BRB No. 94-2571 BLA

JEFFREY ASHER Claimant-Petitioner v. BLUE DIAMOND COAL COMPANY and LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Frank D. Marden, Administrative Law Judge, United States Department of Labor.

Phillip Lewis, Hyden, Kentucky, for claimant.

Phil Reverman (Boehl, Stopher & Graves), Louisville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (92-BLA-01361) of Administrative Law Judge Frank D. Marden 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). The administrative law judge credited

claimant with thirty years of coal mine employment and in accordance with the filing date, August 26, 1991, considered the claim pursuant to the provisions of 20 C.F.R. Part 718. The administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied. On appeal, claimant asserts that the administrative law judge erred in finding the x-ray and medical opinion evidence insufficient to establish the existence of pneumoconiosis. Claimant further contends that the administrative law judge erred by failing to consider the lay

testimony of record. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has not responded to this appeal.[1]

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 law. 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. At Section 718.202(a)(1), the administrative law judge found the weight of the x-ray evidence negative for pneumoconiosis in light of the readers' radiological credentials.[2] Decision and Order at 6. Claimant contends that the administrative law judge erred by failing to accord greater weight to Dr. Anderson's positive interpretation of the May 14, 1991 x-ray because Dr. Anderson, while not a B reader, is "considered by many to be the preeminent physician in the nation with regard to coal workers' pneumoconiosis." Claimant's Brief at 3. We reject claimant's argument, as the administrative law judge

[1] The administrative law judge's findings of thirty years of coal mine employment, that there is no biopsy evidence to be considered at Section 718.202(a)(2), and that the presumptions listed in Section 718.202(a)(3) are inapplicable to this claim are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

[2] The administrative law judge noted that of the thirty-four x-ray readings, only five were positive for pneumoconiosis, and of these five, only one was by a B reader, whereas twenty-seven of the negative readings were by B readers. Decision and Order at 6.

permissibly relied upon the weight of the x-ray evidence, as well as the majority of interpretations by readers with superior credentials, to find that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1). *See* Decision and Order at 6; *Edmiston v. F & R Coal Co*., 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). We therefore affirm the administrative law judge's finding at Section 718.202(a)(1) as it is rational and supported by substantial evidence.

At Section 718.202(a)(4) the administrative law judge found the medical opinion evidence insufficient to establish the existence of pneumoconiosis. Decision and Order at 10. Claimant's first contention of error on this issue is that the administrative law judge erred by failing to credit Drs. Anderson, Myers, Clarke and Wicker, all of whom diagnosed pneumoconiosis, especially in light of Dr. Anderson's experience as a board-certified internist and pulmonologist specializing in coal workers' pneumoconiosis. Claimant's Brief at 3, 4. We disagree. The administrative law judge permissibly accorded more weight to the opinions of Drs. Broudy, Dahhan, Lane and Branscomb based on their superior qualifications compared to Drs. Myers, Clarke and Wicker, and based on the fact that Drs. Broudy, Lane and Branscomb had the benefit of reviewing all of claimant's medical records to date before making their diagnoses. *See* Decision and Order at 10; *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Moreover, while the administrative law judge considered Dr. Anderson's credentials, he permissibly accorded less weight to the physician's opinion because it was based, in part, on a positive x-ray reading, while the administrative law judge had permissibly found the x-ray evidence of record negative for pneumoconiosis. *See* Decision and Order at 10; *Clark*, *supra*; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *see generally Trujillo v. Kaiser Steel Corp*., 8 BLR 1-472 (1986). Thus, we reject claimant's contention of error.

Claimant next contends that the administrative law judge erred by attempting to "rebut" the evidence of claimant's thirty years of coal mine employment plus the reports of Drs. Anderson, Myers, Clarke and Wicker "merely on the basis of negative x-rays, which is impermissible under *Haywood v. Secretary, HHS*, 699 F.2d 277 (6th Cir. 1983)." Claimant's Brief at 4. This contention is without merit, however, as there was no presumption to be rebutted in this case arising under the regulations found at Part 718, and as discussed above, the administrative law judge properly evaluated the medical opinion evidence to find that claimant failed to prove the existence of pneumoconiosis. Further, the administrative law judge's finding of no pneumoconiosis at Section 718.202(a)(4) was not based solely on negative x-rays; rather, it was based on the well-documented medical opinions permissibly credited by the administrative law judge. *See* Decision and Order at 10; 20 C.F.R.

§718.202(b); *see generally Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

Claimant's final contention is that the administrative law judge erred by failing to consider claimant's testimony because "lay testimony in combination with even limited medical evidence is accorded greater weight." Claimant's Brief at 4. Claimant's contention is without merit. The administrative law judge discussed claimant's testimony but was not required to find the existence of pneumoconiosis based upon it, as he permissibly found the weight of the objective medical evidence negative for pneumoconiosis. *See* Decision and Order at 3, 10; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Cooper v. United States Steel Corp*., 7 BLR 1-842 (1985); 20 C.F.R. §718.202(c). Therefore, claimant's contention of error on this issue is rejected.

Thus, the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) is affirmed as supported by substantial evidence. Because claimant has failed to establish the existence of pneumoconiosis under Section 718.202(a), a necessary element of entitlement under Part 718, the denial of benefits is affirmed. *See, Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

_____NANCY S. DOLDER

Administrative Appeals Judge