BRB No. 04-0375 BLA

GEORGE F. SINES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 01/12/2005
	)	
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 Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

George F. Sines, Tunnelton, West Virginia, *pro se*.

Dorothea J. Clark (Jackson Kelly PLLC), Morgantown, West Virginia, 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 (03-BLA-5663) of Administrative Law Judge Fletcher E. Campbell, Jr. 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] Claimant was also not represented by counsel when the instant case was before the administrative law judge. Because claimant was made aware of his right to counsel without cost to him, *see* Notice of Hearing (June 03, 2003), and was given the opportunity to present evidence on his behalf and to respond to evidence proffered by employer, *see* Hearing Transcript at 12-15, 23-39, we hold that the requirements enunciated in *Shapell v. Director, OWCP*, 7 BLR 1-304 (1988), were satisfied.

The instant claim is claimant's third claim for benefits. Both previous claims were denied because claimant failed to establish any of the elements of entitlement. Director's Exhibits 1, 2. Claimant filed the instant claim on January 31, 2001. Director's Exhibit 4. On September 11, 2003, a hearing was held before the administrative law judge.

In his decision dated December 16, 2003, the administrative law judge considered the entirety of the evidence of record, including evidence previously submitted in conjunction with the prior claims, and concluded that such evidence failed to establish the presence of a chronic coal-dust related lung disease, *i.e.*, pneumoconiosis, or a totally disabling pulmonary or respiratory impairment. *See* 20 C.F.R. §§718.202(a), 718.204(b). Further, the administrative law judge specifically stated that he did not consider "the duplicate claim issue," *see* 20 C.F.R. §725.309, as claimant failed to establish any element of entitlement on the merits of the claim, and thus "a fortiori, [claimant] has not established any element which had been found against him previously." Decision and Order at 5 n.7. Accordingly, the administrative law judge denied benefits.

In response to claimant's pro se appeal, employer urges affirmance of the administrative law judge's Decision and Order denying benefits.[2] The Director, Office of Workers Compensation Programs, has not filed a brief 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 (1989); *Stark v. Director, OWCP*, 9 BLR 1-361 (1986). We must affirm the administrative law judge's 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 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 living miner's claim, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arises out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Failure to prove any one of these elements precludes a finding of entitlement. *Id.*

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22

[2] By Order dated April 8, 2004, the Board denied employer's motion to dismiss claimant's appeal as untimely filed.

BLR 2-162 (4th Cir. 2000), that the evidence relevant to the existence of pneumoconiosis, *e.g.*, x-rays and medical opinions, must be weighed together in determining whether the existence of pneumoconiosis is established.

In considering the evidence at 20 C.F.R. §718.202(a)(1), the administrative law judge correctly found that the entirety of the x-ray evidence of record, *see* Director's Exhibits 2, 15-17; Employer's Exhibit 2, was negative for the existence of pneumoconiosis.[3] In considering the relevant medical opinion evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge noted that Dr. Renn opined that claimant did not suffer from pneumoconiosis, *see* Director's Exhibit 12; Employer's Exhibits 1, 4, and that while Dr. Jaworski opined that that claimant suffered from chronic bronchitis, the physician did not indicate any link between the bronchitis and claimant's coal mine employment, *see* Director's Exhibit 2. Because neither Dr. Renn nor Dr. Jaworski diagnosed any condition related to claimant's coal mine employment, their reports cannot support claimant's burden at 20 C.F.R. §718.202(a)(4). 20 C.F.R. §718.201. The administrative law judge further noted that Dr. Abrahams diagnosed "possible early simple" pneumoconiosis. Director's Exhibit 29. The administrative law judge found, however, that Dr. Abrahams' qualified diagnosis was insufficient to satisfy claimant's burden of affirmatively establishing the existence of pneumoconiosis. Decision and Order at 5. The administrative law judge's weighing of Dr. Abrahams' opinion constitutes a permissible exercise of his discretion as a qualified physician's opinion may be considered to be insufficient to support a finding of the existence of pneumoconiosis. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-191 (1988); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). Based on the foregoing, we affirm the administrative law judge's determination that the medical opinion evidence did establish the existence of pneumoconiosis at Section 718.202(a)(4). *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

[3] An x-ray reading by Dr. Jaworski, Director's Exhibit 2, was categorized as 0/1 q. An x-ray interpretation of 0/1 is not a positive reading for the existence of pneumoconiosis. *See* 20 C.F.R. §§410.428(b), 718.102(b); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Canton v. Rochester & Pittsburgh Coal Co.*, 8 BLR 1-475 (1986); *Stanford v. Director, OWCP*, 7 BLR 1-541 (1984). The administrative law judge also noted that the report of the West Virginia Occupational Pneumoconiosis Board indicated "nodular fibrosis in an obvious amount, the result of an occupational pneumoconiosis." Director's Exhibit 29. The administrative law judge permissibly concluded that such an opinion did not support a finding of the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) inasmuch as the underlying x-ray was not in the record nor was the finding classified pursuant to the ILO/U-C standards. 20 C.F.R. §§718.102(b), 718.202(a)(1).

Since the administrative law judge considered the entirety of the relevant evidence of record and provided credible reasons in support of his analysis of the weight and credibility of the evidence, we affirm the administrative law judge's findings regarding the existence of pneumoconiosis at Section 718.202(a), as they are supported by the record and in compliance with *Compton*.

Because claimant did not establish the existence of pneumoconiosis, an essential element of entitlement pursuant to 20 C.F.R. Part 718, *see Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-5, we affirm the administrative law judge's denial of benefits.[4] Based on our disposition on the merits of this case, we need not address the administrative law judge's findings on the issue of total pulmonary or respiratory disability pursuant to 20 C.F.R. §718.204(b). *Id*.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[4] In view of the fact that the administrative law judge considered the entirety of the evidence of record in finding that claimant failed to establish the existence of pneumoconiosis, we need not address the subsequent claim issue at 20 C.F.R. §725.309.