BRB No. 02-0876 BLA

LLOYD L. MARCUM	)
	)
Claimant-Petitioner	)
	)
v.	)
	)
MILLBURN COLLIERY COMPANY	)DATE ISSUED: 08/28/2003
	)
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Lloyd L. Marcum, Belpre, Ohio, *pro se*.

Dorothea Clark (Jackson & Kelly), Morgantown, West Virginia, for employer.

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 Denying Benefits (01-BLA-0206) 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).[1] The administrative law judge determined that this claim constituted a request for modification.[2] The administrative law

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant initially filed a claim for benefits on May 5, 1994, which was finally

judge found that claimant=s August 5, 1999 request for modification, Director=s Exhibit 40, was still pending at the time of the January 5, 2000 claim and thus pursuant to 20 C.F.R. '725.309, the 2000 claim merged with the initial 1994 claim. Decision and Order at 5-7. The administrative law judge also found, over employer=s objection, that the instant claim was timely filed pursuant to 20 C.F.R.'725.308. Decision and Order at 7-8. The administrative law judge determined that the evidence of record established a coal mine employment history of at least seventeen years, Decision and Order at 8, and a smoking history of at least sixty-six pack years, Decision and Order at 9. Turning to the merits, the administrative law judge concluded that the weight of the x-ray evidence of record failed to support a finding of the existence of pneumoconiosis pursuant to 20 C.F.R. '718.202(a)(1)(2000). Decision and Order at 9, 25-26. The administrative law judge further found that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. '718.202(a)(2), (3)(2000), as there was no autopsy or biopsy evidence and claimant was not entitled to any of the presumptions found at 20 C.F.R. ''718.304-306. Decision and Order at 25. Further, the administrative law judge concluded that the weight of the other evidence of record, the medical opinion evidence and CT scan evidence, failed to support a finding of the existence of pneumoconiosis pursuant to 20 C.F.R. '718.202(a)(4)(2000). Decision and Order at 29. The administrative law judge thus concluded that the weight of the entirety of relevant evidence of record failed to support a finding of pneumoconiosis pursuant to the holding of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The administrative law judge proceeded to find that in light of the finding of no pneumoconiosis, the issues of the cause of pneumoconiosis, *see* 20 C.F.R. '718.203, and the issue of disability causation, *see* 20 C.F.R. '718.204(c), were moot. Decision and Order at 29-30. Accordingly, benefits were denied.

On appeal, claimant, who is proceeding without counsel, generally challenges the findings of the administrative law judge. Employer responds, urging affirmance of administrative law judge=s denial of benefits. The Director, Office of Workers= Compensation Programs (the Director), has declined to participate in this appeal.

---

denied by the Department of Labor and administratively closed on January 9, 1995. Director=s Exhibit 39. Claimant filed a second claim on March 14, 1996, which was denied by Administrative Law Judge Jeffrey Tureck in a Decision and Order issued on August 7, 1998. Director=s Exhibit 40. Administrative Law Judge Tureck found that, while employer conceded the existence of a totally disabling respiratory impairment, claimant was unable to establish entitlement to benefits because the record failed to support a finding of pneumoconiosis. On August 3, 1999, claimant sought modification of this denial of benefits. Director=s Exhibit 40. No action was taken pursuant to this request. On January 5, 2000, claimant filed the instant claim. Director=s Exhibit 1. On October 2, 2000, the district director awarded claimant benefits, Director=s Exhibit 36. Subsequent to a hearing, the administrative law judge on August 28, 2002, issued the Decision and Order denying benefits from which claimant now appeals.

[3] We affirm the administrative law judge=s length of coal mine employment determination, as the finding is

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 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 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 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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held in *Compton*, that the evidence relevant to the existence of pneumoconiosis, *e.g.*, x-rays and medical opinions, must be weighed together in determining whether the existence of pneumoconiosis is established. *See also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

In finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), the administrative law judge found that the record consisted of 79 readings of 16 x-rays taken between 1970 and 2001. Decision and Order at 9, 32-37. Of these x-rays, the administrative law judge concluded that seven were noted as unreadable, fifty were read as negative for the existence of pneumoconiosis and twenty-two were read as positive for the existence of the disease. Decision and Order at 9, 25, 32-37. The administrative law judge permissibly accorded greatest weight to those physicians with the dual-qualifications of B-reader and board-certified radiologist, *see Vance v. Eastern*

---

not adverse to claimant and is unchallenged on appeal by the other parties. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] A AB-reader@ is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. '718.202(a)(1)(ii)(E); 42 C.F.R. '37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16 , 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A board-certified radiologist is a physician who has been certified by the American Board of Radiology as having a particular expertise in the field of radiology.

Associated Coal Corp., 8 BLR 1-65 (1985); *Aimone v. Morrison Knudson Co.*, 8 BLR 1-32 (1985), and concluded that the weight of the interpretations by physicians with these superior credentials was negative for the existence of the disease. The administrative law judge thus concluded that claimant was unable to establish the existence of pneumoconiosis through the x-ray evidence at Section 718.202(a)(1). Since the administrative law judge has considered the entirety of the x-ray evidence of record and has properly given due consideration to the qualitative as well as quantitative aspects of these interpretations, *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see also Woodward v. Director, OWCP,* 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993), we affirm the administrative law judge=s finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

We further affirm the administrative law judge=s findings that pneumoconiosis was not established pursuant to Section 718.202(a)(2) and (3) as there was no autopsy or biopsy evidence and there is no evidence of complicated pneumoconiosis in this living miner=s claim filed subsequent to January 1, 1982. *See* Director=s Exhibits 1, 39, 40; 20 C.F.R. ''718.202(a)(2), (3), 718.304, 718.305, 718.306.

In finding that the other medical evidence of record failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge considered the one CT scan of record, which was a negative reading by Dr. Wheeler, Employer=s Exhibit 12, the medical opinions diagnosing the existence of pneumoconiosis rendered by Drs. Gaziano, Rasmussen, A.C. Cohen, and Doyle, Director=s Exhibits 11, 40; Claimant=s Exhibit 13; Employer=s Exhibit 8, and the contrary medical opinions rendered by Drs. Daniel, Castle, Morgan, Jarboe, Zaldivar and Fino, Director=s Exhibits 19, 21, 24, 39; Employer=s Exhibits 3-7, 11. The administrative law judge found that the opinions of those physicians diagnosing the existence of pneumoconiosis were each flawed in such a way as to preclude the opinions from supporting a finding of pneumoconiosis.

The administrative law judge found the opinion of Dr. Cohen flawed and not supportive of a finding of the existence of pneumoconiosis because the physician relied on a smoking history of forty-three years whereas the record establishes a smoking history of at least sixty-six pack years. Decision and Order at 27. An administrative law judge may accord little weight to opinion based on inaccurate smoking history, *see Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984); *see also Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), as such a discrepancy calls into question the physician=s knowledge of the miner=s complete health. *See Stark v. Director, OWCP*, 9 BLR 1-36 (1989); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). Accordingly, we hold the administrative law judge permissibly rejected the opinions of Dr. Rasmussen. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

Further, the administrative law judge found the opinions of Dr. Rasmussen entitled to

little weight as the physician gave contradictory statements in his reports. Initially, the physician diagnosed the existence of pneumoconiosis in claimant. Director=s Exhibit 40. Later, the physician indicated in a follow-up statement that he could not diagnose the existence of pneumoconiosis. Director=s Exhibit 40. Subsequently, at deposition, the physician opined that claimant had chronic obstructive pulmonary disease due to smoking and coal mine dust exposure. Employer=s Exhibit 8. Because the physician failed to explain his contradictory statements, the administrative law judge permissibly concluded that the physician=s opinions were not supportive of a finding of pneumoconiosis. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-191 (1988); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985).

The administrative law judge also found that the medical opinion of Dr. Gaziano diagnosing the existence of pneumoconiosis, was entitled to little weight because the physician provided no basis for his conclusion other than a positive x-ray interpretation. Director=s Exhibit 11. The administrative law judge found that since it was determined that the weight of the x-ray evidence was negative for the existence of pneumoconiosis, the physician=s failure to further explain the basis for his finding of pneumoconiosis called into question the credibility of his opinion. This is a permissible exercise of the administrative law judge=s discretion. *See Hicks* 138 F.3d at 524, 21 BLR at 2-323; *Akers*, 131 F.3d at 438, 21 BLR at 2-269; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985); *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985).

In addition, the administrative law judge gave little weight to the opinion of Dr. Doyle, Claimant=s Exhibit 13. The administrative law judge recognized that Dr. Doyle was claimant=s treating physician and that under the newly amended regulations a treating physician=s opinion could be accorded controlling weight. *See* 20 C.F.R. ' 718.104(d). The administrative law judge noted that the physician had treated claimant for Amany years.@ Decision and Order at 27. Nevertheless, the administrative law judge concluded that the physician=s opinion was not entitled to controlling weight as he was not as well-qualified as the physicians rendering contrary opinions. Moreover, the administrative law judge concluded that the physician=s opinion diagnosing pneumoconiosis was premised on positive x-ray interpretations without further explanation and failed to explain the presence of claimant=s substantial smoking history on his pulmonary condition. Thus, the administrative law judge found Dr. Doyle=s opinion to be not well-reasoned or well-documented. *See York* at 7 BLR 1-766. Under the amended regulations the administrative law judge may accord lesser weight to the opinion of a treating physician, if it is determined that the opinion is poorly reasoned or documented. *See* 20 C.F.R. ' 718.104(d)(5). Accordingly, we affirm the administrative law judge=s decision to accord little weight to the opinion of Dr. Doyle.

The administrative law judge accorded greatest to the opinions of those physicians who concluded that claimant did not suffer from pneumoconiosis. The administrative law judge determined that Drs. Jarboe, Zaldivar, Fino, Castle, Morgan and Daniel, on the whole possessed superior credentials than those physicians rendering contrary opinions. The

qualifications of a physician is a permissible basis for according their opinions greater weight. *See Hicks* 138 F.3d at 524, 21 BLR at 2-323; *Akers*, 131 F.3d at 438, 21 BLR at 2-269; *see also Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985). We hold, therefore, that the administrative law judge has permissibly concluded that claimant has not been able to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff=g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Since the administrative law judge has considered the entirety of the relevant evidence of record and has provided credible reasons in support of his analysis of the evidence, we conclude that administrative law judge=s findings regarding the existence of pneumoconiosis at Section 718.202(a) are in compliance with the holding in *Compton.*

Since claimant is unable to establish the existence of pneumoconiosis, a requisite element of entitlement pursuant to Part 718, *see Trent* at 11 BLR 1-26 (1987); *Perry* at 9 BLR 1-1, we must affirm the denial of benefits.

---

[5] In view of the fact that the administrative law judge has addressed the entirety of the evidence of record in his consideration of the existence of pneumoconiosis, we need not address the procedural issues at 20 C.F.R '' 725.309, 725.310 presented in this claim. *See Trent* at 11 BLR 1-26 (1987); *Perry* at 9 BLR 1-1

Accordingly the administrative law judge=s Decision and Order Denying Benefits is affirmed.

SO ORDERED.

____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

____
ROY P. SMITH
Administrative Appeals Judge

____
BETTY JEAN HALL
Administrative Appeals Judge