BRB No. 07-0947 BLA

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| M.L.M. | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | DATE ISSUED: 08/22/2008 |
| LAMBERT COAL COMPANY, INCORPORATED | ) | |
| | ) | |
| 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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

M.L.M., Clintwood, Virginia, *pro se.*

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order Denying Benefits (2007-BLA-05078) of Administrative Law Judge Linda S. Chapman on a subsequent claim filed pursuant to the provisions of Title IV of the Federal Coal

[1] Jerry Murphree, Benefits Counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[2] The administrative law judge initially found that the newly submitted medical opinions established that claimant had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv) and, thus, she found that claimant demonstrated a change in an applicable condition of entitlement, as required by 20 C.F.R. §725.309(d). However, upon consideration of the merits of the claim under 20 C.F.R. Part 718, the administrative law judge determined that the record evidence, as a whole, was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Furthermore, because claimant failed to establish the existence of pneumoconiosis, the administrative law judge also found that claimant was unable to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in denying his claim. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief unless specifically requested to do so by the Board.

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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). 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 applicable law.[3] 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, 363 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he suffers from pneumoconiosis arising out of coal mine employment, that he is totally disabled by a respiratory or pulmonary impairment, and that he is totally disabled by pneumoconiosis. 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. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v.*

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[2] Claimant filed his initial claim for benefits on August 7, 1995, which was denied by the district director on November 30, 1995, on the grounds that the evidence failed to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant took no further action on that denial until he filed his subsequent claim on November 30, 2005, which is the subject of this appeal. Director's Exhibit 3.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 4.

*Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4, 1-5 (1986) (*en banc*).

After reviewing the administrative law judge's Decision and Order, and the evidence of record, we affirm the administrative law judge's denial of benefits as supported by substantial evidence. We specifically affirm her finding that claimant failed to establish the existence of pneumoconiosis.[4]

The regulation at Section 718.202(a) provides four methods by which a claimant may establish the existence of pneumoconiosis: 1) chest x-ray evidence; 2) biopsy or autopsy evidence; 3) application of the presumptions contained in 20 C.F.R. §§718.304, 718.305 or 718.306; and 4) medical opinion evidence. 20 C.F.R. §718.202(a)(1)-(4). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has further held that all relevant evidence is to be considered together, rather than merely within discrete subsections of Section 718.202(a)(1)-(4), in determining whether a claimant has met his or her burden of establishing the existence of pneumoconiosis by a preponderance of the evidence. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000).

Under Section 718.202(a)(1), the administrative law judge correctly noted that, in connection with claimant's prior claim, there were three narrative interpretations of x-rays dated October 2, 2002, August 17, 2004, and May 11, 2005, but that "none of [the interpretations] include findings of pneumoconiosis." Decision and Order at 11; Director's Exhibit 16. The prior record also contains an x-ray dated September 21, 2005, which was read as negative for pneumoconiosis by Drs. Gaziano and Paranthaman, B readers.[5]

With respect to the subsequent claim, the administrative law judge considered ten readings of five x-rays dated December 16, 2005, February 2, 2006, June 19, 2006, November 6, 2006, and January 19, 2007. As noted by the administrative law judge, the

[4] We affirm, as unchallenged by employer on appeal, the administrative law judge's findings that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] Dr. Gaziano interpreted an x-ray dated September 21, 2005 as showing opacities of the profusion 0/1. Director's Exhibit 1. As noted by the administrative law judge, a chest x-ray classified as category 0, including subcategories 0-, 0/0, or 0/1, does not constitute evidence of pneumoconiosis. *See* 20 C.F.R. §718.102(b); Decision and Order at 11. Dr. Paranthaman likewise read the September 21, 2005 x-ray as negative for pneumoconiosis. Director's Exhibit 1.

December 16, 2005 x-ray was read as positive for pneumoconiosis by Dr. Alexander, a Board-certified radiologist and B reader, and as negative by Dr. Scott, a Board-certified radiologist and B reader. Director's Exhibits 13, 18. The February 2, 2006 x-ray was read as positive by Dr. Baker, a B-reader, and as negative by Dr. Scatarige, a Board-certified radiologist and B reader.[6] Director's Exhibits 14, 19. The June 19, 2006 x-ray was read as positive by Dr. Ahmed, a Board-certified radiologist and B reader, but as negative by Dr. Scatarige. Claimant's Exhibit 1; Employer's Exhibit 12. The November 6, 2006 x-ray was read as positive by Dr. Ahmed and as negative by Dr. Poulos, a Board-certified radiologist and B reader. Claimant's Exhibit 4; Employer's Exhibit 5. Lastly, the January 19, 2007 x-ray was read as positive for pneumoconiosis by Dr. Ahmed, but as negative by Dr. Wheeler, a Board-certified radiologist and B reader. Claimant's Exhibit 3; Employer's Exhibit 10.

In weighing these conflicting readings, the administrative law judge reasonably found that the December 16, 2005, June 19, 2006, November 6, 2006 and January 19, 2007 x-rays were in equipoise as to the presence or absence of pneumoconiosis since each x-ray had one positive and one negative reading by a dually qualified radiologist. Decision and Order at 11. Relying on the superior qualifications of Dr. Scatarige, as a dually qualified Board-certified radiologist and B reader, the administrative law judge also permissibly found that the February 2, 2006 x-ray was negative for pneumoconiosis. *See Worhach v. Director, OWCP*, 17 BLR 1-105, 108 (1993); *Trent,* 11 BLR at 1-26; Decision and Order at 11. Thus, she concluded that claimant failed to satisfy his burden of establishing that he suffers from pneumoconiosis based on the x-ray evidence. *Id*. Because the administrative law judge properly considered the qualifications of the physicians and found that all of the x-rays of record were either negative for pneumoconiosis or in equipoise, we affirm, as supported by substantial evidence, her finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 272-76, 18 BLR 2A-1, 2A-6-9 (1994); *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-65 (2004) (*en banc*).

Under Section 718.202(a)(2), the administrative law judge properly found that there was no biopsy evidence for pneumoconiosis.[7] *See* 20 C.F.R. §718.202(a)(2); Decision and Order at 18. Additionally, because claimant is not eligible for any of the regulatory presumptions at Sections 718.304, 718.305, 718.306, we affirm the

[6] Dr. Barrett also read this x-ray for quality purposes only. Director's Exhibit 15.

[7] Claimant had a needle biopsy performed to evaluate a mass in his right lung, which was negative for a malignancy. Director's Exhibit 16. The biopsy report does not include any findings as to the presence or absence of pneumoconiosis. *Id*.

administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(3). Decision and Order at 18.

Pursuant to Section 718.202(a)(4), the administrative law judge further considered whether claimant's treatment records or the physicians' opinions of record established the existence of pneumoconiosis.[8] 20 C.F.R. §718.202(a)(4). Dr. Baker performed the Department of Labor examination on February 2, 2006. Director's Exhibit 14. As noted by the administrative law judge, Dr. Baker diagnosed clinical pneumoconiosis based on his own positive reading of claimant's x-ray and claimant's history of coal dust exposure. However, because the administrative law judge specifically rejected Dr. Baker's positive reading of the February 2, 2006 x-ray in her consideration of the x-ray evidence at Section 718.202(a)(1), and since Dr. Baker gave no other reason for his diagnosis of clinical pneumoconiosis, other than citing to claimant's work history, the administrative law judge properly found Dr. Baker's opinion to be insufficient to establish the existence of clinical pneumoconiosis at Section 718.202(a)(4). *See Arnoni v. Director, OWCP*, 6 BLR 1-427 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Furthermore, although Dr. Baker also diagnosed chronic obstructive pulmonary disease (COPD) due in part to coal dust exposure, the administrative law judge permissibly gave Dr. Baker's diagnosis of legal pneumoconiosis[9] less weight since she found that he failed to specifically explain how the objective test results or physical findings supported his opinion. *See Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004) (*en banc* on recon.); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Thus, we affirm the administrative law judge's decision to give Dr. Baker's opinion less weight at Section 718.202(a)(4).

Dr. Paranthaman examined claimant in conjunction with his prior claim and diagnosed that claimant suffered from COPD "probably" due to the combined effects of cigarette smoking and coal dust exposure. Director's Exhibit 1. In weighing Dr. Paranthaman's opinion at Section 718.202(a)(4), the administrative law judge observed that "[i]n addition to being equivocal, Dr. Paranthaman's opinions [sic] suffer from the same flaws as Dr. Baker's; that is, Dr. Paranthaman offered no explanation or support for

[8] The administrative law judge properly noted that Dr. Foster performed a pulmonary evaluation of claimant in 2005 and diagnosed chronic obstructive pulmonary disease but did not report whether the condition was due to coal dust exposure. Decision and Order at 12; Director's Exhibit 16. Dr. Reza also screened claimant for colon cancer in 2001 but did not report any respiratory condition and noted that his lungs were clear to auscultation. Decision and Order at 12; Director's Exhibit 16.

[9] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[his] conclusion." Decision and Order at 12 n.2. Thus, to the extent that the administrative law judge found Dr. Paranthaman's opinion to be insufficiently reasoned, she permissibly accorded his opinion less weight at Section 718.202(a)(4). *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Clark*, 12 BLR at 1-51; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

The administrative law judge also properly found that while claimant was treated by a nurse practitioner, Ms. Brooks, who reported that claimant suffered from pneumoconiosis, the various treatment notes contained in the record "do not include any basis other than [claimant's] 25 year history of coal mine employment to support [Ms. Brooks'] diagnosis [of pneumoconiosis]." Decision and Order at 12. Because Ms. Brooks did not explain, to the satisfaction of the administrative law judge, why she diagnosed pneumoconiosis, the administrative law judge reasonably gave the treatment notes less weight at Section 718.202(a)(4), and found them insufficient to satisfy claimant's burden of proof. *See* 20 C.F.R. §718.104(d); *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Clark*, 12 BLR at 1-151; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

In contrast, the administrative law judge properly found that the opinions of Drs. Hippensteel and Rosenberg, that claimant does not have clinical or legal pneumoconiosis, were reasoned and deserving of credit, as both doctors "considered all of the newly submitted medical evidence, and explained how those results supported their conclusions." Decision and Order at 13. As noted by the administrative law judge, Dr. Rosenberg reviewed claimant's medical records, along with his own examination findings, and specifically explained why claimant's "markedly reduced FEV1 [percentage] before bronchodilators, as well as [claimant's] x-ray, which showed upper lobe emphysematous changes, is not a pattern consistent with the effects of coal mine dust" but rather is consistent with COPD due to smoking. Decision and Order at 12; *see* Employer's Exhibit 1. Similarly, the administrative law judge was persuaded by Dr. Hippensteel's explanation that "the variable abnormalities in [claimant's] pulmonary function and arterial blood gas study results were not typical for the fixed and irreversible disease expected with pneumoconiosis." Decision and Order at 12; *see* Employer's Exhibit 6.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element of entitlement. *Trent*, 11 BLR at 1-27. The administrative law judge is empowered to weigh the medical evidence and to draw her own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board, on appeal, may not reweigh the evidence or substitute its own inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge properly exercised her discretion in assessing the relative credibility of the medical opinions, we affirm her finding that claimant failed to establish the existence of pneumoconiosis based on the medical opinion evidence at Section

718.202(a)(4). *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85 (1993); *Clark*, 12 BLR at 1-151; *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). As claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement, benefits are precluded. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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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BETTY JEAN HALL
Administrative Appeals Judge