BRB No. 09-0357 BLA

ROBERT WILSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RANGER FUEL CORPORATION	)	DATE ISSUED: 02/18/2010
	)	
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 – Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Juliet W. Rundle & Associates), Pineville, West Virginia, for claimant.

George E. Roeder, III and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2008-BLA-5523) of Administrative Law Judge Daniel L. Leland 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 twelve and one-half years of qualifying coal mine employment, and adjudicated this claim, filed on August 1, 2007, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge determined that the evidence of record was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), but insufficient to establish the existence of pneumoconiosis pursuant to

20 C.F.R. §718.202(a)(1)-(4), or disability causation pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's finding that pneumoconiosis was not established at Section 718.202(a), arguing that the administrative law judge erred in weighing the biopsy evidence at subsection (a)(2) and the medical opinion evidence at subsection (a)(4), and failed to weigh all relevant evidence together, consistent with the holding of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this cases arises, in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).[1] Claimant also challenges the administrative law judge's finding that claimant failed to establish disability causation pursuant to Section 718.204(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this case.

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 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 living miner's claim pursuant to 20 C.F.R. Part 718, 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).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. After finding that pneumoconiosis was not established at Section 718.202(a)(1),[2] the administrative law judge considered the conflicting reports of

[1] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in West Virginia. Hearing Transcript at 13; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] The administrative law judge determined that the October 2, 2007 x-ray weighed against a finding of pneumoconiosis, as it was read as negative by Dr. Wiot, a dually-qualified B reader and Board-certified radiologist, and as positive by Dr. Rasmussen, a B

the lung biopsy performed on May 15, 2007 at Section 718.202(a)(2). Decision and Order at 6. Dr. Moskaluk, whose credential are not contained in the record, performed the biopsy and indicated by gross description that "this pneumonectomy demonstrates end-stage interstitial pneumonitis," with "numerous fibrotic nodules . . . [and the presence of] abundant polarizable material . . . consistent with silicosis." Director's Exhibit 10. Dr. Moskaluk did not provide a microscopic description, other than stating that the microscopic examination substantiated the diagnosis of "end-stage lung disease with changes consistent with silicosis." *Id.* Dr. Caffrey, a Board-certified anatomical and clinical pathologist, subsequently performed a microscopic examination of the pathology slides, finding interstitial pneumonitis with fibrosis and honeycombing; one focus of pleural plaque formation; five lymph nodes showing large, hyalinized nodules without necrosis; and a slight amount of anthracotic pigment. Dr. Caffrey stated that, while he could not deny Dr. Moskaluk's diagnosis of silicosis, he did not agree with it, and he was unable to diagnose coal workers' pneumoconiosis or silicosis, as there were no lesions in the lung tissue. Employer's Exhibit 3. The administrative law judge permissibly found that Dr. Caffrey's opinion, that pneumoconiosis and/or silicosis was not present, was more complete, better reasoned, and entitled to greater weight, particularly in light of Dr. Caffrey's superior qualifications. Decision and Order at 6; *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). The administrative law judge rationally accorded less weight to the opinion of Dr. Moskaluk, since his report failed to include both a detailed microscopic and macroscopic description of the lungs, as required pursuant to the quality standards under 20 C.F.R. §718.106(a).[3] Thus, the administrative law judge rationally concluded that the weight of the biopsy evidence of record was insufficient to support a finding of pneumoconiosis at Section 718.202(a)(2), and we affirm his findings thereunder, as supported by substantial evidence.

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reader. Director's Exhibits 11, 12. The administrative law judge found that the December 19, 2007 x-ray also weighed against a finding of pneumoconiosis, as it was read as negative by Drs. Zaldivar and Meyer, both B readers, and as positive by a B reader, Dr. Ahmed. Claimant's Exhibit 2; Employer's Exhibits 1, 2. The administrative law judge found that the most recent x-ray of May 1, 2008 weighed against a finding of pneumoconiosis, as it was interpreted as negative by Dr. Wiot, a dually-qualified physician, and as positive by Dr. Ahmed, a B reader. Claimant's Exhibit 1; Employer's Exhibit 5; Decision and Order at 3, 6.

[3] The applicable regulation requires that a biopsy report include both a detailed gross macroscopic and microscopic description of the lungs. 20 C.F.R. §718.106(a). A physician who performs the biopsy itself must include the gross macroscopic findings as part of the original report. *J.V.S. v. Arch of West Virginia/Apogee Coal Co.*, 24 BLR 1-78, 1-92 (2008).

Next, after determining that none of the presumptions at Section 718.202(a)(3) was applicable to this claim,[4] the administrative law judge considered the conflicting medical opinions of record and their underlying documentation at Section 718.202(a)(4). The administrative law judge determined that Dr. Rasmussen diagnosed clinical and legal pneumoconiosis, while Drs. Zaldivar and Killeen opined that claimant does not have clinical or legal pneumoconiosis. Director's Exhibit 11; Employer's Exhibits 1, 4, 6, 7. The administrative law judge permissibly concluded that Dr. Rasmussen's diagnosis of clinical pneumoconiosis was entitled to little weight, as the doctor failed to provide reasoned support for his diagnosis, and because it was based, in part, upon a positive x-ray interpretation that was discredited by the negative interpretation of a better-qualified reader. *See Compton*, 211 F.3d 203, 22 BLR 2-162; Decision and Order at 6; Director's Exhibit 11, 12. Further, as Dr. Rasmussen indicated that claimant's diffuse interstitial fibrosis could be idiopathic or could be caused solely by smoking or coal dust exposure or asbestos exposure, and that "it is likely that there is a combination of factors, among these is coal mine dust, which contributes at least minimally," the administrative law judge rationally determined that Dr. Rasmussen's opinion was too equivocal to establish the existence of legal pneumoconiosis. Director's Exhibit 11; Decision and Order at 6; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987). The administrative law judge reasonably concluded that the weight of the medical opinions did not support a finding of pneumoconiosis at Section 718.202(a)(4), and we affirm his findings thereunder, as supported by substantial evidence. We find no merit to claimant's argument that the administrative law judge denied benefits on the basis of a negative x-ray; rather, he found that the evidence of record was insufficient to establish the existence of pneumoconiosis under any subsection at Section 718.202(a). Decision and Order at 6. Substantial evidence supports the administrative law judge's findings, and we affirm them, as consistent with *Compton*.

Lastly, because Dr. Rasmussen was the only physician who diagnosed pneumoconiosis, and he could only state that "coal mine dust likely contributes only minimally" to claimant's disabling respiratory impairment, we affirm, as supported by substantial evidence, the administrative law judge's determination that the evidence was insufficient to establish disability causation at Section 718.204(c). *See Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

[4] The record contained no evidence that the miner suffered from complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, and the presumptions set forth at 20 C.F.R. §§718.305 and 718.306 are inapplicable because this living miner's claim was filed after June 30, 1982. Decision and Order at 6.

As claimant has failed to establish either the existence of pneumoconiosis pursuant to Section 718.202(a), or total disability due to pneumoconiosis pursuant to Section 718.204(c), essential elements of entitlement, we affirm the administrative law judge's finding that claimant is precluded from entitlement to benefits under 20 C.F.R. Part 718. *See Anderson*, 12 BLR at 1-111; *Trent*, 11 BLR at 1-27.

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

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge