BRB No. 11-0521 BLA

ARVIL ELDRIDGE WADDELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
	)	DATE ISSUED: 04/19/2012
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 Denying Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia.

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

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (10-BLA-5014) of Administrative Law Judge Thomas M. Burke (the administrative law judge) rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified

at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[1] This case involves claimant's request for modification of the denial of a subsequent claim that was filed on July 23, 2003.[2] Claimant's most recent claim for benefits, filed on July 16, 1984, was denied by the district director on November 8, 2004, because claimant did not establish any elements of entitlement. Director's Exhibit 2. Claimant requested a hearing, and the case was forwarded to the Office of Administrative Law Judges for further adjudication.

In a Decision and Order issued on June 26, 2007, Administrative Law Judge Stephen L. Purcell found that the medical evidence developed since the denial of the prior claim established that claimant was totally disabled by a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Judge Purcell therefore determined that claimant established a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(d). Reviewing the claim on the merits, however, Judge Purcell found that claimant failed to establish the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a), and he denied benefits. Director's Exhibit 67. Pursuant to claimant's appeal, the Board affirmed the denial of benefits. *A.E.W.* [*Waddell*] *v. Eastern Assoc. Coal Corp.*, BRB No. 07-0877 BLA (Jul. 24 2008)(unpub.).

Claimant timely requested modification pursuant to 20 C.F.R. §725.310 and submitted additional medical evidence. Director's Exhibit 83. The district director denied modification and the case was assigned to the administrative law judge, for a decision on the record.[3]

In a Decision and Order issued on April 14, 2011, which is the subject of this appeal, the administrative law judge credited claimant with twelve years of coal mine employment,[4] and, based on the date of filing, adjudicated the claim pursuant to 20

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[1] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this case, as it involves a claim filed before January 1, 2005.

[2] This is claimant's third claim for benefits. His first claim, filed on March 19, 1977, was finally denied and administratively closed. Director's Exhibit 1.

[3] At claimant's request, a hearing was initially scheduled for June 10, 2010. Director's Exhibit 93. Pursuant to employer's motion, however, the hearing was cancelled and a decision was issued on the record. Decision and Order at 2.

[4] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibits 2, 5, 8. Accordingly, this case arises within the jurisdiction 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).

C.F.R. Part 718. Decision and Order at 2. The administrative law judge found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and thus did not establish a change in conditions pursuant to 20 C.F.R. §725.310. The administrative law judge further found that a review of the previously submitted evidence did not reveal a mistake in a determination of fact in the prior finding that claimant does not have pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 725.310.[5] Thus, the administrative law judge concluded that claimant did not establish a basis for modification under 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in according greater weight to the opinions of Drs. Crisalli and Zaldivar, than to the contrary opinion of Dr. Rasmussen, in finding that the medical opinion evidence does not establish the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4). Claimant further asserts that the administrative law judge erred in the manner in which he weighed together all of the relevant evidence regarding the existence of pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive brief in this appeal.[6]

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 he 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*

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[5] In determining, de novo, whether claimant established a mistake in the prior denial of benefits, the administrative law judge considered the more recent evidence, submitted in support of claimant's 2003 claim, as had Administrative Law Judge Stephen L. Purcell. On appeal, no party challenges this aspect of the administrative law judge's decision.

[6] The administrative law judge's findings that claimant did not establish the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(1)-(3), or by computerized tomography (CT) scan evidence, pursuant to 20 C.F.R. §§718.107, 718.202(a)(4), are affirmed as unchallenged on appeal. *Skrack v. island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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)(4), the administrative law judge considered the opinions of Drs. Rasmussen, Crisalli and Zaldivar. In a report dated October 16, 2003, Dr. Rasmussen diagnosed clinical coal workers' pneumoconiosis, due to coal mine dust exposure, and legal pneumoconiosis, in the form of "[chronic obstructive pulmonary disease]/Emphysema-Chronic productive cough, airflow obstruction and reduced SBDLCO," due to both coal mine dust exposure and cigarette smoking.[7] Director's Exhibit 15 at 4. Dr. Rasmussen indicated that he based his opinion on his physical examination findings, claimant's medical and exposure histories, and an x-ray, pulmonary function study, and blood gas study dating from 2003.

In contrast, Drs. Crisalli and Zaldivar opined that claimant does not have clinical pneumoconiosis or any coal-mine dust-related disease or impairment, but has coronary artery disease, and a severe pulmonary impairment due to bullous emphysema that is due entirely to his history of heavy smoking. Drs. Crisalli and Zaldivar based their conclusions on the results of their physical examinations and testing, and their review of other medical evidence of record, including the results of two computerized tomography (CT) scans performed in 2004 and 2005. Employer's Exhibits 2, 6, 11, 12. Drs. Crisalli and Zaldivar both opined that while coal mine dust exposure can cause emphysema, it does not cause bullous emphysema, as seen on claimant's x-rays and CT scans. Employer's Exhibits 11 at 26-27, 12 at 26-28.

The administrative law judge noted that Dr. Rasmussen was the only physician to diagnose pneumoconiosis and to opine that coal mine dust was a significant contributing factor in claimant's impairment. Decision and Order at 6. The administrative law judge explained that he accorded less weight to Dr. Rasmussen's diagnosis of clinical pneumoconiosis, because Dr. Rasmussen relied on a positive x-ray reading that was contrary to the weight of the x-ray evidence. Decision and Order at 6. As to the

[7] Clinical pneumoconiosis is a disease "characterized by [the] permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

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 encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

existence of legal pneumoconiosis, the administrative law judge found that Drs. Crisalli and Zaldivar had reviewed "more extensive and more recent medical information" than Dr. Rasmussen, including the 2004 and 2005 CT scans that were negative for pneumoconiosis but positive for the presence of bullous emphysema, and had explained in detail their reasoning for excluding coal mine dust exposure as a cause of claimant's bullous emphysema. Decision and Order at 4-6. He therefore accorded their opinions greater weight.

Claimant contends that the administrative law judge erred, because he discredited Dr. Rasmussen's opinion, and credited the opinions of Drs. Crisalli and Zaldivar, based primarily on the negative x-ray evidence, contrary to 20 C.F.R. §718.202(b).[8] Claimant's Brief at 6. We disagree. Contrary to claimant's contention, as set forth above, the administrative law judge weighed Dr. Rasmussen's opinion not only based on the x-ray evidence, but in comparison to the better reasoned and better documented opinions of Drs. Crisalli and Zaldivar, that claimant does not suffer from legal pneumoconiosis. The administrative law judge's weighing of the medical opinions was proper. *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 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc).

Further, we reject claimant's contention that Dr. Rasmussen's opinion was the only reasoned medical opinion of record. Claimant's Brief at 7. Claimant is asking for a reweighing of the evidence, which the Board is not authorized to do. *Anderson*, 12 BLR 1-113. We, therefore, affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis through medical opinion evidence, pursuant to 20 C.F.R. §718.202(a)(4).

Claimant next contends that the administrative law judge erred by weighing the evidence separately under each section of 20 C.F.R. §718.202(a), rather than weighing all of the evidence together pursuant to the standard enunciated in *Island Creek Col Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Claimant's Brief at 6. Claimant's contention lacks merit. The United States Court of Appeals for the Fourth Circuit has held that although 20 C.F.R. §718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. *Compton*, 211 F.3d 203, 22 BLR 2-162. Contrary to claimant's argument, the administrative law judge weighed together the preponderantly negative x-rays and CT scans when he weighed the medical opinions of Drs. Rasmussen, Crisalli, and Zaldivar at 20 C.F.R. §718.202(a)(4), in finding that

[8] Section 718.202(b) provides that "[n]o claim for benefits shall be denied solely on the basis of a negative chest x-ray." 20 C.F.R. §718.202(b).

claimant did not establish the existence of pneumoconiosis. Decision and Order at 6. Therefore, we reject claimant's contention and 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 has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), a necessary element of entitlement under Part 718, we affirm the denial of benefits. *See Anderson*, 12 BLR at 1-112.

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