BRB No. 04-0402 BLA

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| NORMAN DALE ELLER | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| ELK RUN COAL COMPANY | ) | |
| | ) | |
| and | ) | |
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| ACORDIA EMPLOYERS SERVICES CORPORATION | ) | DATE ISSUED: 02/07/2005 |
| | ) | |
| 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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

Douglas A. Smoot and Dorothea J. Clark (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order - Denying Benefits (03-BLA-5316) of Administrative Law Judge Richard A. Morgan on a miner's 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). The administrative law judge credited claimant with "38.5 years of coal mine employment." Decision and Order at 3. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b). *Id.* at 5, 11-12. However, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.* at 5, 10-12. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and total respiratory disability due to pneumoconiosis pursuant to Section 718.204(c). Claimant's Brief at 4-7. Employer has filed a response brief, urging affirmance of the administrative law judge's denial of benefits.[2] The Director, Office of Workers' Compensation Programs, has declined to participate in 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 rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30

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[1]Claimant is Norman D. Eller, the miner, who filed his claim for benefits on October 17, 2001. Director's Exhibit 2.

[2]The administrative law judge did not admit Employer's Exhibits 5, 7, 8, and 9 into the record because he found these documents to exceed the regulatory limitations set out at 20 C.F.R. §725.414. Decision and Order at 2. "Employer maintains for appellate purposes that all of the evidence which was excluded pursuant to the arbitrary and capricious limitations in the amended regulations is admissible as all relevant evidence should be considered." Employer's Brief at 1 n.2. Employer adds that "there is 'good cause' for the admission of this additional evidence as each physician has analyzed the relevant medical evidence and provided a unique and probative interpretation." *Id.* at 2 n.2.

[3]We affirm the administrative law judge's finding of "38.5 years of coal mine employment" and his finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(a)(3) because these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits under Part 718 in a living 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 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Mullins, Zaldivar, and Crisalli, as well as the CT scan evidence. Decision and Order at 12-14. Dr. Mullins diagnosed coal workers' pneumoconiosis and chronic obstructive pulmonary disease with an asthmatic component. Director's Exhibit 16. Dr. Mullins attributed claimant's coal workers' pneumoconiosis to his coal dust exposure and attributed his chronic obstructive pulmonary disease to "smoking + cwp + unknown." *Id.* Drs. Zaldivar and Crisalli did not find the existence of pneumoconiosis. Director's Exhibit 28; Employer's Exhibits 2, 10, 11. There are two interpretations of the December 13, 2001 CT scan contained in the record. Dr. Scott, a B reader[4] and Board-certified radiologist, found no evidence of silicosis or coal workers' pneumoconiosis and stated that there are "limited images at lung windows." Employer's Exhibit 3. Dr. Wheeler, also a B reader and Board-certified radiologist, found no pneumoconiosis, but noted that the "lung settings are incomplete for lungs above aortic arch and below hila. Those settings were undoubtedly made and I would like to see them to complete this report." *Id.*

Given the comments of Drs. Scott and Wheeler, the administrative law judge found that the CT scan images considered by these physicians "were apparently 'incomplete' or 'limited.'" Decision and Order at 10. Therefore, the administrative law judge found that the "crux of this case rests on the relative weight to be accorded to the opinion of Dr. Mullins . . . versus the opinions of Drs. Zaldivar and Crisalli . . . ." *Id.* at 10-11. The administrative law judge accorded greater weight to the opinions of Drs. Zaldivar and Crisalli over the opinion of Dr. Mullins. *Id.* at 11. In doing so, the

[4]A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

administrative law judge stated that Drs. Zaldivar and Crisalli are both pulmonary specialists, whereas Dr. Mullins' qualifications are not in the record.[5] *Id.* Moreover, the administrative law judge found Dr. Mullins' opinion to be based on "limited information" obtained in conjunction with her examination of claimant, whereas Drs. Zaldivar and Crisalli examined claimant and reviewed the other physicians' opinions in the record, including Dr. Mullins' opinion.[6] *Id.* The administrative law judge additionally noted that "Drs. Zaldivar and Crisalli provided more detailed analyses of the relevant medical data than that which was set forth in Dr. Mullins' report." *Id.*

Claimant contends that the administrative law judge "erred in discrediting the opinion[s] of Dr. Mullins and the physicians of the West Virginia Occupational Pneumoconiosis Board." Claimant's Brief at 5. As the administrative law judge noted, the record contains a copy of the August 21, 2001 letter sent to claimant by the West Virginia Occupational Pneumoconiosis Board notifying claimant of a fifteen percent disability award. Director's Exhibit 10. Decision and Order at 4. However, none of the physicians' opinions which formed the basis for this state award are in the record. Accordingly, the administrative law judge could not have considered them. 20 C.F.R. §725.477(b). Moreover, contrary to claimant's contention, the administrative law judge, within his discretion as trier-of-fact, found that the opinions of Drs. Zaldivar and Crisalli are entitled to greater weight because he found these physicians' opinions to be better reasoned and documented than the opinion of Dr. Mullins. *Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Additionally, the administrative law judge properly noted

[5]The record reveals that Dr. Crisalli is Board-certified in internal medicine and pulmonary disease. Employer's Exhibit 2. Dr. Zaldivar is a B reader and is Board-certified in internal medicine, pulmonary disease, sleep disorders, and critical care. Director's Exhibit 28. The qualifications of Dr. Mullins are not in the record.

[6]The administrative law judge additionally "note[d] that Dr. Mullins relied, at least in part, upon a questionable positive chest x-ray reading which was inconsistent with the overwhelming preponderance of the x-ray evidence." Decision and Order at 11. As discussed above, the administrative law judge has provided rational alternative bases for according greater weight to the opinions of Drs. Zaldivar and Crisalli. Therefore, we deem harmless, any error the administrative law judge may have made in according less weight to Dr. Mullins' opinion because it was based in part on "a questionable positive chest x-ray," *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *see Taylor v. Director, OWCP*, 9 BLR 1-22 (1986); *Dixon v. North Camp Coal* Co., 8 BLR 1-344 (1985); *see generally Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

that Drs. Zaldivar and Crisalli are "pulmonary specialists" and Dr. Mullins' credentials are not in the record. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Claimant further asserts that employer's physicians, on whom the administrative law judge relied, solely based their opinions on the negative x-ray evidence. Claimant's Brief at 5. Claimant, therefore, contends that his claim was denied solely on the basis of a negative x-ray in contradiction to 20 C.F.R. §718.202(b). *Id.* At his deposition, Dr. Zaldivar discussed his reasons for not finding the existence of pneumoconiosis. Employer's Exhibit 11 at 8-22. Specifically, Dr. Zaldivar testified that he considered his examination of claimant as well as the examinations performed by Dr. Crisalli and Dr. Mullins. *Id.* Additionally, Dr. Zaldivar indicated that, in rendering his diagnosis, he relied on the evidence of record, including the x-ray and CT scan evidence and the pulmonary function and blood gas studies. *Id.* At his deposition, Dr. Crisalli testified that his conclusion, that claimant does not have pneumoconiosis, is based on the x-ray, CT scan, physical examination, and pulmonary function study evidence contained in the record. Employer's Exhibit 10 at 22-23. Moreover, Dr. Crisalli stated that he did not find that claimant did not have pneumoconiosis simply because the x-ray he interpreted was negative.[7] *Id.* at 23. Thus, there is no merit in claimant's assertion that these physicians only based their opinions on the negative x-ray evidence. *See* discussion, *supra*. Accordingly, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Lucostic*, 8 BLR at 1-47.

[7]Dr. Crisalli testified that:

> I'm finding that there is no pneumoconiosis based on all the aspects of the examination, including the history which certainly shows that [claimant] has had significant exposure to coal dust, but also on my physical exam which shows evidence of tobacco smoke related emphysema, the chest x-ray which shows no coal workers' pneumoconiosis, and the pulmonary function studies which show findings consistent with tobacco smoke related emphysema. So it's taking it all together that allows me to rule out pneumoconiosis in this case.

Employer's Exhibit 10 at 23.

Claimant also asserts that although the administrative law judge cited to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), in his Decision and Order, he failed to weigh all types of relevant evidence together, when considering whether claimant has established the existence of pneumoconiosis. Claimant's Brief at 5. Pursuant to Section 718.202(a), the administrative law judge stated that he "weighed all the relevant evidence together" and determined, "[s]ince the weight of the x-ray evidence and medical opinion evidence is negative for pneumoconiosis, I find that pneumoconiosis has not been established under 20 C.F.R. §718.202(a)." Decision and Order at 11. Because the administrative law judge considered the medical opinion evidence and the x-ray evidence together, we reject claimant's contention that the administrative law judge failed to comply with the decision of the United States Court of Appeals for the Fourth Circuit in *Compton*. *Compton*, 211 F.3d at 211, 22 BLR at 2-174; *see Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Therefore, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a).

As claimant has not established the existence of pneumoconiosis pursuant to Section 718.202(a), a requisite element of entitlement under Part 718,[8] we also affirm the administrative law judge's denial of benefits.[9] *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[8]In light of the foregoing, it is unnecessary for the Board to address claimant's assertions regarding the cause of claimant's total respiratory disability pursuant to Section 718.204(c), as a finding of entitlement is precluded. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc).*

[9]Employer asserts that claimant's Petition for Review and Supporting Brief were untimely filed with the Board. Employer's Brief at 4 n.4. Because we affirm the administrative law judge's denial of benefits, we decline to address employer's assertion regarding the untimeliness of claimant's Petition for Review and Supporting Brief. *See Bibb v. Clinchfield Coal Co.*, 7 BLR 1-134, 1-136 (1984); *Creggar v. U.S. Steel Corp.*, 6 BLR 1-1219, 1-1222 (1984).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge