

BRB No. 05-0216 BLA

JACK C. BOWLIN, Deceased)
)
 Claimant-Petitioner)
)
 v.)
)
 COASTAL COAL CO./EL PASO)
 ENERGY/UNDERWRITERS SAFETY &)
 CLAIMS, INCORPORATED.)
) DATE ISSUED: 08/26/2005
 Employer/Carrier-)
 Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Jack C. Bowlin, Abingdon, Virginia, *pro se*.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals, without the assistance of counsel, the Decision and Order – Denial of Benefits (03-BLA-5464) of Administrative Law Judge Richard T. Stansell-Gamm on a miner’s 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). In a Decision and Order dated October 20, 2004, the administrative law judge credited the

¹ By letter dated February 16, 2005, the miner’s widow informed the Board that claimant is now deceased, having passed away on February 4, 2005.

miner with twenty-five years of coal mine employment² and found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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 miner 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 a finding of entitlement. *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).

In finding the x-ray evidence insufficient to establish the existence of pneumoconiosis, the administrative law judge properly noted that the relevant x-ray evidence of record consists of eight readings of three x-rays.³ Decision and Order at 6-7. A December 6, 2001 x-ray was read twice as positive by Drs. Alexander and Miller, both dually qualified B readers and Board-certified radiologists, and was read once as negative by Dr. Wiot, also a B reader and Board-certified radiologist. Director's Exhibit 14; Employer's Exhibit 4; Decision and Order at 6-8. The administrative law judge permissibly found this x-ray to be positive based on the preponderance of the readings by highly qualified readers. *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-65 (2004)(*en banc*); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc on recon.*);

² The record indicates that the miner's coal mine employment occurred in Texas. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

³ The January 30, 2002 x-ray was also read for quality only (Quality 1) by Dr. Navani, a Board-certified radiologist and B reader. Director's Exhibit 12.

Decision and Order at 7. A January 15, 2002 x-ray was read once as positive by Dr. Pathak, a B reader and Board-certified radiologist, and was read twice as negative by Drs. Wiot and Spitz, both dually qualified B readers and Board-certified radiologists. Claimant's Exhibits 3, 4; Employer's Exhibits 1, 2. The administrative law judge permissibly found this x-ray to be negative based on the preponderance of the readings by highly qualified readers. *Dempsey*, 23 BLR at 1-65; *Cranor*, 22 BLR at 1-7; Decision and Order at 8. Finally, a January 30, 2002 x-ray was read once as positive by Dr. Patel, a B reader and Board-certified radiologist, and was read once as negative by Dr. Wiot, also a dually qualified B reader and Board-certified radiologist. Director's Exhibit 11; Employer's Exhibit 3. Thus the administrative law judge permissibly found this x-ray to be inconclusive based on the equal number of contradictory readings by highly qualified readers. *Dempsey*, 23 BLR at 1-65; *Cranor*, 22 BLR at 1-7; Decision and Order at 8. The administrative law judge thus permissibly concluded that as the record contained one positive x-ray, one negative x-ray and one inconclusive x-ray, claimant failed to meet his burden of proof to establish the existence of pneumoconiosis by a preponderance of the x-ray evidence. See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 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); *Cole v. East Kentucky Collieries*, 20 BLR 1-50, 1-53 (1996); Decision and Order at 8. Consequently, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

The administrative law judge then found, correctly, that the record contains no biopsy evidence to be considered pursuant to 20 C.F.R. §718.202(a)(2), and that the presumptions set forth at 20 C.F.R. §§718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982. See 20 C.F.R. §§718.202(a)(3), 718.305, 718.306. In addition, the administrative law judge acted within his discretion in finding that, pursuant to 20 C.F.R. §718.304, although Dr. Patel, a dually qualified reader, read the January 30, 2002 x-ray as positive for the presence of a category "A" large opacity, consistent with complicated pneumoconiosis, as this x-ray was read completely negative by Dr. Wiot, also a dually qualified reader, and as none of the other x-ray readings of record, also by dually qualified readers, supported the existence of complicated pneumoconiosis, claimant failed to establish the existence of complicated pneumoconiosis by a preponderance of the x-ray evidence pursuant to 20 C.F.R. §718.304. See *[Ondecko]*, 512 U.S. at 267, 18 BLR at 2A-1; *Cole*, 20 BLR at 1-53; Decision and Order at 6-7. Consequently we affirm the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(3), 718.305, 718.304, and 718.306 as supported by substantial evidence.

Finally, the administrative law judge considered the medical reports and testimony of Drs. Maine, Baron, Rasmussen and Jarboe pursuant to 20 C.F.R. §718.202(a)(4).⁴ Review of the record indicates that claimant's treating physicians, Drs. Maine and Barron, did not diagnose the existence of clinical pneumoconiosis, and while they both diagnosed the existence of chronic obstructive pulmonary disease (COPD), Dr. Maine did not discuss the etiology of this condition, and Dr. Barron stated that the degree to which coal dust contributed to claimant's lung disease was "unknown." Director's Exhibit 16. Dr. Rasmussen diagnosed clinical simple pneumoconiosis, complicated pneumoconiosis, and COPD and emphysema due to a combination of coal dust and cigarette smoking, and Dr. Jarboe found no evidence of either clinical pneumoconiosis or any coal dust related lung disease. Director's Exhibits 11, 13, 15, 16; Decision and Order at 9-12.

In evaluating the opinions of Drs. Baron and Rasmussen, the only opinions supportive of a finding of the existence of pneumoconiosis, the administrative law judge permissibly concluded that while Dr. Baron's statement, that an "unknown" portion of claimant's pulmonary condition was due to coal dust exposure, implied that coal dust may be a factor, the equivocal nature of Dr. Baron's opinion entitled it to diminished probative value. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1- 16 (1987); Director's Exhibit 16; Decision and Order at 13. With respect to the opinion of Dr. Rasmussen, the administrative law judge permissibly discredited his diagnoses of clinical simple and complicated pneumoconiosis as unreasoned because these diagnoses were based on a positive x-ray interpretation which was inconsistent with the weight of the medical evidence of record. Decision and Order at 13. The law is clear that a physician's opinion diagnosing pneumoconiosis based solely on discredited x-ray evidence is not probative evidence of pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *accord Sahara Coal Co. v. Fitts*, 39 F.3d 781, 783, 18 BLR 2-384, 2-387 (7th Cir. 1994); Director's Exhibit 11; Decision and Order at 13. The administrative law judge further found, as was within his discretion, that Dr. Rasmussen's additional conclusion, that coal dust also contributed to the development of the miner's emphysema and COPD, is unsupported by any reasonable explanation. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 13-14.

Claimant bears the burden of establishing the existence of pneumoconiosis, and here, substantial evidence supports the administrative law judge's finding that the weight of the x-ray evidence and medical opinion evidence does not support claimant's burden.

⁴ The administrative law judge took judicial notice that Dr. Maine is Board-certified in internal and geriatric medicine, Dr. Baron is Board-certified in internal medicine and pulmonary disease, Dr. Rasmussen is Board-certified in internal medicine, and Dr. Jarboe is Board-certified in internal medicine and pulmonary disease.

Specifically, the administrative law judge permissibly analyzed the opinions of Drs. Baron and Rasmussen, the only physicians offering opinions supportive of a finding of pneumoconiosis, based on the physicians' reasoning and the underlying bases of their diagnoses of pneumoconiosis and coal dust related pulmonary disease. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993).

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *U.S. Pipe and Foundry Co. v. Webb*, 595 F.2d 264, 266 (5th Cir. 1979), and the Board may not reweigh the evidence or substitute its own inferences on appeal, *Webb*, 595 F.2d at 266; *Clark*, 12 BLR at 1-155; *Anderson*, 12 BLR at 1-111. As the administrative law judge's findings are supported by substantial evidence, we affirm his finding that the existence of pneumoconiosis, an essential element of entitlement, was not established pursuant to 20 C.F.R. §718.202(a). Because claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement to benefits under Part 718, see *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*), an award of benefits is precluded.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge