BRB No. 06-0540 BLA

JAMES C. EDWARDS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	
	)	DATE ISSUED: 01/31/2007
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 – Denial of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

James C. Edwards, Dryden, Virginia, *pro se*.

Christopher M. Hunter (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order – Denial of Benefits (04-BLA-6398) of Administrative Law Judge Richard T. Stansell-Gamm on a subsequent 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]

[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 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).

The instant claim was filed on March 13, 2003.[2] The administrative law judge accepted the parties' stipulation that claimant had "at least" eight years of coal mine employment.[3] The administrative law judge found that the medical evidence developed since the prior denial of benefits established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore determined that claimant established a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). After considering all the evidence developed since the prior claim and in the current claim, the administrative law judge found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant alleges that the administrative law judge erred in failing to find the presence of pneumoconiosis based on the medical evidence submitted. Employer responds, urging the Board to affirm the decision below. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response unless specifically requested.

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. *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36

[2] Claimant's initial application for benefits, filed on March 24, 1983, was denied on July 21, 1989 by Administrative Law Judge Giles J. McCarthy because claimant did not establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. The Board affirmed the denial of benefits on July 9, 1991. *Id.* Claimant filed a second claim on June 10, 1996 that was denied on March 5, 1998 by Administrative Law Judge Ainsworth Brown, also because claimant did not establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Claimant's first and second modification requests, denied March 11, 1999 and January 21, 2001 respectively, were also denied because claimant did not establish either the existence of pneumoconiosis or total disability. Claimant's third modification request was filed February 12, 2002, and was denied December 3, 2002 by Administrative Law Judge Edward Terhune Miller as untimely. Claimant filed his current application for benefits on March 13, 2003. Director's Exhibit 3.

[3] The record indicates that claimant's coal mine employment occurred in Virginia. Director's Exhibits 5, 6. 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*).

(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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered the radiological evidence, consisting of sixty-three x-ray interpretations spanning more than twenty years. Decision and Order at 19; Director's Exhibits 1, 2, 11, 21, 23; Claimant's Exhibits 1, 2; Employer's Exhibits 2, 5. The administrative law judge found most of the interpretations undisputed due to the absence of any contrary opinion, and properly considered the radiological qualifications of the physicians interpreting films whose interpretations were in conflict. 20 C.F.R. §718.202(a)(1); Decision and Order at 19–20; *see Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). By this analysis, the administrative law judge determined that claimant failed to establish the presence of pneumoconiosis by a preponderance of the radiological evidence.[4] Decision and Order at 20. Because substantial evidence supports this finding, we affirm.

Pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge determined that there was no biopsy or autopsy evidence to be considered, and that none of the presumptions listed at 20 C.F.R. §718.202(a)(3) was applicable in this living miner's claim filed after January 1, 1982, in which the record contained no evidence of complicated pneumoconiosis. We therefore affirm the administrative law judge's findings of no evidence to support a diagnosis of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (a)(3).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions submitted with the prior and current claims. The administrative law judge found the opinions of Drs. Howland, Boyd, Baker, Taylor and Smiddy positive for a diagnosis of black lung disease. Decision and Order at 36; Director's Exhibits 1, 2.

[4] In making this determination on the sufficiency of radiological evidence, the administrative law judge also considered the fact that the most recent films were either negative or inconclusive. Decision and Order at 20.

The administrative law judge also noted that Drs. Hippensteel, Castle, Fino, Zaldivar, Dahhan and McSharry concluded that claimant did not have pneumoconiosis.[5] *Id.*.

The administrative law judge gave Dr. Howland's opinion little weight because the physician merely mentioned that claimant had a history of pneumoconiosis, but diagnosed claimant with chronic pulmonary obstructive disease (COPD) and acute asthma. *Id.* at 37; Director's Exhibit 1; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge also relied on other factors, such as the absence of reasoning explaining whether claimant's hospitalization supported a finding of pneumoconiosis, and that Dr. Howland's last contact with claimant was in 1987.

The administrative law judge permissibly found the reasoning in Dr. Boyd's opinion lacking because the doctor primarily based his diagnosis on claimant's history of coal mine employment, and failed to identify any objective medical evidence that allowed him to isolate such employment as a contributing factor in claimant's impairment. Decision and Order at 37; Director's Exhibit 2; *see Clark*, 12 BLR at 1-155; *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985).

The administrative law judge further found that Dr. Baker's diagnosis of "coal workers' pneumoconiosis 1/0" was primarily a restatement of his 2003 x-ray reading, which the administrative law judge earlier discredited. Decision and Order at 20, 38; Director's Exhibit 11. The administrative law judge also permissibly found that, although Dr. Baker diagnosed COPD, chronic bronchitis, and hypoxemia due to both coal dust exposure and smoking, he did not explain his opinion attributing these conditions to coal dust exposure. Decision and Order at 38; *see Clark*, 12 BLR at 1-155. Additionally, although the administrative law judge found that Dr. Baker diagnosed legal pneumoconiosis based on claimant's pulmonary examination, the administrative law judge rationally found that the diagnosis rested on incomplete documentation because the physician did not conduct a post-bronchodilator pulmonary function test to determine if claimant's obstruction was reversible. Decision and Order at 38; *see Clark*, 12 BLR at 1-155.

In considering Dr. Taylor as claimant's treating physician, the administrative law judge permissibly discounted Dr. Taylor's note diagnosing coal workers' pneumoconiosis, finding it based on an assumption of cause and effect between coal dust

[5] The administrative law judge also found the diagnoses of Drs. Abernathy, Endes-Bercher, Faiz, Paranthaman, and Sargent to be negative, but determined that their opinions were less probative due to the physicians' dated and/or limited contact with claimant. Decision and Order at 37.

exposure and lung disease, without consideration of claimant's smoking history and asthma, and also without consideration of the documented variability and reversible nature of claimant's breathing problems. Decision and Order at 37–38; *see Clark*, 12 BLR at 1-155.

The administrative law judge credited Dr. Smiddy's opinion and positive diagnosis based on the physician's reasoning and documentation, because the doctor identified examination results and pulmonary function tests as a basis for the diagnosis, rather than relying primarily on x-ray evidence which was found to be negative. Decision and Order at 38. The administrative law judge properly found that the contrary opinions by Drs. Hippensteel, Castle, Zaldivar, Fino, Dahhan and McSharry outweighed Dr. Smiddy's positive diagnosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). In making this determination, the administrative law judge credited the physicians' superior expertise associated with certifications in pulmonary medicine, and the reasoning in medical reports developed by a thorough review of the entire record. Decision and Order at 40; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993); *Roberson v. Norfolk and Western Railway Co.*, 13 BLR 1-6 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Price v. Peabody Coal Co.*, 7 BLR 1-671 (1985). Because substantial evidence supports the administrative law judge's finding that the medical opinion evidence was insufficient to establish the presence of pneumoconiosis, we affirm the finding pursuant to 20 C.F.R. §718.202(a)(4); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997).

Substantial evidence also supports the administrative law judge's additional finding that the x-ray and medical opinion evidence weighed together did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4); *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); Decision and Order at 13, n. 22, 40. Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a miner's claim under Part 718, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*).

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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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge