BRB No. 06-0190 BLA

MONROE L. WEST (Deceased)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 12/29/2006
CLINCHFIELD COAL COMPANY c/o ACORDIA EMPLOYERS SERVICE	)	
	)	
and	)	
	)	
THE PITTSTON COMPANY, COMPENSATION	)	
	)	
Employer/Carrier-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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Monroe L. West, Mary Alice, Kentucky, *pro se*.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order-Denial of Benefits (03-BLA-6528) of Administrative Law Judge Thomas F. Phalen, Jr., rendered on a subsequent claim[2] 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 accepted the parties' stipulation to at least twenty years of coal mine employment[3] and found that employer is the responsible operator.

The administrative law judge found that the medical 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)(2). The administrative law judge therefore determined that claimant established a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). However, the administrative law judge found that claimant did not establish the existence of pneumoconiosis or that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. 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.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176, 1-177 (1989). The Board's scope of review is defined by statute. The administrative law judge's

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[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] Claimant's first claim for benefits, filed on December 9, 1980, was denied on May 4, 1989 because claimant did not establish any element of entitlement. Director's Exhibit 1. His second claim, filed on January 5, 1995, was denied on July 25, 1995, because he did not establish any element of entitlement. Director's Exhibit 2. Claimant filed his current claim on June 19, 2001. Director's Exhibit 4.

[3] The record indicates that claimant's last coal mine employment occurred in Virginia. Director's Exhibits 4, 5. Accordingly, this case arises within the jurisdiction 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*).

Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered the x-ray readings of record based on the readers' radiological qualifications. Upon review of multiple readings of several x-rays submitted with claimant's first claim, the administrative law judge found that the "overwhelming majority of the better qualified B-readers found no evidence of pneumoconiosis," Decision and Order at 24, and substantial evidence supports his finding.[4] Director's Exhibit 1. The administrative law judge also reviewed four negative readings of a January 20, 1995 x-ray submitted with claimant's second claim and found that x-ray negative for pneumoconiosis.[5] Director's Exhibit 2. Finding a significant time gap between these negative x-rays and the new x-rays submitted with the current claim, the administrative law judge reasonably gave the earlier x-rays less weight. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-65-66 (4th Cir. 1992).

The administrative law judge then turned to the four new x-rays, taken on July 25, 2001, January 30, 2002, July 8, 2003, and February 17, 2004 that were submitted in claimant's current claim. The administrative law judge considered that Dr. Baker, who

[4] A review of the record of claimant's first claim reveals seventy-six readings of twelve x-rays taken between April 1977 and October 1987. Director's Exhibit 1. Ten readings were positive, sixty-four were negative, one reading was not ILO-classified, and another interpreted as unreadable. Director's Exhibit 1.

[5] The administrative law judge inaccurately stated that Drs. Navani and Kanwal read the January 20, 1995 x-ray as positive. Decision and Order at 24. Drs. Navani and Kanwal classified this x-ray as "0/1," which is not a positive reading for pneumoconiosis. *See* 20 C.F.R. §718.102(b); Director's Exhibit 2. The administrative law judge's misstatement was harmless in view of his finding that the January 20, 1995 x-ray was negative for pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

lacks radiological qualifications, read the July 25, 2001 x-ray as positive for pneumoconiosis, and that Dr. Wiot, a Board-certified radiologist and B reader, read the same x-ray as negative. Director's Exhibits 16, 18. Based on "the dually certified reading by Dr. Wiot," Decision and Order at 24, the administrative law judge rationally found the July 25, 2001 x-ray negative for pneumoconiosis. *See Adkins*, 958 F.2d at 52, 16 BLR at 2-65-66. Drs. Ahmed and Alexander, both of whom are Board-certified radiologists and B readers, read the January 30, 2002 x-ray as positive for pneumoconiosis, and Dr. Wiot read the same x-ray as negative. Director's Exhibits 17, 19; Employer's Exhibit 10. Finding these to be "equally credentialed readings," Decision and Order at 24, the administrative law judge reasonably determined that the January 30, 2002 x-ray was inconclusive. *See Adkins*, 958 F.2d at 52, 16 BLR at 2-65-66. Because the July 8, 2003 x-ray received only a positive reading by Dr. Westerfield, a Board-certified radiologist and B reader, the administrative law judge found that x-ray positive for pneumoconiosis. Claimant's Exhibit 3. Finally, Dr. Alexander and Dr. Rosenberg, a B-reader, read the February 17, 2004 x-ray as positive for pneumoconiosis, while Dr. Wiot read the same x-ray as negative. Claimant's Exhibit 7; Employer's Exhibits 1, 9. Based on "the equally credentialed readings by Drs. Alexander and Wiot," Decision and Order at 25, the administrative law judge permissibly found the February 17, 2004 x-ray inconclusive. *See Adkins*, 958 F.2d at 52, 16 BLR at 2-65-66.

Having found one negative x-ray, one positive x-ray, and two inconclusive x-rays, the administrative law judge found within his discretion that the preponderance of the evidence was "equally balanced" and did not establish the existence of pneumoconiosis. Decision and Order at 25; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). Substantial evidence supports the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1), which we therefore affirm.

Pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge found that a biopsy report by Dr. Caffrey identified anthracotic pigment in claimant's lung tissue, but noted that no coal workers' pneumoconiosis was present. Decision and Order at 25; Employer's Exhibit 8. A biopsy finding of "anthracotic pigmentation" is insufficient, by itself, to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(2). The administrative law judge accurately noted that there was no other biopsy evidence, and a review of the record reveals no autopsy evidence. Therefore, substantial evidence supports the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2).

Pursuant to 20 C.F.R. §718.202(a)(3), the administrative law judge accurately determined that none of the presumptions listed at 20 C.F.R. §718.202(a)(3) was applicable in this living miner's claim filed after January 1, 1982 in which the record contains no evidence of complicated pneumoconiosis. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(3).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions submitted with the current claim. Drs. Baker and Smiddy diagnosed claimant with pneumoconiosis, while Drs. Rosenberg and Repsher concluded that he did not have pneumoconiosis. Director's Exhibit 16; Claimant's Exhibits 1-3; Employer's Exhibits 1, 2, 4, 5, 7.

The administrative law judge found that Dr. Baker's diagnosis of coal workers' pneumoconiosis was merely a restatement of Dr. Baker's x-ray reading. This finding is supported by substantial evidence. Dr. Baker diagnosed "Coal Workers' Pneumoconiosis 1/0," based on "abnormal chest x-ray and coal dust exposure," Director's Exhibit 16 at 4, whereas the administrative law judge found Dr. Baker's positive x-ray reading outweighed by the negative reading of a physician with superior radiological credentials. Decision and Order at 24. The administrative law judge further found that, although Dr. Baker diagnosed chronic obstructive pulmonary disease (COPD) and hypoxemia due to both coal dust exposure and smoking, he did not explain his opinion attributing these conditions to coal dust exposure. Decision and Order at 26-27. Substantial evidence supports this finding, which was within the administrative law judge's discretion. *See Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997).

The administrative law judge considered Dr. Smiddy's diagnoses of COPD and bronchitis, and accurately found that Dr. Smiddy did not attribute either condition to coal dust exposure. Claimant's Exhibits 1-3; *see* 20 C.F.R. §718.201(a)(2). The administrative law judge further found that, despite Dr. Smiddy's position as claimant's treating physician and qualifications in Internal Medicine, Dr. Smiddy did not explain how the results of his physical examinations and pulmonary function testing supported his diagnosis of coal workers' pneumoconiosis, but merely stated that claimant's x-ray revealed coal workers' pneumoconiosis. Decision and Order at 27. This finding was reasonable and supported by substantial evidence, considering that the administrative law judge found the x-ray evidence to be equally balanced as to the existence of pneumoconiosis. *See Underwood,* 105 F.3d at 949, 21 BLR at 2-28.

By contrast, the administrative law judge permissibly found that Dr. Rosenberg provided a detailed and well-reasoned opinion that claimant had neither clinical nor legal pneumoconiosis, which was supported by Dr. Rosenberg's credentials in Pulmonary Medicine.[6] Decision and Order at 28; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524,

[6] The administrative law judge found, within his discretion, that although Dr. Rosenberg mentioned an August 27, 2002 x-ray that was not admitted into evidence, Dr. Rosenberg did not base his opinion on that x-ray but relied on an admissible reading of the February 17, 2004 x-ray. Decision and Order at 11-12, n.24; *see* 20 C.F.R. §725.414(a)(3)(i); *Harris v. Old Ben Coal Co*., 23 BLR 1-98, 1-108 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting).

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 (4th Cir. 1997). Having accorded "little weight" to the opinions of Drs. Baker and Smiddy, and "substantial" weight to Dr. Rosenberg's opinion, the administrative law judge found that a preponderance of the medical opinion evidence did not establish the existence of pneumoconiosis. In so finding, the administrative law judge reasonably determined that the medical opinions from claimant's two prior claims merited less weight due to their "remoteness" in time.[7] Decision and Order at 26; *see Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-407 (1982). Because substantial evidence supports the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(4), the finding is affirmed.

Substantial evidence supports the administrative law judge's additional finding that all of the evidence weighed together did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Because claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a necessary element of entitlement under Part 718, we affirm the denial of benefits. *See Anderson,* 12 BLR at 1-112.

[7] Any error by the administrative law judge in giving less weight to earlier medical opinions diagnosing pneumoconiosis, on the ground that pneumoconiosis is a progressive disease, was harmless in view of the fact that all but one of the earlier doctors diagnosed coal workers' pneumoconiosis by x-ray only (Drs. Singh, Robinette, and Sargent), when the administrative law judge found the old x-rays negative for pneumoconiosis. *See Larioni*, 6 BLR at 1-1278. To the extent that Dr. Kanwal's two reports in the earlier claims diagnosed legal pneumoconiosis, the record does not contain Dr. Kanwal's credentials, whereas the administrative law judge relied on Dr. Rosenberg's credentials in Pulmonary Medicine in finding that claimant did not have legal pneumoconiosis. *Larioni*, 6 BLR at 1-1278.

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