BRB No. 07-0444 BLA

J. R. J.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELK RUN COAL COMPANY	)	
	)	DATE ISSUED: 02/29/2008
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2004-BLA-5955) of Administrative Law Judge Daniel F. Solomon denying benefits 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).[1] The administrative law judge accepted the parties' stipulation that claimant worked at least ten years in coal mine employment, and

[1] Claimant filed his claim on May 1, 2003. Director's Exhibit 1.

adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] Although the administrative law judge determined that claimant suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), he found that the evidence was insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge further found that claimant was unable to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find that he established the existence of pneumoconiosis based on the x-ray and medical opinion evidence. Claimant also contends that the administrative law judge erred in his consideration of the issue of disability causation. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this appeal.[3]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, 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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(en banc). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in West Virginia. *See* Director's Exhibits 1, 2; *Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

[3] We affirm the administrative law judge's finding of at least ten years of coal mine employment, his finding that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3), and his finding that claimant established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), as those findings are unchallenged by the parties on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant contends that the administrative law judge erred by failing to find that he established the existence of pneumoconiosis. Under Section 718.202(a)(1), claimant asserts that, contrary to the administrative law judge's finding, the "unequivocal and probative" x-ray interpretations by Drs. Forehand and Patel establish the existence of pneumoconiosis by a preponderance of the evidence. Claimant's Brief at 6-8. We disagree. In this case, the record contains seven readings of four x-rays dated June 24, 2003, October 20, 2003, June 23, 2004, and December 12, 2005. Decision and Order at 4. The June 24, 2003 x-ray was read by Dr. Patel, a Board-certified radiologist and B reader, as positive for pneumoconiosis, and by Dr. Wheeler, a Board-certified radiologist and B reader, as negative for pneumoconiosis.[4] Director's Exhibits 10, 11. There is only one reading of the October 20, 2003 x-ray, which reading was by Dr. Willis, a B reader, as negative for pneumoconiosis. Director's Exhibit 11. Similarly, there is only one reading of the June 23, 2004 x-ray, which reading was by Dr. Zaldivar, a B reader, as negative for pneumoconiosis. Employer's Exhibit 2. The final x-ray dated December 12, 2005 was read as positive for pneumoconiosis by Dr. Forehand, a Board-certified radiologist and B reader, and as negative for pneumoconiosis by Dr. Wiot, a Board-certified radiologist and B reader. Claimant's Exhibit 1; Employer's Exhibit 8.

In weighing the conflicting x-ray evidence at Section 718.202(a)(1), the administrative law judge properly noted that, of the six readings by B readers, four were negative for pneumoconiosis. Decision and Order at 4. He further noted that of the x-ray readings by the dually qualified physicians, there were two negative readings compared to one positive reading. The administrative law judge further noted that while the most recent x-ray dated December 12, 2005 had conflicting positive and negative readings, he considered that x-ray to be negative for pneumoconiosis based on the superior credentials of Dr. Wiot, who was dually qualified, in comparison to Dr. Forehand, who was only a B reader. The administrative law judge thus concluded that a preponderance of the x-ray evidence was negative for pneumoconiosis. This was proper. Because the administrative law judge performed a qualitative and quantitative analysis of the x-ray evidence, and his finding that claimant failed to establish the existence of pneumoconiosis is supported by substantial evidence, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1). *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *White v. New White Coal Co.*, 23 BLR 1-4 (2004).

With respect to Section 718.202(a)(4), claimant asserts that the administrative law judge failed to provide an adequate basis for discounting the opinions of Drs. Forehand and Rasmussen, that claimant suffers from pneumoconiosis, as compared to the contrary

[4] Dr. Binns, a Board-certified radiologist and B reader, also read the June 24, 2003 x-ray for quality purposes only. Director's Exhibit 10.

opinions of Drs. Crisalli and Zaldivar, that claimant does not suffer from the disease. Claimant's assertion of error is without merit.

