BRB No. 07-0468 BLA

F.F.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	
and	)	
	)	
PITTSTON COMPANY	)	DATE ISSUED: 02/29/2008
	)	
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 Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

F.F., Haysi, Virginia, *pro se*.

Timothy W. Grisham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Emily Goldberg-Kraft (Gregory F. Jacob, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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 Denying Benefits (2006-BLA-05284) of Administrative Law Judge Jeffrey Tureck 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). This case involves a subsequent claim filed on August 30, 2004.[2] Based on employer's concession that claimant was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant had established a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309(d). Decision and Order Denying Benefits (Decision and Order) at 4. However, reviewing the claim on the merits,[3] the administrative law judge determined that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds, urging affirmance of the denial of benefits.[4] The

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

[2] Claimant's initial claim for black lung benefits was filed on March 29, 1989, but was denied by reason of abandonment. Director's Exhibit 1; Decision and Order at 2.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, because claimant's coal mine employment occurred in Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibits 1, 4.

[4] The administrative law judge initially determined that the record evidence established that employer had been incorrectly named as the responsible operator because it was not the most recent coal mine operator to have employed claimant for a cumulative period of one year. Decision and Order at 2; *see* 20 C.F.R. §725.101(a)(32). The administrative law judge correctly noted, however, that employer may not be dismissed as a party to the case without the consent of the Director, Office of Workers' Compensation Programs (the Director). Decision and Order at 7; *see* 20 C.F.R. §725.465(b). Employer asks the Board on appeal to dismiss it as a party to this claim. The Director concedes on appeal that the administrative law judge correctly determined that employer is not the proper responsible operator, and that the Black Lung Disability Trust Fund must assume liability in the event that claimant is found entitled to benefits.

Director, Office of Workers' Compensation Programs (the Director), has filed a response, asserting that the administrative law judge's denial of benefits was properly based on his finding that claimant did not have pneumoconiosis. The Director asserts that while the administrative law judge did not credit the opinion of Dr. Forehand, who performed the Department of Labor (DOL) examination, on the issue of the existence of pneumoconiosis, the Board must conclude that the DOL has satisfied its obligation to provide claimant with a complete and credible pulmonary evaluation, as required under the Act.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated 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 under 20 C.F.R. 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

In considering the x-ray evidence relevant to 20 C.F.R. Section 718.202(a)(1), the administrative law judge considered eight interpretations of four x-ray films taken on June 16, 2003, October 11, 2004, May 11, 2005 and December 15, 2005, noting that each x-ray had one positive and one negative reading for pneumoconiosis.[5] Decision and

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Director's Letter Brief at 2 n.3. In light of our affirmance of the denial of benefits herein, it is not necessary that we address employer's request for dismissal.

[5] A June 16, 2003 x-ray was read as positive by Dr. Ahmed, a Board-certified radiologist and B reader, and as negative for pneumoconiosis by Dr. Scott, a Board-certified radiologist and B reader. Claimant's Exhibit 2; Employer's Exhibit 5. Dr. Forehand, a B reader, read an October 11, 2004 x-ray as positive, while Dr. Scatarige, a dually qualified physician, read the same x-ray as negative for pneumoconiosis. Director's Exhibits 15, 19. Dr. Barrett also read the October 11, 2004 x-ray for quality purposes only. Director's Exhibit 17. Dr. Pathak, a B reader, read a May 11, 2005 x-ray as positive for pneumoconiosis, while Dr. Wheeler, a dually qualified physician, read that x-ray as negative. Director's Exhibit 20; Claimant's Exhibit 8. Finally, a December 15,

Order at 4-5; Director's Exhibits 15, 19-20; Claimant's Exhibits 1, 8; Employer's Exhibits 2, 5. Taking into consideration the qualifications of the physicians, the administrative law judge permissibly assigned greater probative weight to the four negative readings for pneumoconiosis, in comparison to the four positive readings. The administrative law judge specifically had discretion to assign controlling weight to the negative readings by Drs. Wheeler, Scott, and Scaterige, because he considered them to be the most qualified physicians of record, being dually qualified as Board-certified radiologists and B readers, and also professors of radiology at the medical school at Johns Hopkins University Hospital. Decision and Order at 5; *see* 20 C.F.R. §718.202(a)(1); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Because the administrative law judge conducted a qualitative and quantitative analysis of the x-ray evidence of record in finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis, we affirm his finding pursuant to Section 718.202(a)(1), as supported by substantial evidence.[6] *See* 20 C.F.R. §718.202(a)(1).

Likewise, we affirm the administrative law judge's determination that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) and (a)(3). A review of the record reveals that there is no biopsy evidence; hence, claimant cannot establish the existence of pneumoconiosis under Section 718.202(a)(2). Decision and Order at 4. Similarly, a review of the record reveals that none of the presumptions set forth in Section 718.202(a)(3) is applicable to the instant case as the record contains no evidence establishing that claimant has complicated pneumoconiosis, *see* 20 C.F.R. §718.304, the claim was filed after January 1, 1982, *see* 20 C.F.R. §718.305, and this is a living miner's claim, *see* 20 C.F.R. §718.306.

Turning to the administrative law judge's consideration of the medical opinion evidence pursuant to Section 718.202(a)(4), there are three physicians' opinions of record. Dr. Forehand performed an examination of claimant at the request of the Department of Labor on October 11, 2004. Dr. Forehand diagnosed coal workers'

2005 x-ray was read as positive for pneumoconiosis by Dr. Alexander, and negative for pneumoconiosis by Dr. Scaterige, both of whom are dually qualified physicians. Claimant's Exhibit 1; Employer's Exhibit 2.

[6] The administrative law judge also noted that none of the physicians who interpreted claimant's CT scans made a diagnosis of pneumoconiosis. Decision and Order at 5-6.

pneumoconiosis due to coal mine employment. Director's Exhibit 15. Dr. Hippensteel examined claimant on May 11, 2005 and opined that he suffered from emphysema due to smoking, but that he did not suffer from pneumoconiosis or any respiratory condition due to coal dust exposure. Director's Exhibit 20. Dr. Castle also examined claimant on March 7, 2006 and diagnosed that he does not have coal workers' pneumoconiosis or a coal mine dust related pulmonary condition. Dr. Castle further opined that claimant suffered from emphysema due to smoking. Employer's Exhibit 1.

The administrative law judge permissibly gave less weight to Dr. Forehand's diagnosis of coal workers' pneumoconiosis since it was based on Dr. Forehand's own positive x-ray reading of the October 11, 2004 x-ray, which x-ray was read as negative for pneumoconiosis by a more qualified physician. *See Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226 (2002) (*en banc*); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). In addition, the administrative law judge found that Dr. Forehand's opinion was less credible since the treatment records indicated that claimant suffered from chronic obstructive pulmonary disease (COPD) and Dr. Forehand was "about the only doctor who did not diagnose COPD and/or emphysema." Decision and Order at 6. The administrative law judge reasoned in this regard that "in the absence of a diagnosis of COPD or emphysema [Dr. Forehand] had to attribute the disability to some condition, which apparently led him to diagnose pneumoconiosis." *Id*. The administrative law judge further found that Dr. Forehand's opinion that claimant suffered from a respiratory condition due to coal dust exposure was not persuasive since the doctor relied on inaccurate cigarette smoking and coal mine employment histories, as provided by claimant at the time of Dr. Forehand's examination. *See Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); *see generally Shoup v. Director, OWCP*, 11 BLR 1-110, 1-112 (1987); Decision and Order at 6. Consequently, the administrative law judge rationally found that the opinion of Dr. Forehand was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order at 6; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). Accordingly, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis based on the medical opinion evidence at Section 718.202(a)(4). We also affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis, based on a preponderance of the evidence, pursuant to Section 718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Additionally, the Director asserts that while the administrative law judge did not find Dr. Forehand's opinion to be sufficient to establish the existence of pneumoconiosis, the Board should conclude that the DOL nonetheless fulfilled its duty to provide claimant

with a complete pulmonary evaluation. The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b); *see also Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). The record reflects that Dr. Forehand conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the DOL examination form. 20 C.F.R. §§718.101(a), 718.104, 725.406(a). Consequently, we agree with the Director that the DOL has met its obligation to provide a complete pulmonary evaluation, as required under the Act.[7] *Hodges*, 18 BLR at 1-87; *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-81 (1993); s*ee generally Cline v. Director, OWCP*, 972 F.2d 234, 16 BLR 2-137 (8th Cir. 1992).

Based on the foregoing, we affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Because claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement, benefits are precluded. *See* 20 C.F.R. §718.202(a); *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

[7] *See Gallaher v. Bellaire Corp.*, 71 Fed.Appx. 528, 2003 WL 21801463 (6th Cir. Aug. 4, 2003)(unpub.)(a report in which the physician addresses the essential elements of entitlement may satisfy the Director's obligation to provide claimant with a complete pulmonary evaluation).

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