BRB No. 09-0127 BLA

W.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PINE RIDGE COAL COMPANY	)	
	)	DATE ISSUED: 08/31/2009
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Juliet W. Rundle & Associates), Pineville, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (08-BLA-5290) of Administrative Law Judge Richard A. Morgan rendered 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). The administrative law judge credited claimant with at least sixteen years of coal mine employment based on the parties' stipulation.[1] The administrative law judge noted that the instant claim is a subsequent

[1] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the

claim, and he indicated that the file from the prior denied claim could not be located at the Federal Records Center. Thus, he stated that he would assume that none of the elements of entitlement was established in the prior claim. The administrative law judge found that the evidence developed since the prior denial of benefits established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), and therefore established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Because the existence of pneumoconiosis was not established, the administrative law judge found that claimant could not establish that he is totally disabled 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 his weighing of the medical opinion evidence when he found that claimant did not establish the existence of pneumoconiosis. Claimant further asserts that the administrative law judge failed to weigh together all of the relevant evidence regarding the existence of pneumoconiosis, contrary to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Employer responds, urging the Board to affirm the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this appeal.[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).

United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] The administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) are not challenged on appeal. Therefore, we affirm those findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to Section 718.202(a)(4), claimant argues that the administrative law judge erred in weighing the medical opinion evidence when he declined to credit Dr. Rasmussen's opinion. Dr. Rasmussen, who is Board-certified in Internal Medicine, examined claimant and diagnosed him with clinical coal workers' pneumoconiosis based on a positive x-ray reading, and "COPD/emphysema" due to both coal mine dust exposure and smoking. Director's Exhibit 13. Dr. Zaldivar, who is Board-certified in Internal Medicine and Pulmonary Disease, examined claimant and reviewed Dr. Rasmussen's report and associated medical testing, and concluded that claimant has neither clinical nor legal pneumoconiosis. Director's Exhibit 15. Dr. Zaldivar diagnosed severe "bullous emphysema resulting from [claimant's] adult history of smoking" and unrelated to coal mine employment. *Id*. at 5. Subsequently, Dr. Rasmussen reviewed Dr. Zaldivar's report and opined that Dr. Zaldivar's conclusion that claimant suffers from a type of emphysema that is traceable solely to smoking was not well-supported by medical literature. Director's Exhibit 11. In this report, Dr. Rasmussen stated that since it is not "medically reasonable" to conclude that all of a smoking coal miner's impairment is either due entirely to smoking, or entirely to coal dust, "both contribute." *Id*. at 4. Dr. Rosenberg, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed the medical evidence of record and concluded that claimant has neither clinical nor legal pneumoconiosis. Employer's Exhibit 3. Dr. Rosenberg opined that, while miners can develop significant COPD from coal mine dust exposure, the specific pattern of the objective evidence in this case indicated that claimant's pulmonary condition is due solely to his "long and significant smoking history."[3] *Id*. at 7.

The administrative law judge chose to accord less weight to Dr. Rasmussen's opinion, and greater weight to the opinions of Drs. Zaldivar and Rosenberg. With respect to the existence of clinical pneumoconiosis, the administrative law judge found that Dr. Rasmussen relied solely on his own positive x-ray reading to diagnose the disease, whereas Drs. Zaldivar and Rosenberg considered "both the positive and negative X-ray readings" of record in concluding that claimant does not have clinical pneumoconiosis. Decision and Order at 16. Regarding the existence of legal pneumoconiosis, the administrative law judge found that Dr. Rasmussen, in attributing claimant's COPD to both sixteen years of coal mine dust exposure and forty years of smoking, relied on the premise that "in any smoking coal miner, all of the miner's impairment may be due to cigarette smoking or all of it may be due to coal mine dust exposure. [N]either scenario is medically reasonable. Therefore, both contribute." Director's Exhibit 11 at 4. The administrative law judge found that, by contrast, Drs. Zaldivar and Rosenberg provided detailed, persuasive explanations based on the medical evidence for how they were able to distinguish between the impact of claimant's "lengthy" smoking history and his coal

[3] Both Drs. Zaldivar and Rosenberg were deposed and they elaborated on their written reports. Employer's Exhibits 4, 5.

mine dust exposure on his pulmonary condition. Decision and Order at 17. The administrative law judge found that those explanations, supported by the doctors' credentials, "cast significant doubt upon Dr. Rasmussen's conclusions," which "appear[ed] to rely more on a general premise." *Id*. Therefore, the administrative law judge found that claimant did not meet his burden to establish the existence of pneumoconiosis.

Claimant contends that the administrative law judge impermissibly "speculated that Dr. Rasmussen's opinion rested on some general premise" as to the etiology of claimant's pulmonary impairment. Claimant's Brief at 8 (unpaginated). We disagree. The administrative law judge acted within his discretion as the fact-finder when he determined that Dr. Rasmussen's reasoning for attributing claimant's pulmonary impairment to both coal dust exposure and smoking was based in part on a general view that, since it would not be reasonable to attribute a smoking miner's impairment entirely to one cause or the other, both contribute. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

Further, contrary to claimant's contention, the administrative law judge permissibly found that the opinions of Drs. Zaldivar and Rosenberg were more persuasive than Dr. Rasmussen's opinion, because they were better reasoned. *See Hicks*, 138 F.3d at 533, 21 BLR 2-323; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Specifically, the administrative law judge rationally found Dr. Zaldivar's explanation regarding the differences in the damage caused by cigarette smoking and coal mine dust to be better explained than Dr. Rasmussen's contrary opinion. *See Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). In addition, the administrative law judge properly considered the relative qualifications of the two physicians in making his finding.[4] *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Further, the administrative law judge rationally found Dr. Rosenberg's opinion to be more credible because Dr. Rosenberg better integrated his opinion with all of the objective evidence of record. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76, *Underwood*, 105 F.3d at 951, 21 BLR 2-31-32; *Pastva v. Youghiogheny & Ohio Coal Co.*, 7 BLR 1-829 (1985); *Fuller v. Gibralter Coal Corp.*, 6 BLR 1-1291 (1984).

[4] In considering the physicians' qualifications and expertise, the administrative law judge determined to "rank Drs. Zaldivar and Rosenberg the very best qualified with Dr. Rasmussen only somewhat less so given his lengthy experience in the field of [coal workers' pneumoconiosis]." Claimant has not challenged this determination. It is therefore affirmed. *See Skrack*, 6 BLR at 1-711.

Because these findings are supported by substantial evidence, we reject claimant's allegations of error.[5]

In all other regards, claimant's assertions regarding the administrative law judge's consideration of the medical opinion evidence amount to a request to reweigh the evidence, which is beyond the Board's scope of review. *Anderson*, 12 BLR at 1-113. Accordingly, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(4).

Claimant argues that the administrative law judge erred by evaluating the evidence regarding the existence of pneumoconiosis under each subsection at Section 718.202(a), which, claimant argues, is "precisely what the Fourth Circuit Court of Appeals said he should not do [in *Compton*]. . . ." Claimant's Brief at 7 (unpaginated). We reject this assertion. In *Compton*, the United States Court of Appeals for the Fourth Circuit held that "all relevant evidence is to be considered together rather than merely within discrete subsections of §718.202(a)." *Compton*, 211 F.3d at 213, 22 BLR at 2-178. Contrary to claimant's assertion, however, the court did not hold that an administrative law judge is required to initially weigh all of the evidence together. Therefore, the administrative law judge did not err in considering whether the evidence submitted under each individual subsection of Section 718.202(a) established the existence of pneumoconiosis. *See Compton*, 211 F.3d at 213, 22 BLR at 2-178. Because the administrative law judge did not find the existence of pneumoconiosis established by either the x-ray evidence or the medical opinion evidence submitted pursuant to Section 718.202(a)(1),(4),[6] any error by him in failing to then weigh together the two categories of negative evidence was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[5] To the extent that claimant argues that the administrative law judge erred in declining to credit Dr. Rasmussen's diagnosis of clinical pneumoconiosis, this argument is rejected. Dr. Rasmussen's diagnosis of clinical pneumoconiosis was based solely on the physician's x-ray interpretation, and the administrative law judge found that the x-ray evidence did not establish the existence of pneumoconiosis, a finding we have affirmed. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-12, 22 BLR 2-162, 2- 175 (4th Cir. 2000); n.2, *supra*. Moreover, claimant does not challenge the administrative law judge's determination that Drs. Zaldivar and Rosenberg based their opinions as to clinical pneumoconiosis on a broader set of data when they considered both the positive and negative x-ray readings. That finding is therefore affirmed. *See Skrack*, 6 BLR at 1-711.

[6] As the administrative law judge noted, no biopsy or autopsy evidence was submitted under 20 C.F.R. §718.202(a)(2), and the presumptions listed under 20 C.F.R. §718.202(a)(3) were inapplicable.

Therefore, we affirm the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a). Because claimant did not establish the existence of pneumoconiosis, a necessary element of entitlement in a miner's claim under Part 718, we affirm the denial of benefits.

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