BRB No. 05-0720 BLA

ROBERT L. MOSLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: 04/27/2006
	)	
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 on Second Remand – Denying Benefits and the Ruling and Order Granting Reconsideration of Evidentiary Ruling of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Second Remand – Denying Benefits and the Ruling and Order Granting Reconsideration of Evidentiary Ruling (1992-BLA-115) of Administrative Law Judge Richard A. Morgan 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 has a lengthy procedural history.[1] In the last appeal, the Board vacated the award of benefits, as the prior administrative law judge's denial of employer's request for a formal hearing on modification precluded the introduction of additional documentary and testimonial evidence. The Board remanded the case for the administrative law judge to conduct a hearing on modification pursuant to 20 C.F.R. §725.310 and adjudicate the merits of the claim. The Board further instructed the administrative law judge to weigh together all relevant evidence pursuant to 20 C.F.R. §718.202(a) to determine whether the existence of pneumoconiosis was established by a preponderance of all the evidence in accordance with the standard set forth in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). *Mosley v. Eastern Associated Coal Corp.*, BRB Nos. 01-0918 BLA and 02-0918 BLA-A (July 16, 2002)(unpub.).

The instant case was then reassigned to the administrative law judge, who, on remand, credited claimant with twenty-four years of qualifying coal mine employment, as stipulated by the parties and supported by the record, and adjudicated this claim, filed on November 2, 1990, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge reviewed all of the evidence of record *de novo* and found that the weight of the evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), but insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or disability causation pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge abused his discretion in admitting three x-ray interpretations by Drs. Wheeler, Scott and Gayler of a July 2, 1997 film [Employer's Exhibit 2] into the record at the hearing without allowing claimant to submit post-hearing rebuttal evidence. Claimant also challenges the administrative law judge's weighing of the x-ray evidence of record at Section 718.202(a)(1) and his weighing of the medical opinions of record on the issues of the existence of pneumoconiosis and disability causation at Sections 718.202(a)(4), 718.204(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not participated in this appeal.

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

[1] The full procedural history of this case is set forth in *Mosley v. Eastern Associated Coal Corp.*, BRB Nos. 01-0918 BLA and 01-0918 BLA-A (July 16, 2002) (unpub.) and in the Decision and Order at 2-4.

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 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 considering the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence and contains no reversible error. Claimant initially contends that the administrative law judge erred in admitting Employer's Exhibit 2 into the record at the 2004 hearing on modification, as this evidence had not been sent directly to claimant or to his present counsel. Claimant argues that employer was aware that claimant was acting *pro se* at the time employer sent Employer's Exhibit 2 to claimant's former counsel on January 19, 1998, and that since claimant never received this evidence, the administrative law judge should either have excluded the three x-ray interpretations from the record or allowed claimant to submit post-hearing rebuttal evidence pursuant to 20 C.F.R. §725.456(b)(3), (4). Claimant's arguments are without merit. The administrative law judge considered claimant's objections and employer's response that claimant's former counsel was properly served with the three rereadings in 1998, despite 1997 correspondence stating that counsel would no longer represent claimant, because counsel continued to be listed on multiple service sheets and, at the very least, there was confusion in view of the procedural posture of the case. Hearing Transcript at 45-46; Ruling and Order at 1-2. The administrative law judge determined that a motion for reconsideration was pending before the original administrative law judge at the time employer served Employer's Exhibit 2 on claimant's former counsel in 1998, and, within a proper exercise of his discretion, the administrative law judge found that it was not unreasonable for employer to send this evidence to claimant's trial counsel.[2] Ruling and Order at 2; *see generally*

[2] Employer's Exhibit 2 was enclosed with a cover letter dated January 18, 1998, addressed to Administrative Law Judge Frederick D. Neusner, who conducted the original hearing in this case. Following the Board's 1996 affirmance of his denial of benefits, Judge Neusner adjudicated claimant's modification request and issued a decision on the record without holding another hearing as requested by employer. Both parties subsequently sought reconsideration, and employer's appeal to the Board was dismissed as premature. *See Mosley v. Eastern Associated Coal Corp.*, BRB Nos. 01-0918 BLA and 01-0918 BLA-A (July 16, 2002)(unpub.); Decision and Order at 2, 3. In addition to service upon Judge Neusner and claimant's former counsel, the cover letter

Clark v. Karst-Robbins Coal Co., 12 BLR 1-149 (1989)(*en banc*). The administrative law judge further determined that although copies of Employer's Exhibit 2 were not included with the Director's exhibits forwarded to the Office of Administrative Law Judges for the 2004 hearing on modification, the claim file had been misplaced between 1998 and 2001. Ruling and Order at 2. Consequently, the administrative law judge reasonably concluded that admission of Employer's Exhibit 2 into the record did not violate the proscription of 20 C.F.R. §725.456(b)(2), and, as claimant had already obtained four rereadings of the July 2, 1997 film by dually-qualified readers, which were admitted into the record at the 2004 hearing, the administrative law judge properly found that no post-hearing development of additional rebuttal evidence was warranted. Ruling and Order at 2; *Clark*, 12 BLR 1-149.

Turning to the merits, claimant contends that the administrative law judge erred in weighing the x-ray evidence of record and finding it insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1). Specifically, claimant maintains that the administrative law judge improperly considered the totality of the x-ray evidence without first determining whether each separate film was positive or negative for pneumoconiosis. Claimant, however, has not specified how a film-by-film weighing of the x-ray evidence would change the result herein. After considering the quality and quantity of the x-ray evidence, the administrative law judge determined that although the interpretations of films taken between November 15, 1990 and April 20, 1992 were overwhelmingly negative for pneumoconiosis, the interpretations of films taken between January 24, 1997 and December 28, 2003 were in equipoise. Decision and Order at 6-8. Assuming that the positive interpretations were consistent with the progressive and irreversible nature of pneumoconiosis, and were equally as credible as the negative interpretations by similarly well-qualified readers, the administrative law judge acted within his discretion in finding that the x-ray evidence was inconclusive at best, and that claimant consequently failed to meet his burden of establishing the existence of pneumoconiosis by a preponderance of the x-ray evidence. Decision and Order at 8, 18; *see Director, OWCP v. Greenwich Collieries* [*Onderko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

Claimant next challenges the administrative law judge's finding that the weight of the medical opinion evidence of record was insufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4) or disability causation at Section 718.204(c). Claimant asserts that the diagnoses of pneumoconiosis by his treating sources and by Drs. Ranavaya and Rasmussen merited significant weight, and that the administrative law

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indicates that copies of Employer's Exhibit 2 were sent to Ronald Gurka, Associate Regional Solicitor; United States Department of Labor – Hearings & Appeals Section; and employer's insurer.

judge should have discounted the contrary opinions of Drs. Zaldivar, Tuteur and Fino, as these physicians failed to adequately explain why claimant's 24-year history of coal dust exposure did not contribute to any of claimant's pulmonary problems. Claimant's Brief at 20-22. Claimant's arguments are without merit, and essentially amount to a request to reweigh the evidence, which is beyond the Board's scope of review. *See Anderson*, 12 BLR 1-111.

In evaluating the conflicting evidence of record, the administrative law judge properly concluded that the isolated references to pneumoconiosis in claimant's multiple treatment records did not constitute well reasoned medical opinions as required by Section 718.202(a)(4). Decision and Order at 19. The administrative law judge permissibly accorded little weight to Dr. Ranavaya's diagnosis of pneumoconiosis for several reasons: the physician had relied in part upon a questionable positive x-ray; he had not explained why he attributed claimant's impairment to coal dust exposure; he had understated claimant's smoking history;[3] he had failed to discuss the possible roles of smoking or heart disease in causing the impairment; and he had based his opinion upon limited medical evidence obtained in December 1990. Decision and Order at 9-10, 19; Director's Exhibit 9; *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Clark*, 12 BLR 1-149; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Similarly, the administrative law judge acted within his discretion in giving less weight to Dr. Rasmussen's diagnosis of pneumoconiosis following examinations conducted in April 1992 and January 1997, as the physician had relied in part upon questionable positive x-rays; his two reports contained inconsistent statements;[4] his interpretation of claimant's test results was incorrect, as Dr. Tuteur had persuasively explained; and employer's

[3] Dr. Ranavaya listed an ongoing smoking history of one-half pack per day beginning in 1960, Director's Exhibit 9, whereas the administrative law judge found that claimant was a chronic smoker who averaged one to two packs per day beginning in the mid-1950s. Decision and Order at 5-6.

[4] In both of his reports, Dr. Rasmussen found a moderate obstructive ventilatory impairment on pulmonary function studies and a marked impairment in oxygen transfer with marked hypoxia on exercise blood gas studies. Decision and Order at 10-12; Director's Exhibits 31, 89. The administrative law judge noted that in 1992, Dr. Rasmussen reported that both smoking and coal dust exposure could cause the same type and degree of impairment observed in claimant, but that "there is no clear way in which a separation can be made," Director's Exhibit 31, yet in 1997, Dr. Rasmussen stated that coal dust exposure was "the major cause of [claimant's] impaired function since his impairment in oxygen transfer significantly exceeds his mild to moderate ventilatory impairment," Director's Exhibit 89. Decision and Order at 19-20.

pulmonary experts had considered significantly more recent (2003) medical data in addition to the earlier evidence. Decision and Order at 10-12, 19-20; Director's Exhibits 31, 89; *see Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985).

Contrary to claimant's arguments, Drs. Zaldivar, Tuteur and Fino explained in detail why they did not diagnose pneumoconiosis and concluded that claimant's totally disabling respiratory impairment was unrelated to his lengthy coal mine employment.[5] Decision and Order at 12-18; Director's Exhibits 29, 30; Employer's Exhibits 1, 3, 6, 7, 10, 11. The administrative law judge permissibly accorded greater weight to the opinions of these experts, as he found them to be better reasoned, based upon more extensive and more recent evidence, and consistent with claimant's occupational and smoking histories and the credible objective medical evidence of record. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Akers*, 131 F.3d 438, 21 BLR 2-269; *Collins*, 21 BLR 1-181. Weighing all of the evidence together, the administrative law judge reasonably concluded that, at best, the evidence was inconclusive regarding the presence of both clinical and legal pneumoconiosis, thus claimant failed to meet his burden at Section 718.202(a)(1)-(4), *see Compton*, 211 F.3d 203, 22 BLR 2-162, and could not establish disability causation at Section 718.204(c). Decision and Order at 20-22. The administrative law judge's findings pursuant to Section 718.202(a) are supported by substantial evidence and are affirmed. Consequently, claimant is precluded from entitlement to benefits. *See Anderson*, 12 BLR 1-111.

[5] The administrative law judge acknowledged that, while Dr. Zaldivar has consistently stated that claimant has no respiratory condition related to coal dust exposure, Dr. Tuteur initially reported mild radiographic evidence of pneumoconiosis, Director's Exhibit 29, and subsequently stated that claimant does not have pneumoconiosis "of sufficient severity and profusion to produce clinical symptoms, physical examination abnormality, impairment of pulmonary function, or radiographic change," Employer's Exhibit 6 at 8; and Dr. Fino admitted he could not rule out that a portion of claimant's obstruction as measured in 1991 "may be related to coal dust, [but] it is of no clinical significance," Employer's Exhibit 7 at 12-13. Decision and Order at 15-18, 20.

Accordingly, the administrative law judge's Decision and Order on Second Remand – Denying Benefits and his Ruling and Order Granting Reconsideration of Evidentiary Ruling are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge