

BRB No. 08-0155 BLA

P. S.)
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 Claimant-Petitioner)
)
 v.)
)
 PINNACLE MINING COMPANY)
)
 and)
) DATE ISSUED: 09/22/2008
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS FUND)
)
 Employer/Carrier-)
 Respondents)
)
 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 Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams & Rutherford), Norton, Virginia, for claimant.

Seth P. Hayes (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (06-BLA-5731) of Administrative Law Judge Jeffrey Tureck rendered 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). This case involves a claim filed on February 2, 2005. After crediting claimant with twenty-six years of coal mine employment,¹ the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1), (4). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to claimant's appeal.²

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 she 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).

Pursuant to 20 C.F.R. §718.202(a)(1), claimant contends that the administrative law judge did not indicate how he determined that the x-ray evidence is negative for pneumoconiosis. We disagree. The administrative law judge stated that he weighed the x-ray readings based on the readers' radiological qualifications. Decision and Order at 3-4. He considered eight readings of four x-rays. The administrative law judge accurately noted that the March 9, 2005, August 18, 2005, and October 10, 2006 x-rays received

¹ The record indicates that claimant's last coal mine employment occurred in West Virginia. Director's Exhibits 4, 5. 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*).

² Because no party challenges the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

only negative readings for the existence of pneumoconiosis.³ Turning to the one x-ray that received conflicting readings, the administrative law judge noted that Dr. Rasmussen, a B reader, read the August 24, 2006 x-ray as positive for pneumoconiosis, while Dr. Wiot, a B reader and Board-certified radiologist, read the x-ray as negative for pneumoconiosis.⁴ Claimant's Exhibit 1; Employer's Exhibit 9. Based upon Dr. Wiot's superior qualifications, the administrative law judge permissibly accorded the negative reading greater weight. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-65-66 (4th Cir. 1992); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003). Because the administrative law judge properly determined that the x-ray evidence did not establish the existence of pneumoconiosis, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(4), claimant contends that the administrative law judge erred in his analysis of the medical opinions when he found that neither clinical nor legal pneumoconiosis⁵ was established. The administrative law judge considered the opinions of five physicians along with the physicians' qualifications. Dr. Forehand, whose qualifications are not of record, examined and tested claimant on behalf of the Department of Labor and diagnosed chronic obstructive pulmonary disease due to both smoking and coal mine dust exposure. Director's Exhibit 9. Claimant submitted two opinions. Dr. Rasmussen, who is Board-certified in Internal Medicine, examined and tested claimant and diagnosed clinical coal workers' pneumoconiosis based on a positive

³ As summarized by the administrative law judge, Dr. Forehand, a physician with no special radiological qualifications, and Drs. Gogineni and Wiot, B readers and Board-certified radiologists, read the March 9, 2005 x-ray as negative for pneumoconiosis. Director's Exhibits 9, 11; Employer's Exhibit 1. Dr. Gaziano read the March 9, 2005 x-ray for quality purposes only. Director's Exhibit 9. Drs. Hippensteel and Castle, both B readers, read the August 18, 2005 and October 10, 2006 x-rays as negative for pneumoconiosis. Director's Exhibit 10; Employer's Exhibit 7.

⁴ The administrative law judge noted further that Dr. Wiot is a Professor of Radiology at the University of Cincinnati, is a member of the American College of Radiology Task Force on Pneumoconiosis, which created the ILO x-ray classification standards, and has served on several committees regarding those standards. Decision and Order at 3; Employer's Exhibit 1.

⁵ "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). This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. *Id.*

x-ray reading, and minimal or mild obstructive impairment due to both smoking and coal mine dust exposure, based in part on a pulmonary function study. Claimant's Exhibit 1; Employer's Exhibit 5.⁶ Dr. Ghio, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed the medical evidence of record and concluded that claimant does not have clinical or legal pneumoconiosis.⁷ Dr. Ghio opined that claimant's tests, including those conducted by Dr. Rasmussen are normal, and that she has respiratory symptoms due to smoking. Claimant's Exhibit 2. Drs. Castle and Hippensteel, who are Board-certified in Internal Medicine and Pulmonary Disease, examined and tested claimant and reviewed the medical evidence, and reached a similar conclusion. Director's Exhibit 10; Employer's Exhibits 4, 7, 8. They opined that claimant has minimal or mild chronic bronchitis due to smoking. *Id.* The administrative law judge found that the opinions of Drs. Ghio, Castle, and Hippensteel were well-reasoned and persuasive, and merited greater probative weight than the opinions of Drs. Forehand and Rasmussen.⁸

Claimant contends that the administrative law judge improperly substituted his own opinion for that of Dr. Forehand. Contrary to claimant's contention, the administrative law judge permissibly found that Dr. Forehand did not adequately "explain his reasons for concluding that Claimant's coal mine employment contributes to h[er] respiratory impairment." Decision and Order at 4; *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 at 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Because substantial evidence supports the administrative law judge's permissible credibility determination, we reject claimant's allegation of error.

Claimant further asserts that the administrative law judge erred in discounting Dr. Rasmussen's opinion as based primarily on an x-ray reading. Decision and Order at 5.

⁶ Employer conducted a deposition of Dr. Rasmussen, in which claimant participated. Employer's Exhibit 5.

⁷ Although employer developed Dr. Ghio's opinion, employer withdrew it at the hearing because employer designated two medical reports by Drs. Castle and Hippensteel as its affirmative evidence under 20 C.F.R. §725.414. However, claimant, by counsel, adopted Dr. Ghio's deposition as one of her two affirmative medical reports under 20 C.F.R. §725.414, and it was admitted as Claimant's Exhibit 2. Hearing Transcript at 15.

⁸ In making this determination, the administrative law judge found Dr. Ghio's qualifications to be "outstanding." Decision and Order at 6. The administrative law judge's finding as to Dr. Ghio's qualifications is unchallenged on appeal. It is therefore affirmed. *Skrack*, 6 BLR at 1-711.

The administrative law judge accorded no weight to Dr. Rasmussen's diagnosis of clinical coal workers' pneumoconiosis because it was "based in substantial part" on Dr. Rasmussen's "erroneous x-ray interpretation" Decision and Order at 5. This finding was reasonable, since the administrative law judge found that Dr. Rasmussen's positive reading of the August 24, 2006 x-ray was outweighed by the negative reading of a physician with superior radiological qualifications. See *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335.

Claimant alleges further that the administrative law judge did not adequately analyze Dr. Rasmussen's diagnosis of legal pneumoconiosis, which, claimant argues, was not based primarily on an x-ray reading. The administrative law judge found that, although Dr. Rasmussen relied upon other tests to formulate his diagnosis of pneumoconiosis, his deposition testimony reflected that he relied heavily on his x-ray reading, and he nowhere stated that his diagnosis would remain the same if claimant's x-ray were interpreted as negative. Decision and Order at 5. Claimant does not specifically address this finding by the administrative law judge.

Regardless of whether the administrative law judge's stated rationale was sufficient, we conclude that, based on this record as weighed by the administrative law judge, and based on claimant's specific arguments, claimant identifies no reason to remand this case to the administrative law judge. Specifically, in findings that are unchallenged on appeal, the administrative law judge permissibly found that the opinion of Dr. Ghio, submitted by claimant, and the opinions of Drs. Castle and Hippensteel, submitted by employer, concluding that claimant does not have clinical or legal pneumoconiosis, were well-reasoned and supported by the objective evidence, and therefore, highly probative and persuasive. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 438, 441, 21 BLR 2-269, 2-275-76; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997). In so finding, the administrative law judge relied on the doctors' credentials,⁹ and credited the opinions of Drs. Castle and Hippensteel that claimant's minimal or mild obstruction is due to smoking, not coal mine dust exposure. As claimant has not challenged these permissible findings, error, if any, in the administrative law judge's consideration of Dr. Rasmussen's diagnosis of legal pneumoconiosis is harmless. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4

⁹ The record indicates that Dr. Rasmussen does not possess the additional qualifications of the physicians relied upon by the administrative law judge. Decision and Order at 4; Director's Exhibit 9. Further, as already noted, claimant does not challenge the finding that her other medical expert, Dr. Ghio, possesses outstanding credentials.

(1983). Thus, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4).

Based on the foregoing, we affirm the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a miner's claim under Part 718, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112.

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

JUDITH S. BOGGS
Administrative Appeals Judge