BRB No. 05-0532 BLA

HABERT JOHNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DRUMMOND COMPANY, INCORPORATED	)	
	)	
	)	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–Denial of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Patrick K. Nakamura (Nakamura, Quinn & Walls LLP), Birmingham, Alabama, for claimant.

Katie Loggins Vreeland (Maynard, Cooper & Gayle, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order–Denial of Benefits (04-BLA-5902) of Administrative Law Judge Richard T. Stansell-Gamm on a subsequent 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

[1] The administrative law judge found that claimant filed this subsequent claim, his

accepted the parties' stipulations that claimant had at least fifteen and one-half years of coal mine employment, that employer is the responsible operator, and that claimant's wife is a dependent for the purpose of augmenting any benefits that may be payable. Decision and Order at 3; Hearing Transcript at 8-10. The administrative law judge further found that although the newly submitted evidence failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii),[2] claimant established by a preponderance of the medical opinion evidence that he is totally disabled under 20 C.F.R. §718.204(b)(2)(iv), and thus demonstrated a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). The administrative law judge, however, found that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's consideration of the x-ray evidence under Section 718.202(a)(1). In response, employer argues that the administrative law judge's denial of benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs has filed a letter stating that he will not file a response brief on the merits of this 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 supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the

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fourth application for black lung disability benefits, on January 16, 2003. Decision and Order at 2; Director's Exhibit 4. The administrative law judge recorded the prior procedural history in his Decision and Order at 2 and concluded that claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis and total disability.

[2] The administrative law judge found that claimant did not present evidence of cor pulmonale with right-sided congestive heart failure, that the record contains no evidence of complicated pneumoconiosis, and that the newly submitted pulmonary function and blood gas studies are non-qualifying. Decision and Order at 6-7.

[3] The parties do not challenge the administrative law judge's decision to accept the parties' stipulation that claimant has at least fifteen and one-half years of coal mine employment, or his findings pursuant to 20 C.F.R. §§725.309(d), 718.202(a)(2)-(a)(4), and 718.204(b)(2)(i)-(iv). We affirm these findings as unchallenged on appeal. *Skrack v. Island Creek Coal Co,* 6 BLR 1-710 (1983).

Act 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 pursuant to 20 C.F.R. Part 718, claimant must establish 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); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Under Section 718.202(a)(1), claimant contends that the administrative law judge erred in considering as negative the x-rays taken on March 30, 1999 and April 28, 2004, when neither x-ray was classified as negative under the International Labour Organization classification system and were therefore "ambiguous as to whether they were read [a]s negative for pneumoconiosis." Claimant's Brief at 5. We disagree. The Board has recognized that, "in appropriate circumstances, x-ray interpretations that contain no mention of pneumoconiosis will support an inference that the miner did not, or does not have pneumoconiosis." *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218 (1985). The administrative law judge found that the March 30, 1999 x-ray was negative based on Dr. Bryant's reading that claimant's x-ray showed cardiomegaly, osteoarthritis of the dorsal spine, and possible mild chronic obstructive pulmonary disease. Decision and Order at 12; Director's Exhibit 3. A physician who interprets an x-ray can be expected to accurately report the presence of any abnormalities that he or she observes. *Marra*, 7 BLR at 1-218. Therefore, the administrative law judge permissibly inferred that if Dr. Bryant did not mention pneumoconiosis, pneumoconiosis was not present. *Marra*, 7 BLR at 1-219. Similarly, because Dr. Payne noted that the April 28, 2004 x-ray revealed no pulmonary infiltrates and he did not mention pneumoconiosis, the administrative law judge reasonably inferred that pneumoconiosis was not present. *Id.*

Claimant also argues that the administrative law judge erred by not explaining why he gave equal weight to the earlier, negative x-rays taken on November 2, 1994, January 11, 1999, March 30, 1999 and May 9, 2000, as he gave to the more recent, positive x-ray taken on March 27, 2003. Again, we disagree. First, we note that the administrative law judge had found that a change in an applicable condition of entitlement was established at 20 C.F.R. §725.309(d). Thus, he could not ignore the earlier x-rays; rather, he had to consider and weigh the evidence filed with both the prior claim and the new claim. *See United States Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 23 BLR 2-213 (11th Cir. 2004)(adopting the "one element" standard under the former Section 725.309(d)). Second, claimant does not demonstrate how the administrative law judge, on this record, erred in considering claimant's x-rays. Specifically, the record as weighed by the administrative law judge reflects that claimant's more recent x-rays, dated March 27, 2003, October 1, 2003, and April 28,

2004, were positive, inconclusive, and negative for pneumoconiosis, respectively, not uniformly positive for pneumoconiosis.[4] Decision and Order at 12. Third, an administrative law judge may, but is not required, to credit more recent, positive x-rays. *McMath v. Director, OWCP*, 12 BLR 1-6, 1-8 (1988). In the circumstances of this case, the administrative law judge reasonably declined to do so. Because the administrative law judge considered both the quantity and quality of the x-ray evidence in determining that a preponderance of the x-rays did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), we reject claimant's arguments and affirm the administrative law judge's finding.

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. *Anderson*, 12 BLR at 1-112; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

[4] The mixed picture of claimant's recent x-rays distinguishes this case from *Edwards v. Director, OWCP*, 6 BLR 1-265 (1983), relied upon by claimant. In *Edwards*, the more recent, positive x-ray was uncontradicted. *Edwards*, 6 BLR at 1-266.

Accordingly, the administrative law judge's Decision and Order - Denial of 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