BRB No. 06-0364 BLA

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| EDWARD DOBRZYNSKI | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| VALLEY CAMP COAL COMPANY c/o ACORDIA EMPLOYERS SERVICE | ) | DATE ISSUED: 01/30/2007 |
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| Employer-Respondent | ) | |
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| 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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Anne Megan Davis (Johnson, Jones, Snelling, Gilbert & Davis PC), Chicago, Illinois, for claimant.

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (2002-BLA-0354) of Administrative Law Judge Thomas F. Phalen, Jr., on a duplicate 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] After considering the newly submitted

[1] Claimant first filed a claim on May 14, 1982, which was finally denied by the district director on October 8, 1982. Director's Exhibit 26. Claimant took no further action on this claim. On April 13, 1999, claimant filed a second claim, which was denied by the district director on September 15, 1999, for claimant's failure to establish any of

evidence, *i.e.*, that evidence submitted subsequent to the prior denial, the administrative law judge determined that that evidence established the presence of a totally disabling respiratory impairment, one of the elements previously adjudicated against him. The administrative law judge, therefore, found that claimant had established a material change in conditions. Decision and Order at 21.[2] Turning to the merits of entitlement, the administrative law judge concluded that consideration of all of the evidence of record failed to establish the existence of either clinical or legal pneumoconiosis. 20 C.F.R. §718.201(a)(1), (2). The administrative law judge further found that claimant failed to establish that his totally disabling respiratory impairment was due to pneumoconiosis. 20 C.F.R. §718.204(c). Benefits were, accordingly, denied.

On appeal, claimant contends that the administrative law judge erred in failing to find that the evidence established the existence of either legal or clinical pneumoconiosis. Employer responds, urging that the administrative law judge's decision denying benefits be affirmed. The Director, Office of Workers' Compensation Programs, (Director) is not participating in this appeal.[3]

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).

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the elements of entitlement. Claimant was informed by letter dated October 29, 1999 that he had until September 14, 2000 to file for modification. Director's Exhibit 27. Claimant took no further action on this claim. On November 2, 2000, claimant filed a third claim, the instant claim. Director's Exhibit 1.

[2] Because this duplicate claim was filed on November 2, 2000, the regulation at 20 C.F.R. §725.309 (2000) is applicable. 20 C.F.R. §725.2. Although the administrative law judge initially refers to the revised regulation at 20 C.F.R. §725.309; he ultimately finds that a material change in conditions is established. 20 C.F.R. §725.309(d)(2000); Decision and Order at 17-21.

[3] We affirm the administrative law judge's finding of thirteen years of coal mine employment, his determination that the instant claim was timely filed pursuant to 20 C.F.R. §725.308, and his finding that claimant established a material change in conditions by establishing a totally disabling respiratory impairment, as unchallenged on appeal. 20 C.F.R. §§718.204(b)(2); 725.309(d)(2000). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 element of entitlement precludes an award of benefits. *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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Claimant argues that, in considering the issue of legal pneumoconiosis at Section 718.202(a)(4), the administrative law judge erred in according the opinions of employer's physicians, those of Drs. Fino and Branscomb, as much weight as the opinions of claimant's physicians, Drs. Cohen and Diaz, which were buttressed by the opinions of Drs. Farber and Dowdeswell. Claimant's Brief at 2-3, 32-34.

Contrary to claimant's assertion that both Drs. Fino and Branscomb opined that coal worker's pneumoconiosis is never a latent and progressive disease, review of the physicians' opinions demonstrates that neither precluded the possibility that coal mine dust can contribute to chronic obstructive pulmonary disease, even after coal dust exposure ceases. Rather, both physicians specifically opined that coal worker's pneumoconiosis may be a progressive disease, but that, in this case, claimant's condition was not that of a coal mine dust related disease, but rather one that was caused by smoking. Employer's Exhibits 1, 8. As the administrative law judge found, Dr. Fino explained that the continuing substantial drop in values demonstrated on claimant's pulmonary function studies demonstrated that claimant's pulmonary condition was consistent with smoking, not coal mine dust exposure. Decision and Order at 30. Further, the administrative law judge determined that Dr. Branscomb's finding, that claimant did not suffer from legal pneumoconiosis, was based on an accurate smoking and length of coal mine employment history and the doctor explained why claimant's worsening condition was caused solely by cigarette smoking. Contrary to claimant's assertion, the administrative law judge thoroughly reviewed the opinions of Drs. Fino and Branscomb and permissibly found that the opinions constituted well-reasoned, well-documented opinions concerning the absence of legal pneumoconiosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *see also Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996) (credibility of medical opinion is for administrative law judge to determine); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997).

Further, we reject claimant's assertion that the opinions of Drs. Cohen and Diaz are entitled to superior weight based on their credentials as pulmonologists and because of their expertise in the field of "black lung." In this case, the administrative law judge recognized the qualifications of all of the physicians, and found that Dr. Fino, a pulmonologist, Dr. Branscomb, an internist, Dr. Diaz and Dr. Cohen had thoroughly

reviewed and considered the relevant evidence of record. The administrative law judge was not required to give the opinions of Drs. Cohen and Diaz added weight for the reason set forth by claimant. *See Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990)(*en banc*) (while the administrative law judge may accord greater weight to a physician's opinion based on that physician's superior qualifications, he is not required to do so); *Clark*, 12 BLR 1-149 (1989). Thus, the administrative law judge's failure to accord greater weight to the opinions of Dr. Cohen and Dr. Diaz than to the opinions of Dr. Fino and Dr. Branscomb does not constitute error and we reject claimant's assertion. Decision and Order on Second Remand at 17; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Stiltner*, 86 F.3d 337, 20 BLR 2-246; *Underwood*, 105 F.3d 946, 21 BLR 2-23; *Clark*, 12 BLR at 1-155.

Moreover, we reject claimant's assertion that the administrative law judge "abdicat[ed] his obligation" under the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2) to resolve the conflicting opinions of legal pneumoconiosis. Claimant's Brief at 20. Claimant asserts that, in the instant case, "logically, [the administrative law judge] cannot find all four of such diametrically conflicting opinions," *i.e.*, those of Drs. Fino, Branscomb, Cohen and Diaz, to be equally well-reasoned and well-documented. Claimant's Brief at 21. Contrary to the assertion of claimant, however, the burden rests with claimant to affirmatively establish the elements of entitlement, in this case the existence of pneumoconiosis. *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). Here, the administrative law judge's determination that the medical opinion evidence pertaining to the existence of legal pneumoconiosis is in equipoise is a finding that claimant has failed to carry his burden. *Id*.

Ultimately, the disposition of the issue of legal pneumoconiosis, in this case, turns on whether substantial evidence supports the administrative law judge's determination that the medical opinions of Drs. Fino and Branscomb and those of Drs. Cohen and Diaz are entitled to equal weight. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this cases arises, stated, in *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999) that: "to overturn the [administrative law judge], we would have to rule as a matter of law that 'no reasonable mind' could have interpreted and credited the doctor's opinion as the ALJ did." *Mays*, 176 F.3d at 763, 21 BLR at 2-606. Because we find the administrative law judge's consideration of the evidence to be reasonable, we cannot say that the administrative law judge erred in his consideration of the evidence. *Mays*, 176 F.3d 753, 21 BLR 2-587; *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We, therefore, affirm the administrative law judge's determination that the medical opinion evidence does not

support a finding of the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), *see* 20 C.F.R. §718.201; *Ondecko*, 512 U.S. 267, 18 BLR 2A-1.

Claimant further argues that the administrative law judge erred in determining that the evidence of record did not establish the existence of "clinical" pneumoconiosis. *See* 20 C.F.R. §§718.201(a)(1); 718.202(a)(1). Claimant contends that the most recent x-ray evidence establishes the existence of clinical pneumoconiosis and that, because of the progressive nature of the disease, greater weight should be accorded that evidence. Claimant's Brief at 35. Claimant also argues that the administrative law judge erred in crediting the opinions of Drs. Branscomb and Morgan, that claimant did not have clinical pneumoconiosis.

We reject claimant's assertion regarding the existence of clinical pneumoconiosis as a mere request that the Board reweigh the evidence, a role outside of the Board's scope of review. *See Anderson*, 12 BLR at 1-113. In considering the x-ray evidence of record, the administrative law judge found that the record contained fourteen interpretations of five x-rays. Decision and Order at 23. The administrative law judge found: that all of the interpretations of x-rays taken prior to 2001 were interpreted as negative for the presence of the disease. Regarding the x-rays taken in 2001, the administrative law judge found that the January 2001 x-ray was interpreted as positive for the presence of the disease, while the May 2003 x-ray film was interpreted as negative. *Id*. In addition, the administrative law judge found that of the eight physicians who possessed the dual qualifications of B reader and Board-certified radiologist and who read the x-rays,[4] six interpreted the x-rays as negative for pneumoconiosis. Additionally, the administrative law judge noted that the most recent x-ray evidence was equally split, and was only separated by eighteen months. *Id*. Ultimately, the administrative law judge concluded that the weight of the x-ray evidence was equally balanced, and thus failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Decision and Order at 23-24. Because the administrative law judge considered all of the x-ray evidence of record and gave consideration to the qualitative as well as the quantitative aspects of the x-ray evidence, *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see also Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir.

[4] A B-reader is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A Board-certified radiologist is a physician who has been certified by the American Board of Radiology as having a particular expertise in the field of radiology.

1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993), we affirm the administrative law judge's determination that the x-ray evidence of record failed to support a finding of pneumoconiosis pursuant to Section 718.202(a)(1). *See Ondecko*, 512 U.S. 267, 18 BLR 2A-1.

In addition, we reject claimant's assertion that the administrative law judge erred in his analysis of the narrative medical opinions regarding the existence of clinical pneumoconiosis, particularly with regard to the opinions of Drs. Morgan and Branscomb. Contrary to claimant's assertion, the administrative law judge reasonably found that both Dr. Morgan's opinion, Director's Exhibit 21 and Dr. Branscomb's opinions, Employer's Exhibits 8, 11, were entitled to substantial weight on the issue of clinical pneumoconiosis inasmuch as these physicians provided well-reasoned and well-documented opinions supported by the CT scan and x-ray evidence of record. Decision and Order at 29, 30. *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *Stiltner*, 86 F.3d 337, 20 BLR 2-246; *Underwood*, 105 F.3d 946, 21 BLR 2-23; *Clark*, 12 BLR at 1-155. We, thus, reject claimant's assertion that the administrative law judge erred in determining that claimant did not suffer from clinical pneumoconiosis. In addition, we affirm the administrative law judge's determination that the evidence, when weighed together, *see* 20 C.F.R. §718.202(a)(1) and (a)(4), failed to support a finding of the existence of pneumoconiosis pursuant to Section 718.202(a). *See Compton*, 211 F.3d 303, 22 BLR 2-162.

Because claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement pursuant to 20 C.F.R. Part 718, *see Trent*, 11 BLR 1-26, 1-27; *Perry*, 9 BLR 1-1, 1-2, benefits are precluded. Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed.[5]

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[5] Because we have affirmed the denial of benefits based upon the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), we need not address claimant's contentions pertaining to disability causation at Section 718.204(c). *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1989); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).