BRB No. 09-0431 BLA

| | | |
|---|---|---|
| SAMUEL KURKO, SR. | ) | |
| | ) | |
| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| DONALDSON MINE COMPANY | ) | DATE ISSUED: 01/29/2010 |
| | ) | |
| 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 Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Juliet Rundle & Associates), Pineville, West Virginia, for claimant.

George E. Roeder, III (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (07-BLA-6003) of Administrative Law Judge Richard A. Morgan on a claim[1] 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 thirteen years of qualifying coal mine employment, and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that claimant failed to establish the existence of pneumoconiosis arising out of coal mine

[1] Claimant filed his application for benefits on November 7, 2006. Director's Exhibit 2.

employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis established under Section 718.202(a), and total respiratory disability due to pneumoconiosis established under Section 718.204. In response, employer urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

In challenging the administrative law judge's determination pursuant to Section 718.202(a), claimant contends that the administrative law judge misapplied the holding set forth in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000) and, in so doing, erred in failing to credit the medical opinion of Dr. Rasmussen, who diagnosed pneumoconiosis. Specifically, claimant argues that the administrative law

[2] We affirm the administrative law judge's findings that the miner worked in qualifying coal mine employment for at least thirteen years, that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3), and that claimant failed to establish the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 3, 15, 16-18.

[3] The law of the United States Court of Appeals for the Fourth Circuit applies, because the miner was employed in coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

judge improperly relied on the negative x-ray interpretations, contained within the narrative reports of employer's physicians, as a basis to conclude that pneumoconiosis was absent and, therefore, impermissibly discredited Dr. Rasmussen's opinion. Claimant avers that, because the administrative law judge failed to weigh all evidence on the issue of the existence of pneumoconiosis together, the administrative law judge "ma[de] the x-ray evidence the basis for his finding that the claimant did not suffer from pneumoconiosis and us[ed] that finding to discredit any evidence to the contrary." Claimant's Brief at 4-5 [unpaginated]. Claimant's arguments are without merit.

In *Compton*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that all types of relevant evidence under Section 718.202(a) must be weighed together to determine whether a claimant suffers from pneumoconiosis. *Compton*, 211 F.3d at 211, 22 BLR at 2-174; *see also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); *but see Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-216, 1-226-227 (2002) (*en banc*). Notwithstanding the standard articulated in *Compton*, however, it is incumbent upon the administrative law judge to examine and assess the probative value of the distinct types of evidence, *i.e.*, radiological evidence, pathological reports, and physicians' narrative reports, before weighing all the evidence together.

At Section 718.202(a)(1), the administrative law judge determined that the x-ray evidence of record consisted of three positive interpretations and four negative interpretations of three films. Decision and Order at 4-5. While Dr. Rasmussen, a B reader, interpreted the x-ray taken on January 24, 2007 as positive for pneumoconiosis, the administrative law judge found that this x-ray was negative for pneumoconiosis, based on the negative interpretation of Dr. Meyer, who possessed superior credentials as a dually qualified Board-certified radiologist and B reader. Decision and Order at 12; Director's Exhibits 9, 11; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). As dually qualified physicians interpreted the x-rays taken on September 25, 2008 and May 30, 2007 as both positive and negative for pneumoconiosis, the administrative law judge permissibly concluded that these x-rays were in equipoise. Decision and Order at 12; Claimant's Exhibits 1, 2; Employer's Exhibits 3, 6. Consequently, claimant has failed to meet his burden of establishing the existence of pneumoconiosis by a preponderance of the x-ray evidence at Section 718.202(a)(1). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 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).

After finding that claimant could not establish the existence of pneumoconiosis under Section 718.202(a)(2), (3), the administrative law judge accurately summarized the conflicting medical opinions of record at Section 718.202(a)(4). The administrative law judge initially found that Drs. Rasmussen, Zaldivar, and Hippensteel, the three physicians

who rendered narrative reports in this case, were equally qualified, based on their Board-certifications, B reader status, and pulmonary expertise. Next, the administrative law judge evaluated the credibility of each physician's opinion and, in so doing, cited specific factors that detracted from the probative value of Dr. Rasmussen's opinion, that claimant has clinical and legal pneumoconiosis. The administrative law judge, within a permissible exercise of his discretion, accorded less weight to Dr. Rasmussen's opinion because the physician relied substantially on his own positive x-ray interpretation and, unlike Drs. Zaldivar and Hippensteel, Dr. Rasmussen did not have the benefit of reviewing subsequent negative x-ray interpretations. *See Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226 (2002) (*en banc*); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); Decision and Order at 13. The administrative law judge found further that Dr. Rasmussen's opinion was undermined based on Dr. Zaldivar's observation that Dr. Rasmussen incorrectly stated that "coal mine dust exposure and cigarette smoking cause identical types of emphysema." *See King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 13. Within a permissible exercise of his discretion, the administrative law judge accorded greater weight to the opinions of Drs. Zaldivar and Hippensteel because their findings of an absence of clinical and legal pneumoconiosis were consistent with the x-ray evidence and were based on more comprehensive objective evidence, thereby rendering their opinions more reliable. *See Trumbo*, 17 BLR at 1-88-89; *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984); Decision and Order at 13; Director's Exhibit 9; Employer's Exhibits 1, 2. Because the administrative law judge's credibility determinations are rational and supported by substantial evidence, we affirm his finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Based on the foregoing, we affirm the administrative law judge's determination that claimant failed to affirmatively establish the existence of pneumoconiosis pursuant to Section 718.202(a). *See Compton*, 211 F.3d 203, 22 BLR 2-162.[4] Consequently, we affirm the administrative law judge's denial of benefits.

[4] In light of our affirmance of the administrative law judge's determination that the evidence was insufficient to establish the existence of pneumoconiosis, we need not address claimant's arguments challenging the administrative law judge's determination that the medical opinion evidence was insufficient to demonstrate total respiratory disability under 20 C.F.R. §718.204(b)(2)(iv). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge