BRB No. 04-0443 BLA

VESTER OSBORNE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
	)	
and	)	
	)	DATE ISSUED: 02/18/2005
	)	
OLD REPUBLIC INSURANCE 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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (03-BLA-5355) of Administrative Law Judge Richard A. Morgan rendered 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). The administrative law judge credited claimant with twenty years of coal mine employment. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] Decision and Order at 3. The administrative law judge found that the evidence established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), but failed to establish the existence of pneumoconiosis or total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.204(c), respectively. Accordingly, benefits were denied.

On appeal, claimant contends that the opinions of employer's experts are not credible as they are based on their "refusal" to diagnose pneumoconiosis by x-ray evidence. Claimant's Brief at 6, 7. Claimant thus asserts that the administrative law judge erred by relying on the opinions of employer's experts to deny benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose out of his coal mine employment, and that he is totally disabled due to a respiratory or pulmonary impairment arising out of coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any 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 contends that the administrative law judge's analysis of the evidence was flawed since he relied on the opinions of employer's experts, whose reports were not based on all the evidence of record but on their "refusal" to diagnose pneumoconiosis by x-ray evidence. Claimant's Brief at 5-7. Claimant asserts that employer's experts' opinions are unreasoned. The administrative law

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[1] Claimant filed his claim for benefits on January 25, 2001, which the district director awarded by Proposed Decision and Order on May 9, 2002. Director's Exhibits 1, 20. At employer's request, the claim was referred to the Office of Administrative Law Judges on January 17, 2003, and a hearing was held before the administrative law judge on July 10, 2003. Director's Exhibits 22 - 27.

judge considered the following medical opinions at 20 C.F.R. §718.202(a)(4): Dr. Rasmussen diagnosed pneumoconiosis and opined that coal dust exposure caused claimant's disabling lung disease. Director's Exhibit 6. Drs. Zaldivar and Branscomb opined that claimant does not have pneumoconiosis or any dust disease of the lung, and that any impairment is unrelated to coal mine employment. Employer's Exhibits 4, 5, 6, 11. Dr. Fino diagnosed pulmonary disability due to interstitial fibrosis unrelated to the inhalation of coal mine dust. Employer's Exhibits 7, 10. Hospital records document claimant's treatment for various medical problems, including a pulmonary nodule and pneumonia. Employer's Exhibit 1. The CT scan evidence of record is entirely negative for pneumoconiosis. Employer's Exhibits 1, 9.

The administrative law judge indicated that he was not persuaded by Dr. Rasmussen's opinion, the only opinion of record that supports claimant's burden to establish the existence pneumoconiosis and total disability due thereto. The administrative law judge specifically found that Dr. Rasmussen relied, *inter alia*, on a "grossly understated smoking history of one pack [of cigarettes] per day from 1963 to 1973," and "did not consider other evidence, such as hospital records, CT scan interpretations or clinical test results and findings by other physicians." Decision and Order at 15-16. The administrative law judge also determined that Drs. Zaldivar, Branscomb, and Fino "provided more detailed explanations regarding how the relevant medical data correspond with their opinions regarding the etiology of claimant's pulmonary or respiratory impairment." Decision and Order at 16. The administrative law judge thus properly accorded greater weight to the opinions of Drs. Zaldivar, Branscomb, and Fino over the contrary opinion of Dr. Rasmussen, on the issues of both the existence of pneumoconiosis and the cause of claimant's disability. *See Underwood v. Elkay Mining*, 105 F.3d 946, 951, 21 BLR 2-23, 31-33 (4th Cir. 1997); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

It is claimant's burden to specify error in the decision below. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Claimant, who is represented by counsel, alleges no error in the administrative law judge's permissible weighing of Dr. Rasmussen's opinion. *See Underwood*, 105 F.3d at 951, 21 BLR at 2-31-33. Review of claimant's brief discloses no allegation of error in the administrative law judge's consideration of any evidence, other than the reports of employer's medical experts, reports which do not support claimant's case. Because the administrative law judge properly exercised his discretion in considering the quality of Dr. Rasmussen's opinion, and in refusing to credit it, *Id.*; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993), we affirm the administrative law judge's finding that Dr.

Rasmussen's report fails to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Further, contrary to claimant's assertion, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), was based on his review of all of the relevant evidence pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).[2] Decision and Order at 14-16. We thus affirm the administrative law judge's decision denying benefits in this case.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[2] Claimant specifies no error in the administrative law judge's findings at 20 C.F.R. §718.202(a)(1)-(3). We thus affirm the administrative law judge's findings at 20 C.F.R. §718.202(a)(1)-(3). *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).