BRB No. 95-2189 BLA

WILLIAM R. FLUHARTY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
DONALDSON MINING COMPANY	)	
	)	
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 George A. Fath, Administrative Law Judge, United States Department of Labor.

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

Ann B. Rembrandt (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: SMITH, BROWN, and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (94-BLA-0882) of Administrative

[1] Claimant is William R. Fluharty, the miner, whose application for benefits filed on April 27, 1993 was granted on February 4, 1994. Director's Exhibits 1, 31. Employer contested the award and requested a hearing. Director's Exhibit 30.

Law Judge George A. Fath 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). Pursuant to the parties' stipulation, the administrative law judge credited claimant with twenty-two years of coal mine employment and determined that he had one dependent. The administrative law judge found that the evidence established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c), but failed to establish the existence of

pneumoconiosis or total disability due to pneumoconiosis pursuant to Sections §718.202(a) and 718.204(b). Accordingly, he denied benefits.

On appeal, claimant challenges the administrative law judge's weighing of the evidence pursuant to Section 718.202(a)(4). Claimant also contends that the opinions credited by the administrative law judge at Section 718.204(b) merited no weight because they were based on the mistaken belief that claimant did not have pneumoconiosis. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[2]

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

Pursuant to Section 718.202(a)(4), the administrative law judge accorded greatest weight to the opinions of four physicians who had examined claimant.[3] Drs. MacCallum and Leef, for the West Virginia Occupational Pneumoconiosis Board, concluded that there was "no evidence of occupational pneumoconiosis." Employer's Exhibit 1. Dr. Crisalli, board-certified in both internal and pulmonary

[2] We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment and dependency, and pursuant to 20 C.F.R. §§718.202(a)(1)-(3) and 718.204(c)(1)-(3). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

[3] The administrative law judge noted that Drs. Tuteur, Morgan, and Castle reviewed claimant's medical records and concluded that he did not have pneumoconiosis but suffered from pulmonary impairments related to smoking. Employer's Exhibits 4-5, 8; Decision and Order at 6.

medicine, diagnosed emphysema and chronic bronchitis unrelated to claimant's coal dust exposure. Director's Exhibit 26. He stated that there was insufficient objective evidence to justify a diagnosis of coal workers' pneumoconiosis. *Id*. In contrast, Dr. Rasmussen, board-certified in internal medicine, diagnosed "possible coal workers' pneumoconiosis" and chronic bronchitis due to both cigarette smoking and coal dust exposure. Director's Exhibit 11.

The administrative law judge rationally accorded diminished weight to the 1988 opinion of Drs. MacCallum and Leef because, in light of the progressive nature of pneumoconiosis, "it is possible that claimant did not have the disease" when they examined him, "but has since developed it."[4] Decision and Order at 6; *see Thorn v. Itmann Coal Co*., 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993). The administrative law judge accorded greater weight to Dr. Crisalli's opinion because he found him to be "more qualified to make determinations about diseases of the lungs, and therefore, [found] his report more persuasive," based on his superior credentials. Decision and Order at 6.

Claimant, citing *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), contends that the administrative law judge erred at Section 718.202(a)(4) because the medical opinions diagnosing no pneumoconiosis were premised on the belief that pneumoconiosis cannot cause obstructive impairments. Claimant's Brief at 7-8. Contrary to claimant's contention, Dr. Crisalli acknowledged that pneumoconiosis can cause obstructive ventilatory defects, but explained that the nature of claimant's obstructive disorder suggested that its cause was not coal dust exposure. Employer's Exhibit 10 at 42.

Inasmuch as the administrative law judge permissibly credited Dr. Crisalli's opinion over that of Dr. Rasmussen based on the former physician's superior qualifications, *see Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990)(*en banc*), *rev'd on other grounds*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*), and did not base his finding on the opinions of Drs. Tuteur and Castle,[5] *see* n.3, *supra*, we reject claimant's contention.

Claimant next asserts that, because the medical opinions submitted by employer are based "primarily on the negative x-rays," the administrative law judge,

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[4] Claimant stopped working in 1994. Director's Exhibit 1.

[5] Drs. Tuteur and Castle based their opinions, in part, on their view that pneumoconiosis causes a restrictive ventilatory impairment, not an obstructive one. Employer's Exhibits 4, 8.

by crediting them, violated the Section 413(b) prohibition against denying a claim solely on the basis of negative x-rays. Claimant's Brief at 7; *see* 30 U.S.C. §923(b); 20 C.F.R. §718.202(b). At his deposition, Dr. Crisalli testified that he did not exclude coal dust exposure as a cause of claimant's impairment based solely on negative x-ray readings. Employer's Exhibit 10 at 47. The other physicians of record either examined and tested claimant or reviewed a variety of medical evidence in addition to chest x-rays. Therefore, we reject claimant's contention. *See generally Gray v. Director, OWCP*, 943 F.2d 513, 15 BLR 2-214 (4th Cir. 1991).

Claimant contends that the reports credited by the administrative law judge fail to recognize that claimant could have pneumoconiosis in addition to his cigarette smoke-induced
emphysema. Claimant's Brief at 7. While Dr. Rasmussen diagnosed chronic bronchitis related to both smoking and coal dust exposure, the administrative law judge permissibly credited Dr. Crisalli's opinion that claimant suffers from emphysema and chronic bronchitis resulting from smoking but does not have pneumoconiosis. *See* discussion, *supra*. Therefore, we reject claimant's contention and affirm the administrative law judge's finding pursuant to Section 718.202(a)(4).

Because claimant has failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a necessary element of entitlement under Part 718, we affirm the denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.[6]

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[6] In light of our disposition of this case we need not address employer's allegation of error at Section 718.204(c)(4). Employer's Brief at 8.