BRB No. 05-0249 BLA

WILLIE M. VANDYKE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BEATRICE POCAHONTAS COMPANY	)	
	)	DATE ISSUED: 12/29/2005
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 Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams & Rutherford), Norton, Virginia, for claimant.

Christopher M. Hunter and Douglas A. Smoot (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (03-BLA-5434) of Administrative Law Judge Jeffrey Tureck 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). Claimant filed this subsequent claim on August 27, 2001.[1] The parties stipulated that claimant worked as a coal miner for forty years. The administrative law judge preliminarily found that claimant established a change in an applicable condition of entitlement, specifically total disability, pursuant to 20 C.F.R. §§725.309; 718.204(b)(2)(iv).[2] Thus, the administrative law judge considered the merits of entitlement based on all of the evidence of record. He found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of pneumoconiosis, in finding that the biopsy finding of a mediastinal lymph node did not established the existence of pneumoconiosis, and in finding that the medical opinions of Drs. Rasmussen and Forehand were not sufficient to establish the existence of pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's denial of benefits on the grounds that it is supported by substantial evidence and because claimant's brief lacks specificity. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief. The Director takes no position on the ultimate merits of this case, but addresses claimant's argument with respect to the biopsy evidence, arguing that the biopsy evidence used to prove the existence of pneumoconiosis must be of lung tissue, rather than lymph nodes.

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,

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[1] The miner's first claim was filed on June 20, 1973, and denied on July 22, 1980 for failure to establish any element of entitlement. A duplicate claim was filed on January 5, 1987 and was finally denied by the Benefits Review Board on July 31, 1995, again for failure to establish any element of entitlement. On June 18, 1996, claimant filed for modification, but on October 19, 1998, Administrative Law Judge Edward Terhune Miller denied modification. Director's Exhibit 2. Claimant filed a third claim on November 5, 1999, which was denied by the Office of Workers' Compensation Programs on July 17, 2000, for failure to establish any element of entitlement. The instant claim is claimant's fourth claim. The Office of Workers' Compensation Programs initially found claimant entitled to benefits. Employer sought a hearing before an administrative law judge.

[2] The administrative law judge's findings that claimant established forty years of coal mine employment and that the newly submitted evidence established a change in an applicable condition of entitlement, i.e., total disability, pursuant to 20 C.F.R. §§718.204(b)(2)(iv) and 725.309 are not challenged on appeal. We therefore affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-170 (1983).

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 pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 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 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant first argues that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of pneumoconiosis. Specifically, claimant argues that the administrative law judge should not have considered x-rays taken before 2001, when the instant claim was filed. The x-ray evidence consists of the following: Dr. Manu Patel, a Board-certified radiologist and B-reader, read as positive, two x-rays, dated December 29, 1999 and May 7, 2003. There are nine negative x-ray interpretations, also by dually qualified readers. The administrative law judge, within his discretion, did not consider the status of dually qualified readers, but considered only the physicians' B-reader status. The administrative law judge found that only Dr. Patel read x-rays as positive. While the administrative law judge noted that Dr. Patel is a B-reader, he noted that "at least a dozen other B-readers read x-rays as negative." Decision and Order at 3. Thus, we affirm the administrative law judge's finding that the new x-ray evidence and the previously submitted x-ray evidence did not establish the existence of pneumoconiosis, as the weight of the x-ray readings by B-readers is negative for the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

Claimant next asserts that the administrative law judge erred in determining that a finding on biopsy of anthracosilicosis in lymph nodes does not establish pneumoconiosis. *See* 20 C.F.R. §718.202(a)(2). Claimant submitted a report of a biopsy of a lymph node by Dr. Bechtel indicating "prominent sinus histiocytes and anthracosilicosis." Claimant's Exhibit 2. Dr. Bush, a pathologist, opined that anthracosilicosis in the lymph nodes is not necessarily proof of anthracosilicosis in the lungs. Employer's Exhibit 14. The administrative law judge credited Dr. Bush's opinion, and found the biopsy evidence insufficient to establish the presence of a "chronic dust disease of the lung" as required by Section 718.201. The Director responds in support of the administrative law judge's finding, asserting that the regulations clearly contemplate that biopsy evidence be of lung tissue. *See* 20 C.F.R. §718.201(a)(1) (clinical pneumoconiosis is defined as those diseases "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

coal dust exposure in coal mine employment."). We agree with the Director. Inasmuch as this claim is governed by the revised regulations, *see* 20 C.F.R. §§718.101(b); 725.2, we hold that the administrative law judge properly found that the diagnosis of anthracosis in the lymph nodes was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(2).[3]

Claimant generally contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant notes that the opinions of Drs. Forehand and Rasmussen support a finding of pneumoconiosis. Claimant's Brief at 6-8. In a report dated July 3, 2002, Dr. Forehand diagnosed coal workers' pneumoconiosis based upon claimant's history, a physical examination and the results of an arterial blood gas study. Director's Exhibit 15. The administrative law judge, however, permissibly found that Dr. Forehand's opinion was not sufficiently reasoned since he failed to explain his basis for finding the arterial blood gas study results supportive of a finding of pneumoconiosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

In a report dated May 7, 2003, Dr. Rasmussen diagnosed coal workers' pneumoconiosis based upon a "significant history of exposure to coal mine dust" and "x-ray changes consistent with pneumoconiosis." Claimant's Exhibit 1; *see also* Director's Exhibit 3. The administrative law judge permissibly questioned Rasmussen's reliance upon a positive x-ray interpretation in light of the administrative law judge's earlier finding that the x-ray evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); Decision and Order at 6. The administrative law judge also credited the opinions of Drs. Castle and Hippensteel that claimant did not suffer from pneumoconiosis over Dr. Rasmussen's contrary opinion because the administrative law judge found that their opinions were well reasoned and

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[3] The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that anthracosis in the lymph nodes may constitute pneumoconiosis, as defined in the regulations then in effect. *Daugherty v. Dean Jones Coal Co.*, 895 F.2d 130, 13 BLR 2-134 (4th Cir. 1989). The Court stated that the Board's own decisions held that it was within an administrative law judge's discretion to determine whether anthracotic pigmentation could be sufficient proof of the existence of pneumoconiosis. *See Bueno v. Director,OWCP*, 7 BLR 1-337, 1-340 (1984). As the Director points out, even under the regulations in effect at the time *Daugherty* was issued, the administrative law judge's reliance upon Dr. Bush's opinion to find that anthracosis in the lymph nodes was not sufficient to establish the existence of pneumoconiosis, would have been proper.

consistent with the evidence of record. Decision and Order at 10. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's finding that claimant has failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent, supra; Perry, supra*.

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