BRB No. 03-0467 BLA

JAMES G. ARMES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KEY MINING, INCORPORATED	)	
	)	DATE ISSUED: 03/08/2004
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 of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

James G. Armes, Oliver Springs, Tennessee, *pro* se.

Natalee A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (02-BLA-5205) of Administrative Law Judge Thomas M. Burke denying benefits 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] After crediting claimant with seventeen years

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

of coal mine employment, the administrative law judge found that the evidence was insufficient to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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 under 20 C.F.R. Part 718 in a living miner's claim, a 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); *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*).

The four methods to establish the existence of coal workers' pneumoconiosis listed in the regulations include: (1) by x-ray evidence; (2) by biopsy or autopsy; (3) by application of the regulatory presumption; and (4) by reasoned medical evidence and opinion. 20 C.F.R. §718.202; *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002).

The record contains interpretations of two x-rays taken on July 18, 2001 and January 22, 2000. Inasmuch as there are no positive interpretations of these x-rays in the

record,[2] we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Inasmuch as there is no biopsy evidence of record, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 11 n.7. Furthermore, the administrative law judge properly found that claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3).[3] *Id.*

We now turn our attention to the administrative law judge's consideration of whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis. A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[4] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

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[2] Although Dr. Hughes found that claimant's July 18, 2001 x-ray revealed pleural abnormalities consistent with pneumoconiosis, he did not provide a profusion of the x-ray. *See* Director's Exhibit 11. Consequently, this x-ray interpretation is not sufficiently classified to support a finding of pneumoconiosis under the regulations. *See* 20 C.F.R. §718.102. Moreover, in considering whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge acted within his discretion in according the greatest weight to the x-ray interpretations rendered by physicians dually qualified as B readers and Board-certified radiologists. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 11-12. Dr. Wiot, a physician dually qualified as a B reader and Board-certified radiologist, interpreted claimant's July 18, 2001 x-ray as negative for pneumoconiosis. Director's Exhibit 12. Dr. Hughes's radiological qualifications are not found in the record.

Drs. Wiot and Hudson each interpreted claimant's January 22, 2002 x-ray as negative for pneumoconiosis. Director's Exhibit 13; Employer's Exhibit 3. There are no positive interpretations of this x-ray.

[3] 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, inasmuch as the instant claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

[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).

Dr. Hughes diagnosed a mild airflow obstruction that he found "suspicious for asthma." Director's Exhibit 11. Although Dr. Hughes also noted a "significant coal dust exposure," the doctor did not specifically relate any of claimant's diseases to his coal dust exposure. *Id.* The administrative law judge, therefore, properly found that Dr. Hughes's opinion was insufficient to support a finding of pneumoconiosis. Decision and Order at 13.

Dr. Hudson found the evidence insufficient to establish a diagnosis of coal workers' pneumoconiosis. Director's Exhibit 13. Dr. Hudson further noted that he could not identify any pulmonary pathology "other than *perhaps* industrial bronchitis from [the miner's] previous years of coal-mining exposure." Director's Exhibit 13 (emphasis added). The administrative law judge permissibly found that Dr. Hudson's diagnosis of industrial bronchitis was too equivocal to support a finding of "legal" pneumoconiosis. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order at 13; Director's Exhibit 13.

Dr. Fino, the only other physician to submit a medical report in this case, opined that there was insufficient objective medical evidence to justify a diagnosis of clinical or legal pneumoconiosis. Employer's Exhibit 5. Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718.

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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REGINA C. McGRANERY
Administrative Appeals Judge

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PETER A. GABAUER, JR.
Administrative Appeals Judge