BRB No. 06-0275 BLA

JAMES A. SPOSITO	)	
	)	
Claimant-Petitioner	)	
	)	DATE ISSUED: 08/31/2006
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

James A. Sposito, Carbondale, Pennsylvania, *pro se*.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (05-BLA-05359) of Administrative Law Judge Robert D. Kaplan denying benefits 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). The administrative law judge found three years of coal mine employment[1] and, based on the date of filing, adjudicated

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was last employed in the coal mine industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 3, 5.

the claim pursuant to 20 C.F.R. Part 718.[2] Decision and Order at 5-7. After considering all the evidence of record, the administrative law judge concluded that although the evidence established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), it was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Decision and Order at 8-15. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. The Director, Office of Workers' Compensation Programs responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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*).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. Considering the relevant evidence of record, the administrative law judge acted within his discretion in concluding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

[2] Claimant filed his claim for benefits on February 2, 2004, which was denied by the district director on October 21, 2004. Director's Exhibits 2, 16. Claimant subsequently requested a hearing before the Office of Administrative Law Judges on November 5, 2004. Director's Exhibit 17.

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered the four readings of the two x-rays of record in light of the readers' radiological qualifications. Decision and Order at 8-9. The "1/0" reading of the May 10, 2005 x-ray by Dr. Gaia, who is a Board-certified radiologist, was the only positive x-ray interpretation of record. Director's Exhibits 11-13, 25; Claimant's Exhibit 2. Taking into account that the May 10, 2005 x-ray was read as negative for the existence of pneumoconiosis by Dr. Barrett, a B reader and Board-certified radiologist, the administrative law judge found that the May 10, 2005 x-ray was negative for pneumoconiosis. Director's Exhibit 25; Claimant's Exhibit 2; Decision and Order at 8-9. Because all of the other readings were negative, the administrative law judge found that claimant did not establish the existence of pneumoconiosis by a preponderance of the x-ray evidence. Director's Exhibits 11-13; Decision and Order at 8-9. The administrative law judge conducted a proper qualitative analysis of the conflicting x-ray readings. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Worhach v. Director,* OWCP, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); Director's Exhibits 11-13, 25; Claimant's Exhibit 2; Decision and Order at 8-9. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

The administrative law judge also correctly found that the claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2)-(3), as the record contains no biopsy or autopsy results demonstrating the presence of pneumoconiosis and the presumptions set forth at 20 C.F.R. §§718.304, 718.305, 718.306 are not applicable to this claim.[3] *See* 20 C.F.R. §§718.202(a)(2)-(3); Decision and Order at 9; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge properly noted the entirety of the medical opinion evidence of record and rationally considered the quality of the evidence in determining whether the opinions of record are supported by the underlying documentation and adequately explained. *Collins v. J & L Steel*, 21 BLR 1-181 (1999); Decision and Order at 10-12. The administrative law judge rationally found that the opinions of Drs. McNabb, Cali, and Talati were insufficient to meet claimant's burden of proof as their respective diagnoses of pneumoconiosis were based upon an understated smoking history. *See Mancia v. Director, OWCP*, 130 F.3d 579, 21

[3] The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 because this claim was filed after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 2. Lastly, this claim is not a survivor's claim or filed prior to June 30, 1982; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

BLR 2-114 (3d Cir. 1997); *Jones v. Badger Coal Co.*, 21 BLR 1-103 (1998); *Stark v. Director, OWCP*, 9 BLR 1-136 (1986); Decision and Order at 12; Director's Exhibits 7, 28, 30; Claimant's Exhibit 1. In rendering this finding, the administrative law judge acted within his discretion as fact-finder in crediting claimant's testimony that he used cigarettes intermittently for approximately thirty years, quitting in 1990 or 1991, and that he consumed one to one and one-half packs of cigarettes per day. *See Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); Decision and Order at 11; Hearing Transcript at 37-38. Dr. Cali recorded a less significant use of cigarettes when he noted that claimant smoked less than a pack per day for ten years and stopped smoking in 1965. Director's Exhibit 7. Similarly, Dr. Talati relied upon a smoking history of ten years at a rate of one-half a pack per day ending "many years ago." Director's Exhibit 28. Dr. McNabb did not state how long claimant had smoked. Claimant's Exhibit 1.

The Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) as it is supported by substantial evidence and is in accordance with law. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d. Cir. 1997).

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