Dr. Rasmussen examined claimant on June 24, 2003. He reported a positive x-ray, a normal pulmonary function study, and an arterial blood gas study showing very marked impairment in oxygen transfer during light exercise. Director's Exhibit 10. Dr. Rasmussen diagnosed that claimant suffered from coal workers' pneumoconiosis and chronic bronchitis due to coal dust exposure and smoking. *Id*. Citing several medical journal articles he had authored, Dr. Rasmussen stated that claimant's "pattern of impairment, *i.e*., very marked impairment in oxygen transfer during light exercise absent ventilatory impairment, is commonly observed among impaired coal miners." *Id*.

Dr. Crisalli examined claimant on October 20, 2003. He reported a negative x-ray, pulmonary function studies showing a mild obstruction, and a normal resting arterial blood gas study (there was no exercise test performed). Director's Exhibit 11. Based on his examination and a review of Dr. Rasmussen's report, Dr. Crisalli diagnosed that claimant did not suffer from pneumoconiosis or any respiratory condition due to coal dust exposure. *Id*. Dr. Crisalli criticized Dr. Rasmussen's opinion that claimant's abnormal exercise arterial blood gas study proved a lung disease due to coal dust exposure, explaining that, because claimant's VD/VT ratio (0.22) was normal at peak exercise during Dr. Rasmussen's test, "there is no ventilation-perfusion mismatch and one cannot attribute [claimant's] decrease in oxygenation to pulmonary disease." *Id*. Furthermore, Dr. Crisalli noted that in Dr. Rasmussen's cited study, all of the miners who were diagnosed with a coal dust-related impairment, "showed dead space to tidal volume ratio (VD/VT) of at least 0.356." *Id*. As such, Dr. Crisalli opined that claimant did not fit into the population of patients reported by Dr. Rasmussen in the cited study. *Id*. Noting that claimant had a normal arterial blood gas study during his examination and only a mild respiratory impairment on pulmonary function testing, Dr. Crisalli diagnosed that claimant did not have pneumoconiosis, and that he suffered from a mild obstructive respiratory condition due to a prolonged history of smoking. *Id*.

Dr. Zaldivar examined claimant on June 23, 2004 and reported a negative x-ray for pneumoconiosis, moderate airways obstruction based on the pulmonary function testing, and air trapping by lung volumes. Employer's Exhibit 1. Dr. Zaldivar diagnosed bronchiolitis and emphysema, both of which he attributed to smoking. He opined that both of these conditions were causing airways impairment, reducing the diffusion capacity, and dropping the PO2 level during exercise. *Id*. In a deposition conducted on November 15, 2004, Dr. Zaldivar also criticized the medical literature cited by Dr. Rasmussen in support of his opinion. Employer's Exhibit 6. Dr. Zaldivar reiterated his diagnosis that claimant did not have any respiratory condition due to coal dust exposure. *Id*.

Dr. Forehand examined claimant on December 19, 2005. He reported that claimant had a positive x-ray for pneumoconiosis, a mild obstructive impairment based on the results of his pulmonary function testing, and an abnormal blood gas study showing a reduced oxygen response (PO2 level) on exercise. Claimant's Exhibit 1. Dr. Forehand diagnosed coal workers' pneumoconiosis and a "mild cigarette-smoker's lung disease." *Id*. He also opined that claimant's pattern of impairment was consistent with coal workers' pneumoconiosis, since there was no evidence of hyperinflation, enlarged heart, congestive heart failure or emphysema on x-ray, the FEV1 value was 86 percent of predicted, and there was an abnormal exercise blood gas study. *Id*.

In weighing the conflicting medical opinion evidence on the issue of the existence of pneumoconiosis at Section 718.202(a)(4), the administrative law judge properly took into account the qualifications of the physicians and noted that, "unlike Drs. Crisalli and Zaldivar, who are both Board-certified pulmonary specialists, Drs. Rasmussen and Forehand are not Board-certified in Pulmonary Diseases." Decision and Order at 10. Although the administrative law judge considered Dr. Rasmussen's qualifications to be "roughly comparable to those of Drs. Crisalli and Zaldivar[,]" based on Dr. Rasmussen's "extensive" clinical experience in the field of pulmonary medicine, the administrative law judge noted that Dr. Forehand was not as qualified as employer's experts. *Id*. Therefore, contrary to claimant's assertion, the administrative law judge permissibly assigned less weight to Dr. Forehand's opinion at Section 718.202(a)(4),[5] in comparison to the other opinions of record. *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (*en banc); Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 10.

We also affirm the administrative law judge's finding that claimant did not establish the existence of clinical pneumoconiosis as the administrative law judge properly determined that the diagnoses of clinical coal workers' pneumoconiosis by Drs. Forehand and Rasmussen were based, in part, on "questionable x-ray readings." Decision and Order at 10. Specifically, as discussed *infra*, Dr. Rasmussen's x-ray dated June 24, 2003, while read as positive for pneumoconiosis by Dr. Patel, a Board-certified radiologist and B reader, was also read as negative for pneumoconiosis by Dr. Wheeler, a Board-certified radiologist and B reader. Director's Exhibits 10, 11. Similarly, Dr. Forehand, a B reader, read the x-ray taken in conjunction with his examination as positive

[5] Although claimant maintains that Dr. Forehand is as equally qualified as Drs. Crisalli and Zaldivar, he fails to point out what aspects of Dr. Forehand's experience should be considered comparable to Board-certification in pulmonary medicine or to otherwise explain why the administrative law judge did not act within his discretion in assigning less weight to Dr. Forehand's opinion at 20 C.F.R. §718.202(a)(4). Claimant's Brief at 5.

for pneumoconiosis, but the same x-ray was reread by Dr. Wiot, a dually qualified physician, as negative for pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibit 8.

Furthermore, contrary to claimant's assertion, the administrative law judge gave permissible reasons for assigning less weight to Dr Rasmussen's diagnosis of legal pneumoconiosis (chronic obstructive pulmonary disease due, in part, to coal dust exposure), in comparison to the contrary opinions of Drs. Crisalli and Zaldivar. First, the administrative law judge permissibly determined that "Drs. Crisalli and Zaldivar provided reasoned explanations which undermine Dr. Rasmussen's assertion that the 'pattern of impairment' [demonstrated by the objective evidence in this case] was indicative of a miner with an impairment due to pneumoconiosis." Decision and Order at 10; *see Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Secondly, the administrative law judge permissibly determined that, because Dr. Rasmussen did not fully address what role, if any, claimant's heart condition played in his pulmonary condition, his opinion as to the etiology of claimant's respiratory disease was less persuasive.[6] *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Claimant's assertions of error are tantamount to a request that the Board reweigh the medical opinion evidence of record, a role outside its scope of review. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility, *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999); *Underwood v Elkay Mining Inc*., 105 F.3d 946, 949, 21 BLR 2-23, 2-2-28 (4th Cir. 1997), we affirm the administrative law judge's determination that claimant is unable to establish the existence of pneumoconiosis based on the medical opinion evidence pursuant to Section 718.202(a)(4). We also affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). As claimant did not

[6] We reject claimant's assertion that, because Dr. Rasmussen noted claimant's history of heart disease, it is reasonable to assume that Dr. Rasmussen did not consider heart disease to be a causative factor for claimant's respiratory condition. An administrative law judge may reject a physician's opinion where he finds that the doctor did not adequately explain the basis for his diagnosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

establish the existence of pneumoconiosis, a requisite element of entitlement, benefits are precluded.[7] *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[7] In light of our affirmance of the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a) and the denial of benefits, we need not address claimant's argument with respect to the issue of disability causation pursuant to 20 C.F.R. §718.204(c).