BRB No. 07-0381 BLA

E.M.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COLONY BAY COAL COMPANY	)	DATE ISSUED: 01/31/2008
	)	
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 Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle and Rundle), Pineville, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order (04-BLA-6460) of Administrative Law Judge Stephen L. Purcell denying benefits 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). This case involves claimant's request for modification of a claim filed on May 21, 2001. In the initial Decision and Order, Administrative Law Judge Richard A. Morgan found that the evidence did not establish the existence of

[1] Claimant died on August 10, 2007. His widow is pursuing this claim.

pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Director's Exhibit 64. Although Judge Morgan found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b), he found that the evidence did not establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.* Accordingly, Judge Morgan denied benefits. *Id.*

Claimant filed a request for modification on March 1, 2004. Director's Exhibit 69. Finding that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), the administrative law judge denied claimant's request for modification.

On appeal, claimant contends that the administrative law judge erred in finding that the new evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *See* 20 C.F.R. §718.202(a)(3). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable 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 miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish 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 (1989).

Claimant argues that the administrative law judge erred in finding that claimant did not establish the existence of complicated pneumoconiosis, and therefore was not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis set out at 20 C.F.R. §718.304.[2] In finding that claimant could not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3), the administrative law judge found that the "presumptions described in §§718.304, 718.305 and 718.306 [did] not apply in this case." Decision and Order at 8.

[2] Section 718.304 provides that there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if (a) an x-ray of the miner's lungs shows an opacity greater than one centimeter in diameter; (b) a biopsy or autopsy shows massive lesions in the lung; or (c) when diagnosed by other means, the condition could reasonably be expected to reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304.

Claimant notes that he submitted, in support of his request for modification, Dr. Cappiello's interpretation of a February 25, 2004 x-ray. *See* Claimant's Brief at 2. Dr. Cappiello interpreted claimant's February 25, 2004 x-ray as positive for complicated pneumoconiosis. *See* Director's Exhibit 69. However, the administrative law judge noted that:

> In his request for modification of the prior decision denying benefits…., [c]laimant submitted a chest x-ray interpretation by Dr. Enrico Cappiello which is included among the Director's Exhibits as DX 69. Claimant was informed at the hearing that, since this was a modification proceeding, each party was permitted to introduce as affirmative evidence only one additional chest x-ray interpretation, and [c]laimant therefore stated that he wished to substitute the interpretation of Dr. Edward Aycoth of a June 28, 2005 x-ray, marked as CX 1, for the interpretation of Dr. Cappiello marked as DX 69. Tr. 8-9. The x-ray included in DX 69 was therefore excluded from the record, and CX 1 was admitted into evidence. Tr. 9-10.

Decision and Order at 2 n.2. Because no party challenges the administrative law judge's exclusion of Dr. Cappiello's x-ray interpretation, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Thus, the only new evidence supportive of a finding of complicated pneumoconiosis is Dr. Aycoth's interpretation of claimant's July 28, 2005 x-ray. Dr. Aycoth, a B reader, interpreted claimant's July 28, 2005 x-ray as positive for both simple pneumoconiosis and complicated pneumoconiosis. Claimant's Exhibit 1. However, Dr. Scott, a B reader and Board-certified radiologist, interpreted this x-ray as negative for both simple and complicated pneumoconiosis. Employer's Exhibit 1. In his consideration of whether the new x-ray evidence established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge acted within his discretion in crediting Dr. Scott's negative interpretation of claimant's July 28, 2005 x-ray, over Dr. Aycoth's positive interpretation, based upon Dr. Scott's superior qualifications. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 8.

Although the administrative law judge did not explicitly address the x-ray evidence at 20 C.F.R. §718.304, the administrative law judge properly found Dr. Scott's interpretation of claimant's July 28, 2005 x-ray, based upon the doctor's superior qualifications, entitled to greater weight than Dr. Aycoth's contrary interpretation. Consequently, any error in failing to specifically address Dr. Aycoth's interpretation at 20 C.F.R. §718.304 is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

As claimant raises no other challenge to the administrative law judge's decision, we affirm the denial of benefits.

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