

BRB No. 07-0271 BLA

R.L.)
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 Claimant-Petitioner)
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 v.)
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 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED: 11/16/2007
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order of Adele Higgins Odegard,
Administrative Law Judge, United States Department of Labor.

R.L., Belington, West Virginia, *pro se*.

Helen H. Cox (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2004-BLA-06184) of Administrative Law Judge Adele Higgins Odegard 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). The administrative law judge adopted the District Director's finding of 18.691 years of qualifying coal mine employment and considered the claim, filed on January 28, 2002, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge further found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv), but

failed to establish disability causation at 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance.

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 and is in accordance with law.¹ *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hichman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 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 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. In finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1), the administrative law judge accurately reviewed the x-ray evidence of record and the qualifications of the readers, and determined that the film dated October 23, 2002 was read as positive for pneumoconiosis by a dually-qualified Board-certified radiologist and B reader, and reread as negative by an equally qualified physician. Decision and Order at 8. Director's Exhibits 11, 12. As the remaining three films were interpreted as negative for pneumoconiosis by three different dually-qualified physicians, the administrative law judge acted within her discretion in finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1), based on a preponderance of negative interpretations by qualified readers. Decision and Order at 8; *see Island Creek Coal Co.*

¹ The law of the United States Court of Appeals for the Fourth Circuit is applicable, as the miner was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 3-7.

v. Compton, 211 F.3d 203, 208-09, 22 BLR 2-162, 2-169-70 (4th Cir. 2000); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 517 U.S. 267, 18 BLR 2A-1 (1994).

The administrative law judge properly determined that Section 718.202(a)(2) and (a)(3) are not applicable in this case. Decision and Order at 8-9. There is no biopsy evidence or evidence of complicated pneumoconiosis in the record, and this claim was filed by a living miner after January 1, 1982. 20 C.F.R. §§718.202(a)(2), (3), 718.304, 718.305, 718.306.

With respect to the medical opinion evidence relevant to Section 718.202(a)(4), the administrative law judge accurately reviewed the conflicting medical opinions of record and the qualifications of the physicians and determined that Dr. Rasmussen diagnosed pneumoconiosis, while Drs. Renn and Bellotte found no pneumoconiosis or any impairment related to coal dust exposure. Decision and Order at 9-14. The administrative law judge noted that in his first report, Dr. Rasmussen diagnosed coal workers' pneumoconiosis, chronic obstructive pulmonary disease and emphysema, and concluded that coal dust exposure was a significant contributing factor in claimant's impaired respiratory function, as well as smoking. Director's Exhibit 11. In Rasmussen's second report, after reviewing the findings of Drs. Renn and Bellotte,² he stated that coal dust exposure contributed to claimant's totally disabling respiratory insufficiency "at least to a minimal degree." Claimant's Exhibit 1. The administrative law judge acted within her discretion in finding that Dr. Rasmussen's diagnosis of pneumoconiosis was entitled to little weight, as the physician did not identify the objective support for his conclusions, and failed to explain the inconsistency between the opinions expressed in his two reports. Decision and Order at 13; Claimant's Exhibit 1; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*). The administrative law judge also rationally determined that the contrary opinions of Drs. Renn and Bellotte³ were entitled to greater weight because their conclusions were

² Both Drs. Renn and Bellotte found no respiratory condition related to dust exposure in coal mine employment, but diagnosed chronic obstructive pulmonary disease and bullous emphysema attributable to cigarette smoking. Employer's Exhibits 1, 2, 7 at 22-25. Dr. Renn also diagnosed chronic bronchitis due to smoking. *Id.*

³ The administrative law judge considered Dr. Bellotte's medical report in conjunction with Dr. Castle's deposition testimony. Decision and Order at 5. As Dr. Bellotte was ill and unable to testify, the administrative law judge permissibly found that good cause was demonstrated pursuant to 20 C.F.R. §§725.414(c), 725.456 for the admission into evidence of Dr. Castle's deposition testimony in place of Dr. Bellotte's

supported by more thorough analyses of their clinical findings and observations, and they both hold subspecialties in pulmonary disease, while Dr. Rasmussen is only Board-certified in internal medicine. Employer's Exhibit 1, 2; *Hicks*, 138 F.3d at 533, 21 BLR at 2-325; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Therefore, we affirm the administrative law judge's finding that the weight of the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), as supported by substantial evidence.

Because the administrative law judge's finding that claimant did not prove the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4) is rational and supported by substantial evidence, it is affirmed. *Compton*, 211 F.3d at 208-09, 22 BLR at 2-169-70. Consequently, we affirm the administrative law judge's denial of benefits. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

testimony. Decision and Order at 5; see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*); see also *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*). The administrative law judge properly limited consideration of Dr. Castle's testimony to those portions of the deposition that discussed Dr. Bellotte's medical report and findings. Decision and Order at 5; see *Webber v. Peabody Coal*, 23 BLR 1-123 (2006).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge