BRB No. 04-0567 BLA

BILL M. JUSTICE Claimant-Petitioner v. WESLEY COAL COMPANY, INCORPORATED and ISLAND CREEK COAL COMPANY and KENTUCKY COAL PRODUCERS' SELF-INSURANCE FUND and ISLAND CREEK COAL COMPANY Employers/Carriers-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/29/2005 DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Bill M. Justice, Pikeville, Kentucky, *pro se*.

David H. Neeley (Neeley & Reynolds, PSC), Prestonsburg,

Kentucky, for Wesley Coal Company, Incorporated.
Natalee A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky, for Island Creek Coal Company.

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 (03-BLA-0169) of Administrative Law Judge Daniel J. Roketenetz 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).[1] The administrative law judge credited the miner with sixteen and one-third years of coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] The administrative law

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[1]Susie Davis, President of the Kentucky Black Lung Coalminers & Widows Association, filed this appeal on behalf of claimant but is not representing claimant on appeal. *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2]Claimant filed his claim for benefits on November 9, 1999. Director's Exhibit 2. The district director denied the claim on February 25, 2000 and on September 15, 2000. Director's Exhibit 40. Claimant subsequently sought modification of the denial, and submitted additional evidence. Director's Exhibit 44. The district director denied claimant's request for modification on March 14, 2001. Director's Exhibit 45. Claimant again sought modification of the denial on September 11, 2001. Director's Exhibit 49. The district director denied claimant's second request for modification on October 24, 2001. Director's Exhibit 50. Claimant filed a third request for modification on October 9, 2002, which the district director denied on November 18, 2002. Director's Exhibits 61, 63, 64. Claimant's request of December 2, 2002, that he be allowed to withdraw his claim, was denied on January 17, 2003. Director's Exhibits 65, 66. Pursuant to claimant's request for a hearing, the case was transferred to the Office of Administrative Law Judges. Director's Exhibit 67. A hearing was held on December 11, 2003. Because claimant's requests for modification were addressed by the district director, prior to adjudication of the claim by the administrative law judge, the administrative law judge properly considered the merits of the claim based on all of the evidence of record. *See Kott v. Director, OWCP*, 17 BLR 1-9 (1992).

judge found that the evidence of record was insufficient to establish the existence of pneumoconiosis, total respiratory or pulmonary disability, or total disability due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a) and 718.204(b), (c). Accordingly, benefits were denied.

In response to claimant's appeal, both Island Creek Coal Company (Island Creek) and Wesley Coal Company (Wesley Coal) respond, urging affirmance of the administrative law judge's denial of benefits. In addition, Island Creek contends that if Wesley Coal's carrier is unable to pay any benefits awarded, then the Black Lung Disability Trust Fund, not Island Creek, should be liable for the payment of benefits. Island Creek thus asserts that the administrative law judge erroneously found that while Wesley Coal was the responsible operator, because the bankruptcy proceedings involving its carrier were not finalized, Island Creek remained potentially liable for the payment of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in the appeal.

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. *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Corp.*, 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, 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. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's findings and the evidence of record, we hold that the administrative law judge's finding that the record evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202 is supported by substantial evidence, is in accordance with applicable law, and contains no reversible error. At 20 C.F.R. §718.202(a)(1), the administrative law judge considered the qualitative and quantitative nature of the x-ray evidence of record, and properly accorded greater weight to the preponderance of the negative x-ray readings by physicians with superior qualifications. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th

Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); Decision and Order at 13; Director's Exhibits 8, 14-16, 32, 35, 40; Claimant's Exhibit 1.

The administrative law judge further correctly found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3) as there is no biopsy evidence, this is a living miner's claim filed after January 1, 1982, and there is no evidence that could establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis provided at 20 C.F.R. §718.304. 20 C.F.R. §§718.304, 718.305, 718.306; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986); Decision and Order at 13.

Considering the medical opinion evidence of record at 20 C.F.R. §718.202(a)(4), the administrative law judge correctly noted that Drs. Musgrave, Clarke, and Sundaram opined that claimant had pneumoconiosis, while Drs. Mettu, Burki, Broudy, Fino, Dahhan, Rosenberg, Ghip, and Repsher opined that claimant did not have pneumoconiosis. The administrative law judge accorded less weight to the opinions rendered by Drs. Musgrave, Clarke, and Sundaram. Specifically, the administrative law judge permissibly determined that Dr. Musgrave's opinion was entitled to "less probative value" as it amounted to a mere restatement of an x-ray reading. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); Decision and Order at 22; Director's Exhibit 27. The administrative law judge next noted Dr. Clarke's statement that he "understands that to make a diagnosis of pneumoconiosis and a decision on impairment that we cannot depend on any one test, any one x-ray, and one history, any one spirometry, any one blood gas study; but, by a process of colligation of all the evidences for and against the diagnosis in a reasoned medical judgment and in the realm of medical probability come to a decision." Director's Exhibit 27. The administrative law judge rationally accorded less weight to Dr. Clarke's opinion based on his finding that, even if Dr. Clarke relied on "indicia" other than an x-ray, "this description of his general methodology inadequately sets forth what specific evidence is relied upon in determining the presence of pneumoconiosis," Decision and Order at 23. *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983) (in making credibility determinations, the administrative law judge must examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical conclusion is based).

Further, the administrative law judge, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), rationally determined that Dr. Sundaram's opinion was "neither well-reasoned nor well-documented" as he "fails to state any other reasons for his diagnosis of pneumoconiosis beyond the x-ray and exposure history." Decision and Order at 23-24. The administrative law judge thereby properly accorded less weight to the medical opinions of Drs.

Musgrave, Clarke, and Sundaram, the only medical opinions of record which could meet claimant's burden at 20 C.F.R. §718.202(a)(4). The administrative law judge also permissibly found the opinions by Drs. Broudy, Fino, Dahhan and Rosenberg, that claimant did not have pneumoconiosis, to be reasoned and documented where these physicians conducted several objective tests, in addition to examining claimant and reviewing claimant's medical records. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002).

Based on the foregoing, we affirm the administrative law judge's findings that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), as they are supported by substantial evidence and are in accordance with law. We therefore affirm the administrative law judge's determination that claimant failed meet his burden to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement under 20 C.F.R. Part 718. As a finding of entitlement is precluded in this case, we need not address the administrative law judge's findings on the issues of total disability or total disability causation at 20 C.F.R. §718.204(b), (c). *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-5.

Because we affirm the administrative law judge's denial of benefits on the merits, we need not address Island Creek's contention that the administrative law judge erred in finding that it remained potentially liable for the payment of benefits.

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