BRB No. 05-0149 BLA

ROBERT C. ANDERSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BETHENERGY MINES, INCORPORATED	)	
	)	DATE ISSUED: 08/23/2005
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose), Johnstown, Pennsylvania, for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (03-BLA-6591) of Administrative Law Judge Daniel L. Leland rendered on a subsequent 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 credited claimant with forty-one years and eight months of coal mine employment.[2] The administrative law judge found that the medical evidence developed since the prior denial established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), thus establishing an element of entitlement that was previously adjudicated against claimant, as required by 20 C.F.R. §725.309(d). 20 C.F.R. §725.309(d)(2),(3); *see also Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). After weighing all the evidence of record, however, the administrative law judge found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge failed to properly consider whether Dr. Solic's opinion established the existence of pneumoconiosis as defined at 20 C.F.R. §718.201. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter declining to submit a substantive response.[3]

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).

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[1] Claimant's initial claim for benefits filed on May 18, 1979 was finally denied on July 16, 1985 because claimant did not establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Claimant filed his current application for benefits on June 21, 2002. Director's Exhibit 3.

[2] The record indicates that claimant's coal mine employment occurred in Pennsylvania. Director's Exhibits 7-9. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] The letter contains a footnote stating that the Board "may wish to remand this case so the ALJ may take a closer look at Dr. Solic's opinion" to determine whether it supports a finding of legal pneumoconiosis. Director's Letter at 1 n.1.

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.[4] *Anderson 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 found that the medical opinions submitted with claimant's prior claim did not establish the existence of pneumoconiosis, and he then weighed the medical opinions submitted with claimant's current claim. The physicians who prepared those recent opinions agreed that claimant suffers from a severe, fixed obstructive impairment. As summarized by the administrative law judge, Drs. Bajwa, Schaaf, and Patel attributed this impairment to dust exposure in claimant's coal mine employment, while Drs. Zlupko and Solic opined that claimant's fixed obstruction "is due to asthma, which has taken on the characteristics of a fixed obstruction after many years of inadequate treatment." Decision and Order at 6; Director's Exhibits 14, 19; Claimant's Exhibits 1, 7, 10; Employer's Exhibits 5, 6. The administrative law judge found that Drs. Zlupko and Solic rendered opinions that were "better reasoned than the opinions of Drs. Bajwa and Schaaf." Decision and Order at 6. Specifically, he found that Drs. Zlupko and Solic pointed out that claimant was diagnosed with asthma in the past and that his pulmonary abnormality "had once been reversible," but they also "stated convincingly that asthma can produce a fixed obstruction over a long period of time, a factor which Drs. Bajwa and Schaaf did not consider." *Id*. Additionally, the administrative law judge found that although Dr. Patel was claimant's treating physician, he "did not provide any reasons to support his opinion," which therefore did not merit "greater weight." Decision and Order at 7; citing 20 C.F.R. §718.104(d). Accordingly, the administrative law judge found that claimant did not establish the existence of pneumoconiosis.

Claimant does not challenge the administrative law judge's analysis of the opinions of Drs. Bajwa, Schaaf, Patel, or Zlupko. His sole argument is that the administrative law judge erred in finding that Dr. Solic did not diagnose pneumoconiosis as defined in 20 C.F.R. §718.201. Claimant contends that "a close reading of Dr. Solic's

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[4] We affirm as unchallenged on appeal the administrative law judge's findings that claimant has forty-one years and eight months of coal mine employment, is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.204(b)(2), 725.309(d), and did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(a)(3). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

deposition" testimony reflects that he "agrees that [claimant's] coal dust exposure has aggravated and does in fact contribute" to his obstructive impairment, and that "the Doctor has conceded legal pneumoconiosis . . . ." Claimant's Brief at 3, 5-6. Upon review of the administrative law judge's analysis of Dr. Solic's testimony, we reject claimant's allegation of error.

Under Section 718.201, the term "legal pneumoconiosis" "includes but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). A disease "'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). The administrative law judge applied Section 718.201 in his decision. Decision and Order at 6 n.2.

The administrative law judge considered Dr. Solic's testimony, on cross-examination, that coal dust exposure "probably is a contributing factor" to claimant's obstructive impairment in that it "may have aggravated" or made "a slight contribution" to the impairment. Employer's Exhibit 6 at 16-17. The administrative law judge inferred that, overall, what Dr. Solic meant was that "claimant's coal dust exposure has made a contribution, although not a significant contribution" to claimant's impairment. Decision and Order at 6. The administrative law judge found that "Dr. Solic's conclusion that claimant's coal mine dust exposure made only a slight contribution to his pulmonary impairment does not meet the definition of legal pneumoconiosis." Decision and Order at 6-7.

Although claimant urges us to take "a close reading" of Dr. Solic's testimony, from which he argues "it can be gleaned" that the doctor diagnosed legal pneumoconiosis, Claimant's Brief at 3, 5, we are not authorized to reweigh the doctor's testimony. *Anderson*, 12 BLR at 1-113. Rather, the administrative law judge weighs the medical evidence and draws his or her own inferences. *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). In the case at bar, the administrative law judge reasonably inferred that Dr. Solic believes that coal dust exposure has made only a slight, or insignificant contribution to claimant's pulmonary impairment. *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8. The administrative law judge's finding that Dr. Solic's testimony did not establish the existence of legal pneumoconiosis under Section 718.201 is supported by substantial evidence and in accordance with law. *See* 20 C.F.R. §718.201(b); *Henley v. Cowan and Company*, 21 BLR 1-147, 1-150 (1999)(deferring to the Director's position that the "aggravation of a pulmonary condition by dust exposure in coal mine employment must be 'significant'"); *see generally Wisniewski v. Director, OWCP*, 929 F.2d 952, 959, 15 BLR 2-57, 2-71 (3d Cir. 1991)(requiring, under Section 718.203(c), "competent evidence" that a miner's "disease arose at least in part from his coal mine employment"). We therefore affirm the

administrative law judge's otherwise unchallenged finding that claimant did not establish the existence of pneumoconiosis pursuant to Sections 718.202(a)(4) and 718.201. *See Swarrow*, 72 F.3d at 315, 20 BLR at 2-90; *Henley*, 21 BLR at 1-150.

Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a miner's claim under Part 718, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

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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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge