BRB No. 09-0174 BLA

T. C.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U. S. STEEL MINING COMPANY, LLC	)	
	)	DATE ISSUED: 08/26/2009
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 Walker Rundle & Associates), Pineville, West Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay Casto & Chaney), Charleston, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (08-BLA-5164) of Administrative Law Judge Richard A. Morgan 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).[1] The administrative law judge credited

[1] Claimant filed his claim for benefits on February 27, 2007. Director's Exhibit 2. The district director issued a proposed decision and order awarding benefits on October 10, 2007. Director's Exhibit 19. Employer requested a formal hearing and the case was

claimant with at least six and one-half years of coal mine employment[2] and found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further found that although the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), since claimant did not establish that he has pneumoconiosis, he could not establish that his total disability is 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 evaluation of the x-ray and medical opinion evidence in determining that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Claimant further challenges the administrative law judge's finding that the evidence did not establish that his total disability was due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to claimant's appeal.[3]

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).

---

transferred to the Office of the Administrative Law Judges for a hearing on November 29, 2007. Director's Exhibit 20.

[2] The record indicates that claimant's last coal mine employment was in West Virginia. Director's Exhibit 3, 6. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

[3] We affirm the administrative law judge's finding that the existence of pneumoconiosis is not established pursuant to 20 C.F.R. §718.202(a)(2), (3), as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

Claimant contends that the administrative law judge erred in finding that the x-ray evidence does not establish the existence of pneumoconiosis because "he accepted the slightly greater number of negative interpretations as being dispositive of the existence of the disease." Claimant's Brief at 6. We disagree.

In finding the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge properly noted that the relevant x-ray evidence of record consists of four readings of eight x-rays. Decision and Order at 5, 12. The administrative law judge properly found that a March 21, 2007 x-ray was read as positive for pneumoconiosis by Dr. Forehand, a B reader, and read as negative for pneumoconiosis by Dr. Abramowitz, a Board-certified radiologist and B reader.[4] Director's Exhibit 11; Employer's Exhibit 3. The administrative law judge permissibly found this x-ray to be negative, based on Dr. Abramowitz's superior radiological qualifications. *See 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*); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc*); Decision and Order at 12. The administrative law judge noted that a January 23, 2008 x-ray was read as negative for pneumoconiosis by Dr. Zaldivar, a B reader, but was read as positive for pneumoconiosis by Dr. Ahmed, a B reader and Board-certified radiologist. Claimant's Exhibit 2; Employer's Exhibit 2. The administrative law judge permissibly found this x-ray to be positive, based on Dr. Ahmed's superior radiological qualifications. *See Adkins*, 958 F.2d at 52, 16 BLR at 2-66; *Dempsey*, 23 BLR at 1-65; *Cranor*, 22 BLR at 1-7; Decision and Order at 12. The administrative law judge further noted that a February 13, 2008 x-ray was read as negative for pneumoconiosis by Dr. Hippensteel, a B reader. Employer's Exhibit 1. The administrative law judge properly found this x-ray to be negative, based on Dr. Hippensteel's uncontradicted reading. *See Adkins*, 958 F.2d at 52, 16 BLR at 2-66; *Dempsey*, 23 BLR at 1-65; *Cranor*, 22 BLR at 1-7; Decision and Order at 12. Finally, the administrative law judge considered that a March 26, 2008 x-ray was read as positive for pneumoconiosis by Dr. Pathak, a B reader, while the same x-ray was read as negative for pneumoconiosis by Dr. Gogineni, a B reader and Board-certified radiologist. Claimant's Exhibit 1; Employer's Exhibit 4. The administrative law judge permissibly found this x-ray to be negative, based on Dr. Gogineni's superior radiological qualifications. *See Adkins*, 958 F.2d at 52, 16 BLR at 2-66; *Dempsey*, 23 BLR at 1-65; *Cranor*, 22 BLR at 1-7; Decision and Order at 12. The administrative law judge concluded that, having found "one chest x-ray [January 23, 2008] to be positive for the existence of pneumoconiosis, and three chest X-rays [March 21, 2007, February 13, 2008, March 26, 2008] to be negative for the existence of pneumoconiosis" the x-ray evidence of record does not support a finding of pneumoconiosis. Decision and Order at

[4] Dr. Gaziano, a B reader, reviewed the March 21, 2007 x-ray for quality purposes only. Director's Exhibit 11.

13. Thus, contrary to claimant's contention, the administrative law judge properly considered both the quantity and the quality of the x-ray readings of record, and his findings are supported by substantial evidence. *See Adkins*, 958 F.2d at 52, 16 BLR at 2-66; *Dempsey*, 23 BLR at 1-65. We, therefore, affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Claimant next asserts that the administrative law judge erred in his weighing of the medical opinions of record in determining that the existence of pneumoconiosis was not established. Claimant's contention lacks merit.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the opinions of Drs. Forehand, Hippensteel, and Zaldivar. Dr. Forehand diagnosed claimant with both clinical pneumoconiosis and legal pneumoconiosis,[5] in the form of an obstructive ventilatory impairment due in part to coal dust exposure, while Drs. Hippensteel and Zaldivar opined that claimant does not have clinical pneumoconiosis or any coal-dust related disease or impairment. The administrative law judge accorded greater weight to the opinions of Drs. Hippensteel and Zaldivar than to the opinion of Dr. Forehand, to conclude that claimant failed to establish the existence of pneumoconiosis by means of the medical opinion evidence. Decision and Order at 13-14.

The administrative law judge found, correctly, that Dr. Forehand stated that he based his diagnosis of clinical pneumoconiosis on claimant's work history, complaints of shortness of breath, positive x-ray, pulmonary function studies, and the presence of crackles on chest examination. Director's Exhibit 11. The administrative law judge permissibly accorded less weight to Dr. Forehand's diagnosis of clinical pneumoconiosis, as not well reasoned, because the physician relied in part on a positive x-ray reading that was reread as negative by a physician with superior radiological qualifications, and failed to explain how any of his additional findings and observations supported his conclusion. *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

[5] A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). "Clinical pneumoconiosis" is defined as "those diseases recognized by the medical community as pneumoconiosis, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

(4th Cir. 1997); Decision and Order at 13-14. The administrative law judge also permissibly discredited Dr. Forehand's diagnosis of legal pneumoconiosis as conclusory and not well reasoned, because the physician failed to explain how the underlying documentation supported his opinion that claimant's obstructive ventilatory pattern was caused by a combination of coal dust and smoking. *See Hicks*, 138 F.3d at 524, 533, 21 BLR at 2 -323, 2-335; *Akers*, 131 F.3d at 438, 441, 21 BLR at 2-269, 2-275-76; Decision and Order at 14.

By contrast, the administrative law judge found the opinions of Drs. Hippensteel and Zaldivar to be supported by extensive documentation and objective medical data. Dr. Zaldivar opined that claimant has no evidence of pneumoconiosis, but has a moderate reversible airway obstruction due to asthma, and aggravated by smoking. Dr. Zaldivar based his opinion on blood gas studies, pulmonary function studies and a negative x-ray. Decision and Order at 9; Employer's Exhibit 2 at 3. Further, as noted by the administrative law judge, Dr. Zaldivar specifically explained how the objective testing supported his conclusion that claimant's impairment is due to smoking:

> The importance of a diffusion capacity measurement in this case is that [claimant] has a moderate airway obstruction, which is reversible, given that the FEV1 improved by more than 200 ml and 27% after bronchodilators, but the diffusion capacity is almost normal. What this means is that [claimant] has a very large component of asthma which is causing the airway obstruction. If any emphysema is present, it is masked by this significant bronchodilation. If he were to have emphysema or coal workers' pneumoconiosis, which causes destruction of lung capacity, the capillary base of the lungs would have been destroyed as well in similar relationship as the airway obstruction increases.

Decision and Order at 9; *Id.* Similarly, as the administrative law judge noted, Dr. Hippensteel found no radiographic evidence of pneumoconiosis or physiologic findings consistent with pneumoconiosis, and explained that he found, "partially reversible airflow obstruction consistent with active bronchial inflammation from [claimant's] continuing cigarette smoking and not consistent with fixed obstructive impairment expected from coal workers' pneumoconiosis, and not associated with any associated restriction from interstitial fibrosis from coal workers' pneumoconiosis." Decision and Order at 10; Employer's Exhibit 1 at 6. While the administrative law judge found the opinions of Drs. Zaldivar and Hippensteel to be entitled to slightly diminished weight because both physicians failed to adequately address the positive x-ray evidence of record, he acted within his discretion in concluding that their opinions were nonetheless better supported and reasoned than Dr. Forehand's opinion. *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987);

Decision and Order at 14. Thus, we affirm the administrative law judge's finding that the medical opinion evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), as supported by substantial evidence.

Based on the foregoing, we affirm the administrative law judge's finding that the evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a miner's claim under Part 718, we affirm the administrative law judge's denial of benefits.[6] *Anderson*, 12 BLR at 1-112.

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[6] Consequently, we need not address claimant's argument concerning the administrative law judge's finding that claimant did not establish total disability due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).