconiosis, whereas Dr. Fino, a B reader, read the film as negative. Decision and Order at 5; Claimant's Exhibit 6; Employer's Exhibit 2. The March 15, 2005 x-ray was read as positive by Dr. Gohel and by Dr. Cohen, a B reader. Decision and Order at 5; Claimant's Exhibits 1, 2.

Noting Dr. Fino's statement that the shape and location of the opacities are not consistent with pneumoconiosis, the administrative law judge nonetheless found that the existence of pneumoconiosis was established, based upon the preponderance of positive readings. Decision and Order at 5-6, 12. Because the administrative law judge conducted a rational qualitative and quantitative analysis of the x-ray evidence, we affirm his finding that considering the x-ray evidence in isolation, claimant proved the existence of 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).

The administrative law judge also correctly found that the claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §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 applicable to this claim.[3] *See* 20 C.F.R. §§718.202(a)(2)-(3); Decision and Order at 12; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

[3]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 2. 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.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the interpretations of three CT scans, dated between July 28, 2003 and July 20, 2004. Decision and Order at 6-7. The administrative law judge acted rationally in finding that the CT scan evidence was insufficient to establish the existence of pneumoconiosis as none the interpretations included a diagnosis of pneumoconiosis. Decision and Order at 6; Claimant's Exhibits 5a, 7.

The administrative law judge also noted the entirety of the medical opinion evidence of record relevant to 20 C.F.R. §718.202(a)(4), and properly considered the quality of the evidence in determining whether the opinions of record are supported by the underlying documentation and adequately explained. *Collins v. J & L Steel*, 21 BLR 1-181 (1999); Decision and Order at 6-11. The administrative law judge reasonably found that the opinions of Drs. Celko and Cohen, that claimant has both legal and clinical pneumoconiosis, were insufficient to meet claimant's burden of proof, as their diagnoses of legal pneumoconiosis were based upon an understated smoking history and their diagnoses of clinical pneumoconiosis conflicted with the CT scan evidence.[4] *See Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997); *Jones v. Badger Coal Co.*, 21 BLR 1-103 (1998); *Stark v. Director, OWCP*, 9 BLR 1-136 (1986); Decision and Order at 12; Director's Exhibit 13; Claimant's Exhibits 1, 7. In rendering his finding regarding the diagnoses of legal pneumoconiosis, the administrative law judge rationally found that claimant had a sixty-five to ninety-five pack year history of cigarette use based upon claimant's treatment records from the 1980s and the records from his hospitalizations in 1988. *See Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); Decision and Order at 4-5; Claimant's Exhibit 7.

In addition, the administrative law judge rationally found that although Dr. Hyder is claimant's treating physician, his opinion, that the miner has both legal and clinical pneumoconiosis, is entitled to little weight because Dr. Hyder failed to adequately explain his conclusions. *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997)(administrative law judge may permissibly require the treating physician to provide more than a conclusory opinion); *see Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Gross v. Dominion Coal Corp*, 23 BLR 1-8 (2003); *Lafferty v.*

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[4]Dr. Celko relied on a cigarette smoking history of one and one-half to two packs per day for fifteen years, quitting in 2001. Director's Exhibit 13. Dr. Cohen recorded a smoking history of twenty cigarettes per day for twenty-four years, quitting in 2001, but also noted a smoking history of between twenty-four and sixty-five pack years. Claimant's Exhibit 1.

Cannelton Industries, Inc., 12 BLR 1-190 (1989); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 13; Claimant's Exhibit 5. The administrative law judge permissibly determined that the medical opinion of Dr. Fino, that claimant did not suffer from either legal or clinical pneumoconiosis, was entitled to greater weight than the opinions of Drs. Celko, Cohen, and Hyder, as it was better reasoned and documented. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 13; Employer's Exhibits 2, 3. We affirm, therefore, the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4).

We also affirm the administrative law judge's determination that the medical evidence, considered as a whole, was insufficient to establish the existence of pneumoconiosis. The administrative law judge weighed all of the evidence together and rationally found that although the x-ray evidence was positive for minimal simple pneumoconiosis, the negative CT scan evidence and the rationale contained in Dr. Fino's medical opinion regarding the superior sensitivity of CT scans, outweighed the positive x-ray evidence. *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d. Cir. 1997); Decision and Order at 14.

Because the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge, *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), as it is supported by substantial evidence and is in accordance with law. *See Williams*, 114 F.3d 22, 21 BLR 2-104.

As the medical evidence of record fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement, an award of benefits is precluded. *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge