BRB No. 05-0436 BLA

CLYDE N. HEAVIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BRIDGER COAL COMPANY	)	
	)	DATE ISSUED: 09/30/2005
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 Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jody L. James (James and Scott, P.C.), Rock Springs, Wyoming, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2004-BLA-05500) of Administrative Law Judge Richard K. Malamphy, with respect to 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). In his Decision and Order, the administrative law judge credited claimant with sixteen years of coal mine employment and considered the claim, filed on May 7, 2002, pursuant to the regulations set forth in 20 C.F.R. Part 718. The administrative law judge found that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis established. Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed brief in this appeal.[1]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

With respect to the administrative law judge's determination, pursuant to Section 718.202(a)(1), that the x-ray evidence is insufficient to support a finding of pneumoconiosis, claimant contends that the administrative law judge erred in considering the x-ray readings contained in claimant's treatment records and in relying upon the most recent evidence to resolve the conflict in the evidence. These contentions are without merit. Contrary to claimant's contention, the administrative law judge acted properly in admitting the x-ray interpretations appearing in claimant's treatment records in accordance with 20 C.F.R. §725.414(a)(4). In addition, the administrative law judge acted properly in basing his finding under Section 718.202(a)(1) upon his consideration of the x-rays that were read for the presence of pneumoconiosis.

Regarding his weighing of the x-ray readings, the administrative law judge did not rely upon the fact that Dr. Repsher interpreted the most recent x-ray as negative for pneumoconiosis. *See* Director's Exhibit 22; Employer's Exhibit 1. Rather, the administrative law judge acted within his discretion in finding that the x-rays read for pneumoconiosis do not establish the presence of the disease because they were not interpreted as positive under the ILO system as is required pursuant to 20 C.F.R. §§718.102 and 718.202(a)(1). The administrative law judge indicated correctly, therefore, that Dr. Shockey's 0/1 reading of the film dated October 3, 2002 does not

[1] We affirm the administrative law judge's findings under 20 C.F.R. §718.202(a)(2) and (a)(3), as they are not challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

constitute a positive reading under Sections 718.102 and 718.202(a)(1). Decision and Order at 6; Director's Exhibit 13. In addition, the administrative law judge rationally accorded greater weight to the negative interpretations of this x-ray offered by Drs. Hayes and Preger and to the negative reading of a film dated April 29, 2003 by Dr. Repsher based upon their status as B readers. Decision and Order at 6; *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985).

With respect to the medical opinion evidence relevant to Section 718.202(a)(4), claimant argues that the administrative law judge erred in discrediting Dr. Shockey's opinion diagnosing coal workers' pneumoconiosis and in according more weight to Dr. Farney's contrary opinion. These contentions are without merit. The administrative law judge rationally found that because Dr. Shockey's diagnosis was based primarily upon his classification of the October 3, 2002 x-ray as 0/1, which does not constitute evidence of pneumoconiosis, it is entitled to little weight. Decision and Order at 7; Director's Exhibit 9; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). The administrative law judge also rationally determined that Dr. Farney's opinion is more probative than Dr. Shockey's, as Dr. Farney's report reflects his review of extensive records documenting claimant's treatment history and information regarding the length and nature of claimant's coal mine employment.[2] Decision and Order at 8; Employer's Exhibit 5; *Carson v. Westmoreland Coal* Co., 19 BLR 1-18 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Because the administrative law judge's finding that claimant did not prove the existence of pneumoconiosis pursuant to Section 718.202(a) is rational and supported by substantial evidence, it is affirmed. Moreover, in light of the fact that claimant has not established the existence of pneumoconiosis, an essential element of entitlement, the denial of benefits must also be affirmed. *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

[2] Employer indicates correctly that the administrative law judge did not weigh Dr. Repsher's opinion, that claimant does not have pneumoconiosis, under 20 C.F.R. §718.202(a)(4). Director's Exhibit 22; Hearing Transcript at 33-57. This error is harmless in light of the administrative law judge's permissible determination that the medical evidence of record does not support a finding of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4). *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, we affirm the administrative law judge's Decision and Order – Denying Benefits.

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