BRB No. 06-0237 BLA

CHARLES T. BOWMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MYSTIC ENERGY, INCORPORATED	)	DATE ISSUED: 08/30/2006
	)	
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, Associate Chief Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (03-BLA-6438) of Associate Chief Administrative Law Judge Thomas M. Burke (the administrative law judge) 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). Adjudicating this claim under 20 C.F.R. Part 718, based on claimant's February 15, 2001 filing date, the administrative law judge credited claimant with fifteen years of coal mine employment pursuant to the parties' stipulation.[1] Addressing the merits of entitlement,

[1] The record indicates that claimant's coal mine employment occurred in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the

the administrative law judge found that the medical evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). In addition, he found that the medical evidence did not establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to properly consider the evidence in accordance with the decision of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Claimant further contends that the administrative law judge erred in finding that the medical opinion of Dr. Rasmussen failed to establish a total respiratory disability and disability causation. Employer has not responded in this appeal. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not submit a response brief in this claim.[2]

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 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 Section 718.202(a)(1), the administrative law judge considered seven readings of four x-ray films. The administrative law judge found that all of the readings were performed by highly qualified B-readers, with four of the readings provided by physicians who are also Board-certified radiologists. Decision and Order at 5. Of the seven readings, the administrative law judge found that four of the readings were

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United States Court of Appeals for the Fourth Circuit. Decision and Order at 2 n.2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[2] As the parties do not challenge the administrative law judge's decision to credit claimant with fifteen years of coal mine employment, or his findings pursuant to 20 C.F.R. §718.202(a)(2) and (3), we affirm these findings as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

negative for the existence of pneumoconiosis, three of which were provided by dually-qualified radiologists, including the most recent film, which was read as negative by Dr. Patel, a B-Reader and Board-certified radiologist. Director's Exhibits 20, 21, 22; Claimant's Exhibit 3. Contrary to claimant's contentions, the administrative law judge not only found that the preponderance of the x-ray readings is negative for the existence of pneumoconiosis, but relied on the preponderance of the readings by the most highly qualified B-readers and Board-certified radiologists. Decision and Order at 5; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the 2001 and 2004 medical reports of Dr. Rasmussen and the medical report of Dr. Zaldivar. The administrative law judge found that in 2001 Dr. Rasmussen opined, based on claimant's occupational history and positive x-ray reading, that claimant suffers from coal workers' pneumoconiosis and that he also diagnosed chronic obstructive pulmonary disease and emphysema, with claimant's cigarette smoking and his coal dust exposure being risk factors. Decision and Order at 6; Director's Exhibit 14. Following a second examination in August 2004, Dr. Rasmussen stated that claimant's pulmonary function status showed an improvement since his 2001 examination; however, he still opined that claimant did not retain the respiratory capacity to perform very heavy manual labor. Decision and Order at 6; Claimant's Exhibit 3. In addition, Dr. Rasmussen noted that the x-ray administered in conjunction with this examination was read as negative for the existence of pneumoconiosis. *Id*. Dr. Rasmussen further stated that there were three risk factors for claimant's minimal lung impairment: cigarette smoking, coal dust exposure, and probably asthma. *Id*.

The administrative law judge also considered the medical report of Dr. Zaldivar, in which he opined that there was no evidence to justify a diagnosis of coal workers' pneumoconiosis or any dust disease of the lungs, based on his examination of claimant, and the results of claimant's x-ray, pulmonary function study, blood gas study, and EKG studies. Decision and Order at 6; Director's Exhibit 22. Dr. Zaldivar further stated that claimant would probably be able to perform his last coal mine employment as a roof bolter, but if heavy work was required on a regular basis, then claimant would not be able to do it. However, Dr. Zaldivar attributed this pulmonary impairment to claimant's prior and continuing smoking habit. *Id*. Weighing this evidence, the administrative law judge found that claimant failed to establish the existence of either clinical or legal pneumoconiosis, based on his determination that Dr. Zaldivar's opinion was better reasoned and documented and on Dr. Zaldivar's superior professional qualifications. *Id*.

Contrary to claimant's contention, the administrative law judge did not rely solely on the number of negative x-ray readings to find the medical opinion evidence supportive of a finding of pneumoconiosis to be unreliable. Rather, the administrative law judge

weighed the conflicting medical opinions of Drs. Rasmussen and Zaldivar and reasonably accorded greater weight to the opinion of Dr. Zaldivar that claimant does not suffer from clinical or legal pneumoconiosis, finding his opinion to be well reasoned and documented. Decision and Order at 7. The administrative law judge found that Dr. Zaldivar's opinion was better supported by its underlying documentation as well as the objective evidence of record. Decision and Order at 7; *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). In addition, the administrative law judge accorded greater weight to Dr. Zaldivar based on his superior professional credentials as Board-certified in Internal Medicine and Pulmonary Diseases, whereas Dr. Rasmussen's credentials are not found in the record. *Id*. Consequently, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Claimant contends further that the administrative law judge erred in failing to weigh the evidence in this claim as required by the United States Court of Appeals for the Fourth Circuit court in *Compton.* We reject this contention. The Fourth Circuit court has held that the different categories of medical evidence must be weighed together to determine whether a preponderance of the evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Compton*, 211 F.3d at 208-11, 22 BLR at 2-169-74. In this case, however, the administrative law judge found that no individual category of evidence supported a finding of pneumoconiosis under any subsection of Section 718.202(a).[3] Therefore, there was no contrary evidence for him to weigh pursuant to Section 718.202(a) under *Compton*.

Because claimant 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.

[3] The administrative law judge correctly found that there was no biopsy or autopsy evidence to be considered pursuant to 20 C.F.R. §718.202(a)(2), and that none of the presumptions by which the existence of pneumoconiosis may be established pursuant to 20 C.F.R. §718.202(a)(3) were applicable in this case.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge