BRB No. 09-0658 BLA

RUSSELL E. LAMBERT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FRANK ARNOLD CONTRACTORS, INCORPORATED	)	
	)	DATE ISSUED: 05/14/2010
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 Denial of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Russell E. Lambert, Oakland, Maryland, *pro se*.

Paul E. Frampton (Bowles, Rice, McDavid, Graff & Love), Charleston, West Virginia, for employer.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denial of Benefits (05-BLA-5784) of Administrative Law Judge Daniel F. Solomon

rendered on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[2] The administrative law judge found that the parties' stipulation to at least twenty-one years of coal mine employment was supported by the evidence.[3] The administrative law judge found that the evidence submitted since the previous denial established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). Therefore, he found that claimant established a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge, however, found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Because he found that this element of entitlement was not established, the administrative law judge denied benefits.

On appeal, claimant generally asserts that he is entitled to benefits. The Director, Office of Workers' Compensation Programs (the Director), has submitted a letter, asserting that the administrative law judge erred in his analysis of the medical opinions pursuant to Section 718.202(a)(4), when he discredited Dr. Parker's diagnosis of pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's denial of benefits. Employer argues, however, that the administrative law judge erred in discrediting the opinions of Drs. Renn and Zaldivar that claimant does not have pneumoconiosis.[4]

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[1] Claimant's first claim for benefits, filed on May 29, 1987, was denied by the district director on October 22, 1987, because the evidence did not establish any element of entitlement. Director's Exhibit 1. Claimant did not further pursue that claim. Claimant filed the instant claim on April 15, 2002.

[2] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as claimant's current claim was filed before January 1, 2005.

[3] The record indicates that claimant's last coal mine employment was in Maryland. Director's Exhibits 5, 8. Accordingly, the Board will apply the law 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*).

[4] We affirm the administrative law judge's findings that the new evidence establishes the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), and a change in an applicable condition of entitlement

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 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).

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 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).

As an initial matter, we consider the administrative law judge's evaluation of the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge considered four interpretations of three new x-rays. Dr. Wheeler, a B reader and Board-certified radiologist, interpreted the December 17, 2003 x-ray as negative for pneumoconiosis. Director's Exhibit 25. Dr. Parker, a B reader, and Dr. Scott, a B reader and Board-certified radiologist, both interpreted the January 22, 2003 x-ray as negative for pneumoconiosis. Director's Exhibits 23, 27. Dr. Wiot, a B reader and a Board-certified radiologist, interpreted the June 2, 2007 x-ray as negative for pneumoconiosis.[5] The administrative law judge found that since no reading was positive for pneumoconiosis, the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1). Because this finding is supported by substantial evidence, it is affirmed.

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pursuant to 20 C.F.R. §725.309(d), as these findings are not challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] In addition to the new x-ray readings discussed by the administrative law judge, the record contains several interpretations of new x-rays taken between 1995 and 2005, for medical treatment purposes. Director's Exhibit 18; Employer's Exhibit 4. These interpretations are not classified as positive for pneumoconiosis. Because the treatment x-ray interpretations would not assist claimant in establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), any error by the administrative law judge in not discussing them was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

The administrative law judge also found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2), (3). The administrative law judge correctly found that the record contains no biopsy evidence, and that none of the presumptions is available to claimant.[6] Therefore, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(2),(3).

Turning to the new medical reports pursuant to Section 718.202(a)(4),[7] the administrative law judge noted accurately that none of the physicians diagnosed clinical pneumoconiosis. He found that Dr. Parker's diagnosis of legal pneumoconiosis[8] was not well-reasoned. Specifically, the administrative law judge found that Dr. Parker did not explain the basis for his opinion that claimant's chronic obstructive pulmonary disease (COPD) is due to both smoking and dust exposure. Further, the administrative law judge found that Dr. Parker expressed a "limited understanding" of claimant's coal mine employment history. Decision and Order at 18. Additionally, the administrative law

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[6] 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 this claim before January 1, 2005. *See* n.2, *supra*. Finally, because this claim is not a survivor's claim, the Section 718.306 presumption is inapplicable. *See* 20 C.F.R. §718.306.

[7] Dr. Renn examined claimant, noted that he worked in coal mine employment for about forty-one years, and that he smoked one pack of cigarettes per day from 1951 to 1993. Dr. Renn diagnosed chronic obstructive pulmonary disease and pulmonary emphysema, both due to tobacco smoking, and opined that "[a] pneumoconiosis does not exist." Director's Exhibit 26; Employer's Exhibit 6. Dr. Zaldivar reviewed claimant's medical records. He diagnosed a severe pulmonary impairment due to emphysema resulting from smoking, and he opined that claimant does not have any pulmonary impairment related to his occupation. He stated that there was no evidence to justify a diagnosis of medical or legal coal workers' pneumoconiosis. Director's Exhibit 19; Employer's Exhibit 5 at 17. Dr. Parker examined and tested claimant, and diagnosed chronic obstructive pulmonary disease due to tobacco smoke and "work place dust exposure of coal, silica and mixed dust." Director's Exhibit 19.

[8] "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). A disease "[a]rising out of coal mine employment" includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

judge found that the opinions of Drs. Renn and Zaldivar, that claimant does not have legal pneumoconiosis, were not well reasoned. *Id.* at 17.

The Director contends that the administrative law judge erred in discrediting Dr. Parker's opinion, asserting that the physician's report indicates that he considered an accurate coal mine employment history. The Director states that, in view of Dr. Parker's "in-depth, accurate recitation of claimant's employment history, his comment that he was 'a bit unclear' about the miner's coal mine history can only reflect that the specific details of the miner's coal mine employment may not have been crystal clear. It does not suggest that the doctor lacked a sufficient employment history on which to base a diagnosis." Director's Letter at 4. Employer asserts that the administrative law judge permissibly evaluated the credibility of Dr. Parker's opinion.

Upon review, we conclude that substantial evidence supports the administrative law judge's discretionary finding that Dr. Parker's opinion was not well-reasoned. Credibility determinations are committed to the discretion of the administrative law judge, who, as the finder of fact, is charged with deciding whether a medical report is sufficiently documented and adequately reasoned. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*). An administrative law judge may, but need not, credit a medical opinion that lacks an explanation for the physician's diagnoses. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-176 (4th Cir. 2000); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Moreover, the Board may not substitute its inferences for those of the administrative law judge, or reweigh the evidence. *Anderson*, 12 BLR at 1-113. Therefore, we hold that the administrative law judge acted within his discretion in discrediting Dr. Parker's opinion because the physician did not explain the rationale for his opinion. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Underwood*, 105 F.3d at 951, 21 BLR at 2-31-32.

Similarly, we hold that the administrative law judge, within a proper exercise of his discretion, reasonably found that Dr. Parker's opinion was not well-reasoned and documented because the physician did not consider an accurate occupational history. Decision and Order at 18. As the administrative law judge found, Dr. Parker admitted that claimant's coal mine employment history was "a bit unclear" to him. Director's Exhibit 19. Moreover, despite the fact that Dr. Parker detailed claimant's different jobs for different employers, as the administrative law judge found, it is not clear from Dr. Parker's opinion whether he was aware of claimant's limited dust exposure noted by the

administrative law judge, in view of claimant's lengthy smoking history.[9] Therefore, we affirm the administrative law judge's finding that Dr. Parker's self-proclaimed "limited knowledge" of claimant's coal mine employment "lessen[ed] the probative value of his opinion" regarding the cause of claimant's COPD. *See Underwood*, 105 F.3d at 951, 21 BLR at 2-31-32. We therefore hold that the administrative law judge's credibility determinations regarding Dr. Parker's opinion are supported by substantial evidence.

In view of our affirmance of the administrative law judge's decision to discount Dr. Parker's opinion, the only opinion supportive of claimant's burden of establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(4), we need not address employer's challenges to the administrative law judge's findings regarding the opinions of Drs. Renn and Zaldivar. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Further, we affirm the administrative law judge's finding that the evidence, when weighed together, did not establish the existence of pneumoconiosis pursuant to Section 718.202(a), as this finding is supported by substantial evidence.[10] *See* Decision and Order at 18; *Compton*, 211 F.3d at 211, 22 BLR at 2-173.

Because we affirm the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis, one of the essential elements of entitlement pursuant to 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. *Trent*, 11 BLR at 1-27.

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[9] Claimant testified that when working for employer he never worked underground, and that he had worked underground for one year when he was sixteen years old. Claimant also stated that when he was a machine operator, his work took place about a mile from the mine site. Hearing Transcript at 24-25. Further, claimant testified that he smoked one pack of cigarettes a day from age sixteen until 1993. Hearing Transcript at 20.

[10] Although the administrative law judge did not indicate that he considered the evidence submitted in the prior claim, *see Westmoreland Coal Co. v. Cox*, F.3d , 2010 WL 1409418*10 (4th Cir. 2010), the prior evidence did not contain a diagnosis of pneumoconiosis. Director's Exhibit 1. Therefore, any error in the administrative law judge's failure to discuss the prior evidence was harmless. *See Larioni*, 6 BLR at 1-1278.

Accordingly, the administrative law judge's Decision and Order Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge