BRB No. 07-0589 BLA

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| D.L.M. | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| CHIEF MINING, INCORPORATED | ) | DATE ISSUED: 04/30/2008 |
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| and | ) | |
| | ) | |
| WEST VIRGINIA CWP 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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

D.L.M., Pineville, West Virginia, *pro se*.

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

PER CURIAM:

Claimant, without the assistance of legal counsel, appeals the Decision and Order - Denying Benefits (2006-BLA-05282) of Administrative Law Judge Richard A. Morgan, 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 credited claimant with twenty-eight and one-half years of

qualifying coal mine employment and considered the claim, filed on January 19, 2005, 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). In addition, he found that claimant failed to established total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs has filed a letter indicating that he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling.[1] 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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. Pursuant to Section 718.202(a)(1), the administrative law judge considered eight readings of four x-rays, dated February 15, 2005,[2] July 13, 2005, November 16, 2005 and April 27, 2006.

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant's coal mine employment was in West Virginia. Director's Exhibit 4; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[2] The administrative law judge indicated that Dr. Rasmussen's notation of the date of the film on the x-ray reading form was unclear and was interpreted as either February

Decision and Order at 4-5. The February 15, 2005 x-ray was read as positive for pneumoconiosis by Dr. Rasmussen, a B reader; whereas, Dr. Wiot, who is dually qualified as a Board-certified radiologist and B reader, read this film as negative for pneumoconiosis. Director's Exhibit 15; Employer's Exhibit 3. Dr. Zaldivar, a B reader, interpreted the July 13, 2005 x-ray as 0/1 under the ILO classification system, a reading that does not constitute evidence of pneumoconiosis. 20 C.F.R. 718.102(b); Director's Exhibit 16. Dr. Jarboe, also a B reader, interpreted the April 27, 2006 x-ray to be negative for pneumoconiosis. Employer's Exhibit 1. The November 16, 2005 film was read as positive for pneumoconiosis by Drs. Pathak and Cappiello, both of whom are dually qualified as B readers and Board-certified radiologists, but as negative for pneumoconiosis by Drs. Wheeler and Scott, both of whom are also dually qualified radiologists. Claimant's Exhibits 1, 2; Employer's Exhibits 4, 5.

In weighing the conflicting x-ray evidence, the administrative law judge permissibly accorded greater weight to Dr. Wiot's negative interpretation of the February 15, 2005 x-ray than to Dr. Rasmussen's positive reading, based on Dr. Wiot's status as a B reader and Board-certified radiologist. Decision and Order at 5; 20 C.F.R. §718.202(a)(1); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Likewise, the administrative law judge reasonably found that the November 16, 2005 x-ray was inconclusive as to the existence of pneumoconiosis because equally qualified physicians read the film as both positive and negative for pneumoconiosis. Decision and Order at 5; *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 517 U.S. 267, 18 BLR 2A-1 (1994). As the remainder of the x-ray films were read as negative for the existence of pneumoconiosis, the administrative law judge found that the preponderance of the x-ray readings was negative for pneumoconiosis and, therefore, that claimant has not established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Decision and Order at 5, 11.

A review of the record shows that the administrative law judge correctly set forth the relevant x-ray evidence of record, including the radiological qualifications of the physicians providing the readings. Decision and Order at 4-5; Director's Exhibits 15, 16; Claimant's Exhibits 1, 2; Employer's Exhibits 1, 3-5. Consequently, we hold that the administrative law judge reasonably exercised his discretion, as trier-of-fact, in finding that the preponderance of the x-ray interpretations by the better qualified physicians was negative for the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

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15 or 16, 2005 by the physicians who re-read the film. Decision and Order at 4 n.3. The administrative law judge found that this discrepancy was "inconsequential for the purposes of rendering this decision." *Id*.

Decision and Order at 4-5, 11; *see Island Creek Coal Co. 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); *Ondecko*, 517 U.S. at 276, 18 BLR at 2A-9.

In addition, the administrative law judge correctly found that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(2)-(3), as the record contains no biopsy results and the presumptions set forth at 20 C.F.R. §§718.304, 718.305, and 718.306 are not available to claimant.[3] Decision and Order at 11; *see* 20 C.F.R. §718.202(a)(2)-(3); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). This finding, therefore, is affirmed.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Zaldivar, Jarboe and Mullins; an April 27, 2006 CT scan read as negative for pneumoconiosis; and claimant's treatment records from Raleigh General Hospital, finding that the weight of this evidence was insufficient to establish the existence of pneumoconiosis. Decision and Order at 6-11, 12. Dr. Zaldivar examined claimant on July 13, 2005 and Dr. Jarboe examined claimant on April 27, 2007. Director's Exhibit 16; Employer's Exhibit 1. Drs. Zaldivar and Jarboe, both of whom are Board-certified in internal medicine and pulmonary disease, provided opinions that claimant does not suffer from either clinical or legal pneumoconiosis. Director's Exhibit 16; Employer's Exhibits 1, 7. Dr. Mullins, who is also Board-certified in internal medicine and pulmonary disease, examined claimant on February 15, 2005 and opined that claimant suffers from coal workers' pneumoconiosis and has an abnormal x-ray, consistent with coal dust exposure in coal mine employment. Director's Exhibit 15. Dr. Mullins also diagnosed chronic obstructive pulmonary disease, which she attributed to both cigarette smoking and coal mine employment.[4] *Id.* In her deposition dated June 28, 2006, Dr. Mullins stated that based upon her own studies and those performed by Drs. Jarboe and Zaldivar, claimant "does possibly have some – and probably does have some degree of black lung and some mild impairment." Employer's Exhibit 8 at 20.

[3]The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 because this claim was filed after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 2. Lastly, as this claim is not a survivor's claim filed before June 30, 1982, the presumption at 20 C.F.R. §718.306 is also inapplicable.

[4] Dr. Mullins noted in her written report that claimant has a "moderate ventilatory impairment which would have prevented performance of last coal mine job," that is due 80% to his coal workers' pneumoconiosis and 20% to claimant's "other" conditions. Director's Exhibit 15.

In weighing this evidence, the administrative law judge accorded greater weight to the opinions in which Drs. Jarboe and Zaldivar stated that clinical or legal pneumoconiosis is not present, finding that these opinions are better reasoned and documented than Dr. Mullins's opinion. Decision and Order at 12. Specifically, the administrative law judge found that the opinions of Drs. Jarboe and Zaldivar were more consistent with the credible objective evidence, including the negative x-ray and CT scan evidence, as well the reversibility of claimant's impairment on the clinical tests. Decision and Order at 12; Director's Exhibit 16; Employer's Exhibits 1, 7. Therefore, the administrative law judge reasonably found that Drs. Jarboe and Zaldivar "clearly and unequivocally" opined that claimant does not suffer from either clinical or legal pneumoconiosis and accorded these opinions greater weight. Decision and Order at 12; *Hicks*, 138 F.3d at 533, 21 BLR at 2-325; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

In contrast, the administrative law judge found that Dr. Mullins initially opined that claimant suffered from clinical and legal pneumoconiosis, but after reviewing additional pulmonary function studies, she "qualified" her opinion, "noting that [c]laimant 'possibly' or 'probably' has 'some degree of black lung and mild impairment.' [Employer's Exhibit] 8 at 20." Decision and Order at 12. The administrative law judge therefore accorded less weight to Dr. Mullins's opinion, because he found that the more recent opinion expressed in her deposition testimony was equivocal. Decision and Order at 12; *compare* Director's Exhibit 15 *with* Employer's Exhibit 8; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Consequently, the administrative law judge acted within his discretion in according greater weight to the opinions of Drs. Jarboe and Zaldivar, as they were better reasoned and documented and more consistent with the underlying documentation. Decision and Order at 12; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-153. Accordingly, we affirm the administrative law judge's finding that the weight of the medical opinion 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. In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement under Part 718, we must also affirm the denial of benefits. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. We need not address, therefore, the administrative law judge's findings that claimant failed to establish a totally disabling respiratory or pulmonary impairment due to pneumoconiosis pursuant to Section 718.204(b), (c).

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

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