BRB No. 08-0644 BLA

J.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 04/07/2009
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Peter J. Daley (Peter J. Daley & Associates, P.C.), California, Pennsylvania, for claimant.

Helen H. Cox (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2005-BLA-5134) of Administrative Law Judge Thomas M. Burke 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). The administrative law judge found the instant case to be a subsequent claim filed on October 17, 2003.[1] Adjudicating the claim

[1] Claimant filed his initial claim for benefits on July 21, 1998, which was denied by the district director on October 9, 1998. The district director found that claimant failed to establish any of the requisite elements of entitlement pursuant to 20 C.F.R. Part

pursuant to 20 C.F.R. Part 718, the administrative law judge credited claimant with seventeen and one-half years of coal mine employment, based on a stipulation of the parties. Weighing the medical evidence submitted since the prior denial, the administrative law judge found the newly submitted medical evidence sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, that claimant established a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309(d). Addressing the evidence as a whole, however, the administrative law judge found the medical evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in finding the medical evidence insufficient to establish entitlement to benefits. In particular, claimant contends that the administrative law judge erred in relying on Dr. Altmeyer's opinion and not crediting the medical reports of Drs. Rasmussen and Lega. In response, the Director, Office of Workers' Compensation Programs (the Director), urges affirmance of the administrative law judge's denial of benefits, as supported by substantial evidence. However, the Director also states that "for purposes of the current claim," he agrees with the administrative law judge's finding that the newly submitted evidence establishes total disability pursuant to Section 718.204(b) and, thus, establishes a change in one of the applicable conditions of entitlement pursuant to Section 725.309.[2] Director's Response Letter at 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 rational, supported by substantial evidence, and in accordance with applicable law.[3] 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).

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718. Director's Exhibit 1. No further action was taken by claimant until he filed his current claim on October 17, 2003. Director's Exhibit 3.

[2] The administrative law judge's finding that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (3), is affirmed, as unchallenged on appeal. *See Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

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

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. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d 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.

At the outset, we note that claimant does not sufficiently challenge the administrative law judge's determination that the x-ray evidence failed to establish pneumoconiosis at Section 718.202(a)(1). Rather, claimant states only that an x-ray "showed interstitial nodularity and development of some small peripheral nodules." Claimant's Brief at 2. Because claimant alleges no specific error in regard to the administrative law judge's weighing of the x-ray evidence of record, and the Board is not empowered to engage in a *de novo* review of the evidence of record, we affirm the administrative law judge's finding that the weight of the x-ray evidence, as a whole, is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).[4] *See* 20 C.F.R. §§802.211, 802.301; *Sarf v. Director, OWCP*, 10 BLR 1-

[4] Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered the x-ray evidence of record, both old and new, consisting of nine readings of four x-ray films dated August 6, 1998, December 10, 2001, November 26, 2003, and June 11, 2004. Director's Exhibits 1, 18-20, 40, 43; Claimant's Exhibits B, C. Dr. McMahon, a B reader and Board-certified radiologist, read the August 6, 1998 x-ray as positive for pneumoconiosis, whereas Dr. Navani, also a dually-qualified B reader and Board-certified radiologist, and Dr. Gaziano, a B reader, read this film as negative for pneumoconiosis. Director's Exhibit 1. The November 26, 2003 x-ray was read as positive for pneumoconiosis by Dr. Thomeier, a dually-qualified radiologist, but Dr. Wolfe, a dually-qualified radiologist, read this film as negative for pneumoconiosis. Director's Exhibits 18-19, 40. Included with the interpretations of the November 26, 2003 x-ray, is Dr. Navani's reading of this film, which was provided for quality purposes only. Director's Exhibit 20. The June 11, 2004 x-ray was read as positive for pneumoconiosis by Dr. Patel, but also as negative for pneumoconiosis by Dr. Navani, both of whom are dually-qualified radiologists. Claimant's Exhibit C, Director's Exhibit 43. The remaining x-ray film, dated December 10, 2001, was read by Dr. Lega, whose qualifications are not in the record, as "reveal[ing] a left lower granuloma present by chart review from previous reports." Claimant's Exhibit B. Weighing this evidence, the administrative law judge rationally found that the weight of the x-rays is, at best, in equipoise, and cannot be considered sufficient to evidence the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); Decision and

119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Moreover, we note that the x-ray interpretation referred to by claimant would not, as a matter of law, be sufficient to establish pneumoconiosis at Section 718.202(a)(1). 20 C.F.R. §§718.102, 718.202.

With regard to the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), claimant states that "his seventeen years as a coal miner, during which time he was exposed to the harmful effects of coal dust, has resulted in the development of pneumoconiosis." Claimant's Brief at 2. Claimant sets forth the medical opinions supportive of his claim,[5] specifically arguing the administrative law judge "erred by relying heavily" upon the report of Dr. Altmeyer and not crediting the reports of Drs. Rasmussen and Lega, both of whom opined that "claimant has symptoms of pneumoconiosis." Claimant's Brief at 3.

In assessing the weight to accord the conflicting medical opinions as to the existence of pneumoconiosis[6] at Section 718.202(a)(4), the administrative law judge

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Order at 7. Specifically, the administrative law judge found that the November 26, 2003 and June 11, 2004 x-rays are in equipoise because these films were read as both positive and negative for pneumoconiosis by equally qualified doctors. Decision and Order at 7; Director's Exhibits 19, 40, 43; Claimant's Exhibit C. In addition, he found that the remaining x-rays did not establish the existence of pneumoconiosis, as the August 6, 1998 x-ray while read as positive by Dr. McMahon, a B reader and Board-certified radiologist, was read as negative by both Dr. Navani, a dually-qualified radiologist, and Dr. Gaziano, a B reader. Further, the administrative law judge found that Dr. Lega's reading of the December 10, 2001 x-ray was insufficient to establish the presence of pneumoconiosis. Decision and Order at 7-8; Director's Exhibit 1; Claimant's Exhibit B.

[5] Claimant includes the medical opinion of Dr. Ginart in his recitation of the medical opinion evidence supportive of his claim. Claimant's Brief at 2. However, at the hearing before the administrative law judge, claimant withdrew his request to admit this medical report into the record. Hearing Transcript at 23-24.

[6] Pursuant to Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Cho, Lega, Rasmussen and Altmeyer. Dr. Cho, who examined claimant in 1998, diagnosed chronic obstructive pulmonary disease (COPD), but did not relate it to claimant's coal mine employment. Director's Exhibit 1. In a report dated December 10, 2003, Dr. Cho diagnosed pneumoconiosis with COPD, based on "CXR, PFS and work h/x" and stated that the etiology was coal dust. Director's Exhibit 15. Dr. Lega, in a report dated December 10, 2001, stated that claimant has "consequences of coal workers pneumoconiosis, and that he has symptoms of dyspnea." Claimant's Exhibit B. Dr. Rasmussen examined claimant on July 28, 2004 and opined that claimant has x-ray

found the opinion of Dr. Altmeyer, that claimant's reversible airways obstruction was not caused by coal mine dust exposure, to be the best reasoned and documented opinion of record, and therefore, accorded it determinative weight. Decision and Order at 7. In particular, the administrative law judge found that Dr. Altmeyer's opinion is the most persuasive opinion of record, as it is supported by the objective evidence, including the negative x-ray evidence and the pulmonary function study evidence, which both Drs. Altmeyer and Rasmussen interpreted as showing a reversible airways disease consistent with bronchial asthma. Decision and Order at 7-8. In contrast, the administrative law judge found the opinion of Dr. Lega, which diagnosed pneumoconiosis, entitled to little weight because Dr. Lega did not provide a basis for his conclusion, other than referring to an x-ray reading. Decision and Order at 7. In addition, the administrative law judge accorded little weight to the opinions of Drs. Rasmussen and Cho because he found that their diagnoses of pneumoconiosis were based on positive x-ray evidence, contrary to his determination that the weight of the x-ray evidence is negative for pneumoconiosis. *Id*. Consequently, the administrative law judge found the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Contrary to claimant's contentions, the administrative law judge rationally found that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge, within a reasonable exercise of his discretion, accorded little weight to the opinion of Dr. Lega, who opined that claimant has "consequences of pneumoconiosis," because the doctor provided no reasoning for his finding. *Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004); *Lango v. Director, OWCP*, 104 F.3d 573, 577, 21 BLR 2-12, 2-20-21 (3d Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). In addition, the administrative law judge reasonably accorded little weight to the opinions of Drs. Rasmussen and Cho, because they based their diagnoses of pneumoconiosis on their positive x-ray interpretations, contrary to the administrative law judge's finding that the weight of the x-ray evidence is negative. *See Williams*, 114 F.3d

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changes consistent with pneumoconiosis, and that it is reasonable to conclude that claimant has "coal workers' pneumoconiosis/silicosis," which arose from his coal mine employment. Claimant's Exhibit C. In addition, Dr. Rasmussen opined that claimant also has clinical and physiologic evidence of bronchial asthma, but that there is no evidence suggesting that coal dust exposure causes bronchial asthma. *Id*. Dr. Altmeyer, who examined claimant on March 24, 2004 and reviewed additional medical evidence of record, opined that claimant does not have coal workers' pneumoconiosis, and also opined that claimant's pulmonary impairment, described as a reversible airways obstruction, was not caused in whole or in part by claimant's coal mine employment. Director's Exhibit 22.

at 26, 21 BLR at 2-111; *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Moreover, Dr. Rasmussen's diagnosis of bronchial asthma is insufficient to establish legal pneumoconiosis because the doctor stated that he found no evidence suggesting that coal dust exposure caused claimant's bronchial asthma. 20 C.F.R. §718.201; Decision and Order at 8-9; Claimant's Exhibit C. Rather, the administrative law judge reasonably accorded greater weight to the opinion of Dr. Altmeyer, that claimant does not have pneumoconiosis, over the opinions of Drs. Rasmussen and Lega, as he properly determined that this opinion is better reasoned and documented, and supported by the underlying documentation. *Soubik*, 366 F.3d at 234, 23 BLR at 2-99; *Lango*, 104 F.3d at 577, 21 BLR at 2-20-21; *Clark*, 12 BLR at 1-155; Decision and Order at 7-8.

Because the administrative law judge provided a proper analysis of the medical opinion evidence, including his consideration of the doctors' rationale for their conclusions, and the documentation underlying their medical judgments, we affirm his finding that the medical opinion evidence is insufficient to establish pneumoconiosis pursuant to Section 718.202(a)(4). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 272-76, 18 BLR 2A-1, 2A-6-9 (1994); *Soubik*, 366 F.3d at 234, 23 BLR at 2-99; *Lango*, 104 F.3d at 577, 21 BLR at 2-20-21; *Clark*, 12 BLR at 1-155. Moreover, because substantial evidence supports the administrative law judge's finding that all of the evidence weighed together, like and unlike, did not establish the existence of pneumoconiosis, we affirm his finding that the evidence as a whole failed to establish pneumoconiosis pursuant to Section 718.202(a). *Williams*, 114 F.3d at 26, 21 BLR at 2-111.

As the medical evidence of record fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement, an award of benefits is precluded. *Williams*, 114 F.3d at 26, 21 BLR at 2-111; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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