BRB No. 07-0572 BLA

M.N.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	
	)	DATE ISSUED: 03/21/2008
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 Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

M.N., Pennington Gap, Virginia, *pro se.*

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2006-BLA-00028) of Administrative Law Judge Daniel F. Solomon 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). Claimant filed his subsequent claim on October 27, 2004.[1] Because employer conceded

[1] Claimant filed an initial claim for benefits on October 19, 1992. Director's Exhibit 1. In a Decision and Order dated October 31, 1994, benefits were denied by Administrative Law Judge Joel R. Williams. *Id*. Judge Williams specifically determined that claimant failed to establish the existence of pneumoconiosis because none of the x-ray evidence was positive for pneumoconiosis, and the two medical reports of record, by

at the hearing that the newly submitted evidence was sufficient to establish a totally disabling respiratory or pulmonary impairment, the administrative law judge initially found that claimant had demonstrated a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d).[2] However, upon consideration of the merits of the claim under 20 C.F.R. Part 718, the administrative law judge determined that claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and that he was totally disabled by 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. Employer responds, urging affirmance of the denial of benefits.[3] The Director, Office of Workers' Compensation Programs, has declined to file a brief unless specifically requested to do so by the Board.

Drs. Paranthaman and Sargent, concluded that claimant did not have pneumoconiosis. *Id*. Judge Williams also determined that claimant was not totally disabled since none of the pulmonary function studies or arterial blood gas studies was qualifying for total disability, and both Drs. Paranthaman and Sargent opined that claimant was not totally disabled by a respiratory or pulmonary impairment. *Id*. Claimant took no further action with regard to the denial of his initial claim until he filed his subsequent claim on October 27, 2004. Director's Exhibit 3.

[2] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d)(2). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." *Id*. Because claimant's prior claim was denied because he failed to establish any of the requisite elements of entitlement, Director's Exhibit 1, he had to submit new evidence establishing either the existence of pneumoconiosis or that he is totally disabled in order to obtain review of the merits of his claim. *See White v. New White Coal Co., Inc*., 23 BLR 1-1, 1-3 (2004).

[3] Employer challenges that administrative law judge's weighing of the x-ray evidence at 20 C.F.R. §718.202(a)(1), but contends that the administrative law judge's error in finding that claimant established the existence of pneumoconiosis under that subsection is harmless, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), in view of the administrative law judge's determination that the evidence, overall, failed to establish that claimant has the disease. Employer's Brief at 7; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000).

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 Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.[4] 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, 363 (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 a finding of 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).

After reviewing the administrative law judge's Decision and Order, the submissions of the parties, and the evidence of record, we affirm the administrative law judge's denial of benefits based on his finding that claimant failed to establish the existence of pneumoconiosis.[5]

The regulation at Section 718.202(a) provides four methods by which a claimant may establish the existence of pneumoconiosis: 1) chest x-ray evidence; 2) biopsy or autopsy evidence; 3) application of the presumptions contained in 20 C.F.R. §§718.304, 718.305 or 718.306; and 4) medical opinion evidence. 20 C.F.R. §718.202(a)(1)-(4).

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[4] Because claimant's coal mine employment was in Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

[5] The administrative law judge excluded the medical evidence from claimant's initial claim, contained at Director's Exhibit 1, because he found that the evidence had not been properly designated by either claimant or employer in accordance with the evidentiary limitations at 20 C.F.R. §725.414. Decision and Order at 2; Hearing Transcript at 5-6. Section 725.309(d)(1) specifically states that "[a]ny evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim." 20 C.F.R. §725.309(d)(1). Although we conclude that the administrative law judge erred in excluding the medical evidence contained at Director's Exhibit 1, we nonetheless consider his error to be harmless, *Larioni*, 6 BLR at 1-1278, (1984), as there is no medical evidence in Director's Exhibit 1 to support a finding that claimant has pneumoconiosis. Director's Exhibit 1. Thus, even if the administrative law judge had properly admitted the evidence in Director's Exhibit 1, it would not change the outcome of the case.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has further held that all relevant evidence is to be considered together, rather than merely within discrete subsections of Section 718.202(a)(1)-(4) in determining whether a claimant has met his burden of establishing the existence of pneumoconiosis by a preponderance of all of the evidence. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000).

Under Section 718.202(a)(1), the administrative law judge first considered whether claimant was able to establish the existence of pneumoconiosis based on x-ray evidence. *See* 20 C.F.R. §718.202(a)(1). The record contains eleven readings of three x-rays dated November 30, 2004, April 26, 2005 and September 7, 2005, which were classified for the presence or absence of pneumoconiosis in accordance with 20 C.F.R. §718.102(b).[6] The November 30, 2004 x-ray was interpreted by Dr. Baker, a B reader, as positive for pneumoconiosis, by Dr. Alexander, a Board-certified radiologist and B reader, as positive for pneumoconiosis, and by Dr. Wiot, a Board-certified radiologist and B reader, as negative for pneumoconiosis. Director's Exhibits 11, 14; Claimant's Exhibit 5. Dr. Alexander and Dr. Ahmed, also a Board-certified radiologist and B reader, interpreted the April 26, 2005 x-ray as positive for pneumoconiosis, while Dr. Wiot and Dr. Spitz, also a Board-certified radiologist and B reader, interpreted the x-ray as negative for pneumoconiosis. Director's Exhibits 16, 17; Employer's Exhibit 7. Lastly, the September 7, 2005 x-ray was read by Dr. Alexander and Dr. Cappiello, also a Board-certified radiologist and B reader, as positive for pneumoconiosis, while Dr. Wiot and Dr. McSharry, whose qualifications are not contained in the record, read the x-ray as negative for pneumoconiosis. Director's Exhibit 18; Claimant's Exhibits 1, 4; Employer's Exhibit 2.

In weighing the conflicting x-ray evidence, the administrative law judge noted that there were six positive readings and five negative readings for pneumoconiosis.[7]

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[6] In addition, Dr. Barrett interpreted the November 30, 2004 film for quality purposes only, and did not offer any opinion as to the presence or absence of pneumoconiosis. Director's Exhibit 12. There was a fourth x-ray dated April 6, 2004, which was read by Dr. Westhuisen as showing bilateral interstitial markings, ill-defined pulmonary nodules at both lung bases, and a left lung mass. Employer's Exhibit 1. The administrative law judge properly noted that because the April 6, 2004 "x-ray does not conform to the classification requirements set forth in [20 C.F.R.] §718.102(b) . . . it neither precludes nor establishes the presence of pneumoconiosis." Decision and Order at 5.

[7] We reject employer's characterization of the x-ray evidence as evenly divided with six positive and six negative readings. Employer's Brief at 7. Contrary to employer's contention, because Dr. Westhuisen did not classify his interpretation of the April 6, 2004 in accordance with Section 718.102(b), as explained *supra*, Dr.

Decision and Order at 6. Taking into consideration the qualifications of the physicians, he determined that "a slight majority" of the x-ray interpretations by B readers and/or Board-certified radiologists was positive for pneumoconiosis and, thus, found that claimant satisfied his burden of establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *Id*. Because the administrative law judge properly performed both a quantitative and qualitative analysis of the x-ray evidence in finding that claimant established the existence at Section 718.202(a)(1), we affirm his finding as supported by substantial evidence. *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-65 (2004)(*en banc*); Decision and Order at 6.

Under Section 718.202(a)(2), the existence of pneumoconiosis may be established based on autopsy or biopsy evidence. *See* 20 C.F.R. §718.202(a)(2). The record reflects that claimant had a lung biopsy on April 20, 2004 to evaluate a mass in his left lung. Dr. Leslie and Dr. Adelson examined the biopsy specimen and opined that the mass was not malignant. Employer's Exhibit 1. They reported evidence of mild interstitial pneumonia but did not address whether or not claimant had pneumoconiosis. *Id*. Dr. Couch reviewed the biopsy slides and opined that there was minimal dust deposition but no evidence for pneumoconiosis. Employer's Exhibit 4. We, therefore, affirm the administrative law judge's finding that claimant was unable to establish the existence of pneumoconiosis based on the biopsy evidence under Section 718.202(a)(2). Additionally, because claimant is not eligible for any of the regulatory presumptions available to prove that he has pneumoconiosis, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3). Decision and Order at 18; *see* 20 C.F.R. §§718.304, 718.305, 718.306.

Pursuant to Section 718.202(a)(4), the administrative law judge considered whether claimant's treatment records, the CT scan evidence, or the physicians' opinions of record established the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(4). As noted by the administrative law judge, while claimant's medical records document his treatment for a lung disease, those records fail to establish whether claimant's lung condition was "pneumoconiosis and/or coal mine dust-related." Decision and Order at 12. Dr. VanZee, claimant's treating physician, specifically opined that claimant suffered from clinical coal workers' pneumoconiosis. However, because the doctor was not a pulmonary specialist,[8] and he failed to cite to any objective evidence to support his

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Westhuisen's interpretation is not a negative reading for pneumoconiosis as alleged by employer. Employer's Exhibit 1.

[8] The administrative law judge noted that of the four medical opinions of record, Dr. VanZee was the only doctor who was not Board-certified in pulmonary medicine. Decision and Order at 12.

diagnosis, other than claimant's history of coal dust exposure, the administrative law judge permissibly accorded Dr. VanZee's opinion little weight. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 12. Furthermore, the administrative law judge properly found that while Dr. VanZee diagnosed claimant with "far advanced chronic pulmonary disease," this diagnosis does not satisfy the legal definition of pneumoconiosis at 20 C.F.R. §718.201, as Dr. VanZee "could not ascertain the role of coal dust exposure and coal workers' pneumoconiosis in such condition." Decision and Order at 12; *see* 20 C.F.R. §§718.201(a)(2), 718.202(a)(4).

Similarly, the administrative law judge permissibly found that Dr. Baker's diagnosis of clinical pneumoconiosis was entitled to less weight because the administrative law judge determined that Dr. Baker did not take into consideration all of the available medical data, including claimant's more recent treatment records (subsequent to Dr. Baker's 2004 examination), the negative CT scan and negative biopsy evidence for pneumoconiosis.[9] *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); Decision and Order at 12. The administrative law judge also permissibly found Dr. Baker's diagnosis of chronic obstructive pulmonary disease and chronic bronchitis due to coal exposure (legal pneumoconiosis) to be unpersuasive, since the administrative law judge determined that Dr. Baker's opinion was poorly explained and based on limited medical documentation. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151 (1989)(*en banc*); Decision and Order at 13.

In contrast, the administrative law judge properly noted that claimant's CT scan dated April 4, 2004 was interpreted by Dr. Wiot as showing no findings compatible with coal workers' pneumoconiosis. Decision and Order at 12; Employer's Exhibit 2. Moreover, the administrative law judge permissibly credited the opinions of Drs. McSharry and Castle, that claimant does not have clinical or legal pneumoconiosis, because he determined that their opinions were reasoned and documented, and based on a thorough review of all of the available medical data presented in this case.[10] *Clark*, 12

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[9] Dr. Baker conducted the pulmonary evaluation for the Department of Labor on November 30, 2004 and diagnosed coal workers' pneumoconiosis based on claimant's chest x-ray and history of coal dust exposure. Director's Exhibit 11. He also diagnosed chronic bronchitis by history and chronic obstructive pulmonary disease, which he attributed to a combination of coal dust exposure and cigarette smoking. *Id*.

[10] Dr. McSharry diagnosed moderate restrictive lung disease, unrelated to coal dust exposure. Director's Exhibit 18; Employer's Exhibit 6. Dr. McSharry reviewed Dr. Crouch's biopsy findings and reiterated that claimant's pulmonary fibrosis/usual interstitial pneumonitis "has never been linked" to coal dust exposure. Employer's Exhibit 6. Dr. Castle opined that claimant did not have clinical or legal pneumoconiosis.

BLR at 1-151; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Because the administrative law judge properly exercised his discretion in assessing the relative credibility of the medical opinions, we affirm his finding that claimant failed to establish the existence of pneumoconiosis based on the medical opinion evidence at Section 718.202(a)(4). *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85 (1993).

Finally, the administrative law judge also weighed all of the relevant evidence at Section 718.202(a)(1)-(4), and permissibly concluded that while the slight preponderance of the x-ray evidence was positive for pneumoconiosis, the probative value of the positive x-ray evidence was outweighed by the biopsy results, CT scan evidence, and better reasoned medical opinions, which establish that claimant does not have pneumoconiosis. Thus, the administrative law judge found that claimant failed to satisfy his burden of proving the existence of pneumoconiosis pursuant to Section 718.202(a). *Compton*, 211 F.3d at 211, 22 BLR at 2-174; Decision and Order at 13-14. We affirm the administrative law judge's finding at Section 718.202(a), as it is proper, and supported by substantial evidence.

Claimant bears the burden of proof and, thus, the risk of non-persuasion if his evidence is insufficient to establish an element of entitlement. *See Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Because claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement, benefits are precluded. *Trent*, 11 BLR at 1-27; *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.

Employer's Exhibit 3. Dr. Castle also diagnosed that claimant suffered from interstitial pulmonary fibrosis unrelated to coal dust exposure. *Id*.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge