BRB No. 12-0589 BLA

GLENNA WILSON (o/b/o ROBERT F. WILSON)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED: 08/13/2013
RANGER FUEL CORPORATION	)	
and	)	
PITTSTON COMPANY	)	
Employer/Carrier- Respondents	)	
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, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits (11-BLA-5473) of Administrative Law Judge Thomas M. Burke rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). This case involves claimant's request for modification of a claim filed on August 1, 2007. Director's Exhibit 2. In the initial Decision and Order, Administrative Law Judge Daniel L. Leland credited the miner with twelve and one-half years of coal mine employment,[2] and found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b). Director's Exhibit 47. However, Judge Leland found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, Judge Leland denied benefits. *Id.* Pursuant to claimant's appeal, the Board affirmed the denial of benefits. *Wilson v. Ranger Fuel Corp.*, BRB No. 09-0357 BLA (Feb. 18, 2010)(unpub.); Director's Exhibit 58.

Claimant filed a request for modification on April 26, 2010. Director's Exhibit 59. Administrative Law Judge Thomas M. Burke (the administrative law judge) credited the miner with ten to twelve and one-half years of coal mine employment and found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge further found, however, that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge also found that the Section 411(c)(4) presumption is inapplicable to this claim, as the evidence does not establish that the miner had fifteen years of qualifying coal mine employment.[3] The administrative law judge, therefore, found that claimant did not establish a change in

[1] Claimant is the widow of the miner, who died on July 1, 2011. Claimant's Exhibit 1. Claimant is pursuing the miner's claim on his behalf. Decision and Order at 2.

[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); 2011 Hearing Transcript at 12; Decision and Order at 11 n.7.

[3] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner's total disability was due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

conditions, or a mistake in a determination of fact. 20 C.F.R. §725.310(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the x-ray, pathology, and medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Claimant also contends that, in finding that claimant did not establish the existence of pneumoconiosis, the administrative law judge failed to weigh all of the relevant evidence together, consistent with the holding 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 argues that the administrative law judge erred in finding that the evidence did not establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[4] Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

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 under 20 C.F.R. Part 718 in a miner's claim, a 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, 1-27 (1987).

An administrative law judge may grant modification based on a change in conditions[5] or because of a mistake in a determination of fact. 20 C.F.R. §725.310(a).

[4] Claimant does not challenge the administrative law judge's findings that the Section 411(c)(4) presumption is inapplicable to this claim, and that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3). Thus, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] In the prior decision, Administrative Law Judge Daniel L. Leland denied benefits because he found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Director's Exhibit 47. Consequently, in order to establish a

When a request for modification is filed, "any mistake of fact may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B. Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

In evaluating the x-ray evidence of record, the administrative law judge considered ten interpretations of four x-rays taken from October 2, 2007 to April 10, 2010, and permissibly accorded greater weight to the interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 11-12.

Although Dr. Rasmussen, a B reader, interpreted the October 2, 2007 x-ray as positive for pneumoconiosis, Dr. Wiot, a B reader and Board-certified radiologist, interpreted the x-ray as negative for pneumoconiosis.[6] Director's Exhibits 11, 12. The administrative law judge permissibly credited Dr. Wiot's negative interpretation of the October 2, 2007 x-ray, over Dr. Rasmussen's positive interpretation, based upon Dr. Wiot's superior qualifications. *See Adkins*, 958 F.2d at 52-53, 16 BLR at 2-66; *Sheckler*, 7 BLR at 1-131; Decision and Order at 11. The administrative law judge, therefore, permissibly found that the October 2, 2007 x-ray was negative for pneumoconiosis.

The December 19, 2007 x-ray was read as positive by Dr. Ahmed, a B reader, and as negative by Drs. Zaldivar and Meyer, who are both B readers. Director's Exhibits 36, 37, 42. The administrative law judge permissibly found this x-ray to be negative based on the preponderance of the negative readings by equally qualified readers. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81, 18 BLR 2A-1, 2A-12 (1994); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5; *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003); Decision and Order at 11.

The May 1, 2008 x-ray was read as positive by Dr. Ahmed, and as negative by Dr. Wiot. Director's Exhibits 40, 42. The administrative law judge permissibly found this x-ray to be negative, based on Dr. Wiot's superior qualifications. *See Adkins*, 958 F.2d at 52-53, 16 BLR at 2-66; *Sheckler*, 7 BLR at 1-131.

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change in conditions, the new evidence would have to establish the existence of pneumoconiosis or total disability due to pneumoconiosis.

[6] Dr. Gaziano, a B reader, reviewed this x-ray to assess its film quality only. Director's Exhibit 11.

Finally, the x-ray dated April 1, 2010 was read as positive by Dr. Ahmed, and as negative by Drs. Wheeler and Scott, who are both B readers and Board-certified radiologists. Director's Exhibit 39; Employer's Exhibits 1, 2. The administrative law judge permissibly found this x-ray to be negative, based on the preponderance of negative readings by the most highly qualified readers. *See Ondecko*, 512 U.S. at 280-81, 18 BLR at 2A-12; *Adkins*, 958 F.2d at 52-53, 16 BLR at 2-66; *Chaffin*, 22 BLR at 1-300

Having found all four x-rays to be negative for pneumoconiosis, the administrative law judge found that the x-ray evidence did not support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order at 12. As the administrative law judge performed both a qualitative and quantitative analysis of the x-ray evidence, before concluding that the weight of the x-ray evidence was negative for pneumoconiosis, we affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *See Adkins*, 958 F.2d at 52-53, 16 BLR at 2-66; *Chaffin*, 22 BLR at 1-300; Decision and Order at 11-12; Director's Exhibits 11, 12, 36, 37, 39, 40, 42; Employer's Exhibits 1, 2.

With regard to the pathology evidence, the administrative law judge acted within his discretion in according greater weight to the opinion of Dr. Caffrey, that the miner did not have coal workers' pneumoconiosis, because Dr. Caffrey is better qualified, and his report is better reasoned than that of Dr. Moskaluk, who did not explain his diagnosis of silicosis.[7] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 n.9, 21 BLR 2-323, 2-335 n.9 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Decision and Order at 13; Director's Exhibits 10, 38. Thus, the administrative law judge permissibly found that the weight of the pathology evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2).

Claimant also challenges the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In considering whether the medical opinion evidence established the existence of pneumoconiosis, the administrative law judge reviewed the opinions of Drs. Rasmussen, Zaldivar, Killeen, and Rosenberg. Director's Exhibits 11, 36, 39, 41, 42;

[7] Dr. Caffrey is Board-certified in Anatomical and Clinical Pathology while Dr. Moskaluk's qualifications are not in the record. Director's Exhibit 38. The administrative law judge found that while Dr. Caffrey explained that he could not diagnose pneumoconiosis or silicosis because he did not see any pneumoconiotic or silicotic nodules in the lung tissue, in contrast, Dr. Moskaluk did not explain why the changes he saw were consistent with silicosis. Decision and Order at 12-13; Director's Exhibits 10, 38. There is no autopsy evidence of record. Claimant's Exhibit 1.

Employer's Exhibits 1, 3-8. Dr. Rasmussen opined that the miner suffered from both clinical[8] and legal pneumoconiosis.[9] Director's Exhibit 11. In contrast, Drs. Zaldivar, Killeen and Rosenberg opined that the miner suffered from pulmonary fibrosis, unrelated to coal mine dust exposure. Director's Exhibits 36, 39, 41, 42; Employer's Exhibits 1, 3-8. The administrative law judge also considered the miner's death certificate, which lists the cause of the miner's death as respiratory failure due to pneumonia and interstitial lung disease with fibrosis, but does not indicate that these conditions are related to coal mine dust exposure.[10] *Id.*

Contrary to claimant's assertion, the administrative law judge permissibly discounted Dr. Rasmussen's diagnosis of clinical pneumoconiosis because it was based on a positive x-ray reading, which was reread as negative by a better qualified reader, and was contrary to the preponderance of the x-ray and pathology evidence. *See Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; Decision and Order at 13-14; Director's Exhibit 11. The administrative law judge also permissibly found Dr. Rasmussen's opinion to be too equivocal to support a finding of legal pneumoconiosis, because Dr. Rasmussen indicated that the miner's diffuse interstitial fibrosis could be idiopathic, or could be caused solely by coal mine dust exposure, or asbestos exposures, or smoking, or sarcoidosis, or could be due to a combination of factors. *See U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 391, 21 BLR 2-639, 2-653 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); Decision and Order at 13-14; Director's Exhibit 11. Although claimant generally asserts that Dr. Rasmussen's opinion is the "only reasoned" medical opinion of record, this argument amounts to a request that the Board reweigh the evidence, which we are not empowered to do. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756, 21 BLR 2-587, 2-591 (4th Cir. 1999); Claimant's Brief at 6 (unpaginated). Because the administrative law judge's determination to discredit the opinion of Dr. Rasmussen, the only physician to diagnose pneumoconiosis, is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence did not

[8] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[9] 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).

[10] The administrative law judge noted that the name of the physician who signed the death certificate is illegible. Decision and Order at 4 n.6.

establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Finally, we reject claimant's assertion that, in finding that claimant failed to establish the existence of pneumoconiosis, the administrative law judge failed to weigh all of the evidence together, consistent with the holding of the United States Court of Appeals for the Fourth Circuit in *Compton*, 211 F.3d at 211, 22 BLR at 2-174. Having evaluated the evidence in each category pursuant to 20 C.F.R. §718.202(a)(1)-(4), the administrative law judge discussed and weighed all the evidence together:

> In sum, a preponderance of the x-ray evidence, pathology reports, and medical opinions fail to prove the existence of clinical or legal pneumoconiosis. Such findings are supported by the treating CT scans and treating x-rays, none of which demonstrated the existence of pneumoconiosis. Accordingly, the existence of coal worker[s'] pneumoconiosis has not been proven by a preponderance of the evidence.

Id. at 14. As the administrative law judge's evaluation of the evidence is both supported by substantial evidence and consistent with *Compton*, we affirm the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).

In light of our affirmance of the administrative law judge's finding that the evidence of record does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a),[11] an essential element of entitlement, we affirm the administrative law judge's denial of claimant's request for modification. 20 C.F.R. §725.310(a).

[11] In light of our affirmance of the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), we need not address claimant's contentions of error regarding the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge