BRB No. 07-0671 BLA

J.M.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAINEER COAL DEVELOPMENT MARROWBONE DEVELOPMENT	)	
	)	
	)	
	)	
	)	DATE ISSUED: 05/30/2008
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order – Denying Benefits (2006-BLA-5280) of Administrative Law Judge Michael P. Lesniak rendered 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). The administrative law judge credited the miner with at least twenty years of coal mine employment pursuant to the parties' stipulation, and adjudicated this subsequent claim, filed on December 16, 2004, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge

determined that claimant's prior claim had been denied by reason of abandonment pursuant to 20 C.F.R. §725.409, and that because no medical evidence was contained in the record of that claim and no determination had been made on the merits, claimant was required to establish every element of entitlement in order to prevail on the instant subsequent claim.[1] The administrative law judge found that the weight of the evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total respiratory disability pursuant to 20 C.F.R. §718.204(b), and thus, claimant had failed to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's weighing of the medical opinions of record in finding that pneumoconiosis was not established at 20 C.F.R. §718.202(a)(4), and his application of the decision of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000) in weighing the x-ray evidence with the medical opinion evidence.[2] Claimant also challenges the administrative law judge's finding that the evidence is insufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this case.

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 under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

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[1] Claimant's first application for benefits was filed on March 24, 2003. After claimant failed to undergo a pulmonary examination, the claim was considered to be abandoned on November 4, 2003, and no determination was made on the merits of the claim. Director's Exhibit 1.

[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. The administrative law judge accurately reviewed the x-ray evidence of record, consisting of three positive interpretations and three negative interpretations of three films, and permissibly concluded that "the weight of the x-ray evidence is in favor of establishing the existence of pneumoconiosis" under Section 718.202(a)(1), based on a preponderance of positive readings by dually-qualified Board-certified radiologists and B readers.[3] Decision and Order at 9; *see Dixon v. North Camp Coal Co.*, 8 BLR 1-31 (1991); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). After finding that pneumoconiosis was not established at Section 718.202(a)(2), (3), the administrative law judge considered the conflicting medical opinions of record and their underlying documentation at Section 718.202(a)(4), and determined that Dr. Mullins diagnosed both clinical and legal pneumoconiosis based on her examination and testing of claimant, while Drs. Jarboe and Zaldivar found neither clinical nor legal pneumoconiosis. Decision and Order at 6-10; Director's Exhibits 10, 12; Employer's Exhibits 2-4. The administrative law judge further determined that Drs. Zaldivar and Jarboe possessed superior qualifications as pulmonary experts, and that both physicians examined claimant, reviewed all of the x-rays and the medical evidence of record, and provided thorough explanations for their conclusion that claimant suffered no chronic lung disease caused by, contributed to, or aggravated by coal dust exposure. Decision and Order at 6-8, 10; Director's Exhibit 12; Employer's Exhibits 2-4. The administrative law judge then acted within his discretion in finding that the opinions of Drs. Zaldivar and Jarboe were entitled to greater weight than the opinion of Dr. Mullins, as he found that Drs. Zaldivar and Jarboe possessed superior expertise and credentials, and that their reports were well-reasoned and more comprehensive, being based on all of the medical evidence of record. Decision and Order at 10; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-

[3] The administrative law judge determined that the January 25, 2005 x-ray weighed in favor of a finding of pneumoconiosis, as it was read as positive by two dually-qualified readers, Drs. Patel and Alexander, and as negative by one dually-qualified reader, Dr. Wiot. Decision and Order at 9; Director's Exhibit 10; Claimant's Exhibit 1; Employer's Exhibit 1. The administrative law judge found that the May 11, 2005 x-ray also weighed in favor of a finding of pneumoconiosis, as it was read as positive by a dually-qualified reader, Dr. Alexander, and as negative by a B reader, Dr. Zaldivar. Decision and Order at 9; Director's Exhibit 12; Claimant's Exhibit 2. The administrative law judge found that the most recent x-ray of February 23, 2006 weighed against a finding of pneumoconiosis, as it was interpreted as negative without contradiction by Dr. Jarboe, a B reader. Decision and Order at 9; Employer's Exhibit 2.

149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge reasonably concluded that the weight of the medical opinions did not support a finding of pneumoconiosis at Section 718.202(a)(4), and we affirm his findings thereunder as supported by substantial evidence. Furthermore, we find no error in the administrative law judge's weighing of the x-ray and medical opinion evidence together pursuant to Section 718.202(a), consistent with *Compton*. The administrative law judge permissibly found that the evidence was, at best, in equipoise, and thus claimant had failed to meet his burden of establishing the existence of pneumoconiosis by a preponderance of the evidence pursuant to 20 C.F.R. §718.202(a). Decision and Order at 10; *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Compton*, 211 F.3d 203, 22 BLR 2-162; *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

As claimant has failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), an essential element of entitlement, we affirm the administrative law judge's finding that claimant is precluded from entitlement to benefits under 20 C.F.R. Part 718. *See Anderson*, 12 BLR 1-111; *Trent*, 11 BLR at 1-27. Consequently, we need not address claimant's arguments on the issue of total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

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ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the administrative law judge's denial of benefits. With regard to Section 718.202(a), I find no error in the administrative law judge's weighing of the x-ray evidence, but I believe he erred in his

evaluation of the medical opinion evidence at Section 718.202(a)(4). When according greater weight to the opinions of Drs. Zaldivar and Jarboe, the administrative law judge does not specify whether he is crediting them on the issue of clinical pneumoconiosis or legal pneumoconiosis. As the administrative law judge found that Dr. Zaldivar's negative x-ray interpretation at Section 718.202(a)(1) was outweighed by the positive interpretation of that film by a doctor with superior qualifications, and that the preponderance of positive x-ray interpretations by physicians with superior qualifications outweighed Dr. Jarboe's negative x-ray interpretation, the administrative law judge's crediting of these doctors' opinions at Section 718.202(a)(4) on the issue of clinical pneumoconiosis is problematic. I would vacate the administrative law judge's findings at Section 718.202(a)(4), and remand this case for the administrative law judge to reassess the medical opinions at Section 718.202(a)(4); explain the weight he assigns to the conflicting opinions on the issue of clinical pneumoconiosis as well as legal pneumoconiosis; and then weigh all relevant evidence together pursuant to *Compton*.

Furthermore, as I would not affirm the administrative law judge's finding with respect to the issue of pneumoconiosis, I am compelled to additionally address his findings with respect to total disability at Section 718.204(b)(2). At Section 718.204(b)(2)(i), the administrative law judge erroneously determined that the most recent pulmonary function study, conducted by Dr. Jarboe, produced non-qualifying values, when in fact the FEV_1 and MVV values listed by the administrative law judge are qualifying. At Section 718.204(b)(2)(iv), the administrative law judge credited Dr. Zaldivar's opinion, that claimant's mild impairment would not prevent him from returning to his mining work, over the opinion of Dr. Mullins, that claimant's respiratory impairment would prevent him from returning to his usual coal mine job, and over the opinion of Dr. Jarboe, that claimant could not return to his previous coal mine employment based on a qualifying FEV_1 value, on the ground that Dr. Jarboe's opinion "does not follow the entire regulatory scheme for determining total respiratory disability," in that the FVC values and FEV_1/FVC ratio were non-qualifying, and no MVV value was obtained upon testing. Decision and Order at 11-12. As noted, *supra*, however, Dr. Jarboe performed MVV maneuvers, and his pulmonary function study produced qualifying pre-bronchodilator and post-bronchodilator results for both the FEV_1 and the MVV values. Consequently, I would vacate the administrative law judge's findings at Section 718.204(b)(2)(i), (iv), and instruct him on remand to reassess the pulmonary function study evidence and medical opinion evidence in determining whether total disability is established thereunder, and to determine whether the evidence is sufficient to establish disability causation at Section 718.204(c), if reached.

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BETTY JEAN HALL
Administrative Appeals Judge