BRB No. 09-0469 BLA

MARION G. BROCK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
POWELL MOUNTAIN COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
PROGRESS FUELS CORPORATION	)	DATE ISSUED: 02/26/2010
	)	
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 – Denial of Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Marion G. Brock, Evarts, Kentucky, *pro se*.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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 – Denial of Benefits (07-BLA-5283) of Administrative Law Judge Joseph E. Kane

[1] Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the

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 at least fourteen years of qualifying coal mine employment,[2] and adjudicated this claim, filed on March 6, 2006, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge accepted the parties' stipulation that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b), but found that the weight of the evidence of record did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), an essential element of entitlement. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). We must affirm the Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a).

To be entitled to benefits under the Act, 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).

In evaluating the x-ray evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered twelve

---

administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] The record indicates that claimant's coal mine employment was in Virginia. Director's Exhibit 16. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

readings of six x-rays.[3] Decision and Order at 3-4, 15. A February 29, 2008 x-ray was read as positive for pneumoconiosis by Dr. Miller, and as negative by Dr. Scott, both of whom are B readers and Board-certified radiologists. Decision and Order at 3; Claimant's Exhibit 1; Employer's Exhibit 3. The administrative law judge permissibly found this x-ray to be inconclusive, based on the physicians' equal radiological qualifications. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81, 18 BLR 2A-1, 2A-12 (1994); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003); Decision and Order at 15. A June 25, 2007 x-ray was read as positive by Dr. Alexander, and as negative by Dr. Halbert, both of whom are B readers and Board-certified radiologists, and was also read as negative by Dr. Rosenberg, who is a B reader. Decision and Order at 4; Claimant's Exhibit 3; Employer's Exhibit 8. According the greatest weight to the readings by dually-qualified readers, the administrative law judge permissibly found this x-ray to be inconclusive, based on Dr. Alexander's and Dr. Halbert's equal radiological qualifications. *See Ondecko*, 512 U.S. at 280-81, 18 BLR at 2A-12; *Adkins*, 958 F.2d at 52-53, 16 BLR at 2-66; *Chaffin*, 22 BLR at 1-300; Decision and Order at 15. An August 30, 2006 x-ray was read as positive by Dr. Miller, and the administrative law judge properly found this x-ray to be positive, based on Dr. Miller's uncontradicted reading.[4] Decision and Order at 4, 15; Claimant's Exhibit 2. An April

[3] The record contains an additional reading for quality only (Quality 1), by Dr. Barrett, of the April 18, 2006 x-ray. Director's Exhibit 14.

[4] The administrative law judge noted, correctly, that Dr. Miller's reading of the August 30, 2006 x-ray was submitted by claimant in rebuttal of a reading of the same film by Dr. Dahhan. Decision and Order at 4. The administrative law judge properly found that, because employer ultimately decided not to submit Dr. Dahhan's x-ray reading, claimant was not entitled to submit a reading in rebuttal, pursuant to 20 C.F.R. §725.414(a)(2)(ii). *Id.* The administrative law judge acted within his discretion in concluding, however, that because claimant reasonably obtained a rebuttal reading of Dr. Dahhan's x-ray rather than obtaining a second rebuttal reading of the June 25, 2007 x-ray, which claimant was entitled to do, and because both parties ultimately submitted the same number of x-ray readings, good cause permitted the admission and consideration of claimant's August 30, 2006 x-ray reading. Decision and Order at 4. The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-55 (2004)(*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (*en banc*). As we can detect no abuse of discretion under the facts and circumstances of this case, and as no objection has been raised by employer, we affirm the administrative law judge's determination to admit Dr. Miller's reading of the August 30, 2006 x-ray into the record. 20 C.F.R. §725.465(a)(1); *Dempsey*, 23 BLR at 1-55.

18, 2006 x-ray was read as positive by Dr. Alexander and by Dr. Baker, who is a B reader, and as negative by Dr. Wiot, who is a B reader and Board-certified radiologist. Decision and Order at 4; Claimant's Exhibit 4; Employer's Exhibit 1; Director's Exhibit 13. Again according the greatest weight to the readings by dually-qualified readers, the administrative law judge permissibly found this x-ray to be inconclusive, based on Dr. Alexander's and Dr. Wiot's equal radiological qualifications. *See Ondecko*, 512 U.S. at 280-81, 18 BLR at 2A-12; *Adkins*, 958 F.2d at 52-53, 16 BLR at 2-66; *Chaffin*, 22 BLR at 1-300; Decision and Order at 15. A June 23, 2005 x-ray was read as positive by Dr. Alexander, and as negative by Dr. Wheeler, who is a B reader and Board-certified radiologist. Decision and Order at 4; Director's Exhibit 15; Employer's Exhibit 2. The administrative law judge permissibly found this x-ray to be inconclusive, based on the physicians' equal radiological qualifications. *See Ondecko*, 512 U.S. at 280-81, 18 BLR at 2A-12; *Adkins*, 958 F.2d at 52-53, 16 BLR at 2-66; *Chaffin*, 22 BLR at 1-300; Decision and Order at 15.

Finally, the administrative law judge noted that employer submitted a reading of a May 29, 2003 x-ray that was contained in claimant's treatment records. Decision and Order at 4. Dr. Ramakrishnan, a B reader, opined that the x-ray showed a mild to moderate degree of emphysematous changes, and prominent marking of the hila on both sides, with poorly defined margins. Employer's Exhibit 11. The administrative law judge initially found, correctly, that Dr. Ramakrishnan's failure to classify the May 29, 2003 x-ray reading according to the International Labour Organization (ILO) system referenced in 20 C.F.R. §718.102(b), did not preclude its consideration, as the quality standards contained in 20 C.F.R. Part 718 apply only to "evidence developed by any party . . . in connection with a claim[.]" 20 C.F.R. 718.101(b); *see J.V.S.* [*Stowers*] *v. Arch of W. Va./Apogee Coal Co.*, 24 BLR 1-78, 1-89 (2008). *see also* 64 Fed. Reg. 54966, 54975 (Oct. 8, 1999); 65 Fed. Reg. 79,929 (Dec. 20, 2000). In addition, while Dr. Ramakrishnan did not explicitly state that pneumoconiosis was absent, the administrative law judge acted within his discretion in concluding that Dr. Ramakrishnan's x-ray reading was negative for the existence of pneumoconiosis, based upon Dr. Ramakrishnan's radiological qualifications, and the fact that his description of his findings was detailed, yet did not reference pneumoconiosis. *See Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996), *modified on recon.*, 21 BLR 1-52 (1997); Decision and Order at 5.

Having considered that the record contains multiple conflicting readings by similarly qualified readers, and having determined that the record contains one positive x-ray, one negative x-ray, and four inconclusive x-rays for pneumoconiosis, the administrative law judge permissibly concluded that the x-ray evidence, as a whole, was inconclusive and did not support a finding of pneumoconiosis. *See Ondecko*, 512 U.S. at 280-81, 18 BLR at 2A-12; *Adkins*, 958 F.2d at 52-53, 16 BLR at 2-66; *Chaffin*, 22 BLR at 1-300; Decision and Order at 15. Substantial evidence supports the administrative law

judge's finding. Therefore, we affirm the administrative law judge's finding that claimant failed to meet his burden of proof pursuant to 20 C.F.R. §718.202(a)(1).

Because there is no biopsy or autopsy evidence of record, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 15. Furthermore, the administrative law judge properly found that claimant is not entitled to any of the statutory presumptions set forth at 20 C.F.R. §718.202(a)(3).[5] *Id.*

Turning to the medical opinion evidence relevant to the existence of clinical and legal pneumoconiosis[6] pursuant to 20 C.F.R. § 718.202(a)(4), the administrative law judge discussed the medical opinions of Drs. Fleenor, Baker, Rosenberg, and Vuskovich. Decision and Order at 6-11. Dr. Fleenor, who is Board-certified in Family Practice and is claimant's treating physician, opined that a July 17, 2007 computerized tomography (CT) scan "shows nodularity compatible with coal workers' pneumoconiosis," and further stated that pulmonary function testing revealed "very severe obstruction." Claimant's Exhibit 7. Dr. Baker, who is Board-certified in Internal Medicine and Pulmonary Disease, diagnosed clinical pneumoconiosis based on a positive x-ray and a history of twenty-three years of coal mine dust exposure. Director's Exhibit 13 at 15-16. Dr. Baker also opined that claimant suffers from chronic obstructive pulmonary disease (COPD) and severe hypoxemia, due to both smoking and coal mine dust exposure. Director's Exhibit 13 at 15-16. Dr. Rosenberg, who is Board-certified in Internal Medicine and Pulmonary Disease, and Dr. Vuskovich, who is Board-certified in Occupational Medicine, both opined that claimant does not have coal workers' pneumoconiosis or any

[5] Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed this claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, because this claim is not a survivor's claim, the Section 718.306 presumption is inapplicable. *See* 20 C.F.R. §718.306.

[6] A finding of either clinical pneumoconiosis or legal pneumoconiosis is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

coal dust-related lung disease, but suffers from COPD and emphysema due to smoking.[7] Employer's Exhibits 6, 8-10.

The administrative law judge rationally discounted Dr. Fleenor's diagnosis of clinical pneumoconiosis, which was based on Dr. Ramakrishnan's July 17, 2007 CT scan reading, because Dr. Ramakrishnan, a B reader, interpreted the scan as showing only "mild nodular type of interstitial disease" without identifying pneumoconiosis as the disease process, and because Dr. Wheeler, a B reader and Board-certified radiologist, specifically opined that the July 17, 2007 CT scan was negative for the existence of pneumoconiosis. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-12, 22 BLR 2-162, 2-175 (4th Cir. 2000); Decision and Order at 16; Claimant's Exhibit 7; Employer's Exhibits 4, 11. The administrative law judge also found, correctly, that while Dr. Fleenor also diagnosed a severe obstructive impairment, he "did not state or otherwise explain" why claimant's lung disease is due to coal mine dust exposure, and, therefore, his opinion did not support a finding of legal pneumoconiosis. Decision and Order at 16; Claimant's Exhibit 7. Thus, the administrative law judge permissibly concluded that Dr. Fleenor's opinion was "insufficiently reasoned" to support a finding of pneumoconiosis, notwithstanding his status as claimant's treating physician. 20 C.F.R. §718.104(d)(5); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Akers*, 131 F.3d at 441, 21 BLR at 2-274; Decision and Order at 17.

The administrative law judge also permissibly discredited Dr. Baker's diagnosis of clinical pneumoconiosis, because the diagnosis was based on Dr. Baker's positive reading of the April 18, 2006 x-ray, which the administrative law judge found to be inconclusive, based on conflicting readings by more highly qualified physicians, and because the administrative law judge found that the preponderance of the x-ray evidence as a whole was inconclusive for the existence of pneumoconiosis. *See Compton*, 211 F.3d at 211-12, 22 BLR at 2-175; Decision and Order at 16; Director's Exhibit 13; Claimant' Exhibit 4; Employer's Exhibit 1. Further, the administrative law judge acted within his discretion when he found that Dr. Baker's opinion, that claimant has legal pneumoconiosis, in the form of COPD due to both smoking and coal dust exposure, lacked the "required reasoning" to establish the existence of pneumoconiosis, because Dr. Baker "simply concluded that Claimant's respiratory symptoms are due to both coal mine dust exposure and smoking without any analysis or discussion." *See Hicks*, 138 F.3d at

[7] Specifically, Dr. Rosenberg diagnosed chronic obstructive pulmonary disease (COPD) and centrilobular emphysema, due to smoking. Employer's Exhibits 8, 9, 10 at 13-16. Dr. Vuskovich diagnosed giant bullous emphysema, due to smoking. Employer's Exhibit 6 at 12-14, 7 at 9, 17.

533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; Decision and Order at 21; Claimant's Exhibit 13.

As substantial evidence supports the administrative law judge's determination to discredit the opinions of Drs. Fleenor and Baker, the only physicians to diagnose the existence of either clinical or legal pneumoconiosis, we affirm the administrative law judge's finding that, "[t]herefore, claimant has not established the existence of pneumoconiosis by reasoned medical opinion," pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 21; *see Compton*, 211 F.3d at 207-208, 22 BLR at 2-168; *Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir 1997).

Because we have affirmed the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a requisite element of entitlement, the administrative law judge's denial of benefits is affirmed. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge