BRB No. 04-0852 BLA

NOAH S. SMITH	)	
	)	
Claimant-Respondent	)	
v.	)	
	)	
CLINCHFILED COAL COMPAMY	)	DATE ISSUED: 07/18/2005
	)	
and	)	
	)	
PITTSTON COAL COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Timothy W. Gresham, Tracey Alice Berry (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (03-BLA-6210) of Administrative Law Judge Alice M. Craft 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). The administrative law judge found that the newly submitted evidence established the existence of pneumoconiosis, an element previously adjudicated against claimant, and thereby, established a change in a condition of entitlement. 20 C.F.R. §§718.202(a), 718.309(d). Turning to the evidence as a whole, the administrative law judge found that it established the existence of both complicated pneumoconiosis and simple pneumoconiosis, that pneumoconiosis arose out of coal mine employment, and that

the pneumoconiosis was totally disabling. 20 C.F.R. §§718.202, 718.203, 718.204, 718.304. Accordingly, the administrative law judge awarded benefits in this subsequent claim.[1]

On appeal, employer contends that the administrative law judge erred in finding that the evidence established the existence of both simple and complicated pneumoconiosis. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not file a response brief.

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. 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).

We first address employer's argument that the administrative law judge erred in finding the existence of simple pneumoconiosis established at Section 718.202(a)(4) based on the medical opinions of Drs. Robinette and Forehand. Employer contends that the administrative law judge erred in failing to weigh the medical opinion evidence together with the x-ray evidence, which she had found did not establish the existence of simple pneumoconiosis, and that the administrative law judge erred in finding the opinions of Drs. Robinette and Forehand, finding the existence of pneumoconiosis, to be better reasoned than the opinion of Dr. Hippensteel, who did not. In essence, employer contends that the administrative law judge erred in crediting, as reasoned, the opinions of Drs. Robinette and Forehand as they are based solely on x-ray findings.

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[1] The relevant procedural history of this claim is as follows. Claimant filed his first claim with the Department of Labor (DOL) on July 9, 1981. Director's Exhibit 2. The claim was denied by the district director on October 19, 1981. *Id*. Claimant took no further action on the claim and the denial became final.

Claimant filed a second claim with the DOL on January 12, 1988. Director's Exhibit 2. The district director ultimately denied the claim on the basis that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Id*. Claimant took no further action on the claim and the denial became final.

Claimant filed the instant claim, his third, with the Department of Labor on April 12, 2002. Director's Exhibit 4. Following a hearing, Administrative Law Judge Alice M. Craft issued a Decision and Order dated July 9, 2004, awarding benefits. Employer filed the instant appeal of that award with the Board.

In considering the x-ray evidence on the existence of simple pneumoconiosis, the administrative law judge found that x-rays taken between January 17, 1979 and November 17, 1998 were negative based on the weight of the negative readings by well-qualified physicians. Considering the more recent x-rays taken between June 2, 2001 and November 7, 2002, the administrative law judge concluded that they were essentially in equipoise. Considering the x-ray evidence as a whole, therefore, the administrative law judge found that it failed to establish the existence of pneumoconiosis. Likewise, the administrative law judge concluded that CT scans which had been read as both positive and negative, were insufficient to establish the existence of pneumoconiosis.

Turning to the medical opinion evidence, the administrative law judge accorded greater weight to the opinions of Drs. Robinette and Forehand, who found that claimant had pneumoconiosis, than to the opinion of Dr. Hippensteel, that he did not. In according greater weight to the opinions of Drs. Robinette and Forehand, the administrative law judge noted that Dr. Robinette had been claimant's treating physician for a five year period and had seen claimant with "great frequency and regularity." Decision and Order at 22. Specifically, the administrative law judge noted: that claimant had been referred to Dr. Robinette because of the abnormalities seen on claimant's chest x-ray; that Dr. Robinette was a pulmonary specialist, in addition to being claimant's treating physician; and that Dr. Robinette's treatment records reflected that he had diagnosed the existence of both simple and complicated pneumoconiosis, as well as underlying chronic obstructive pulmonary disease, chronic interstitial fibrosis and granulomatous disease. The administrative law judge concluded that while x-ray and CT scan evidence, standing alone, did not establish the existence of pneumoconiosis, they did offer considerable support to Dr. Robinette's opinion that claimant suffered from the above diseases. Further, in determining that the opinions of Drs. Robinette and Forehand were in better accord with the evidence underlying their opinions and the overall weight of the evidence of record than the opinion of Dr. Hippensteel, the administrative law judge noted that Dr. Hippensteel offered no convincing argument for attributing claimant's x-ray abnormalities to smoking and old granulomatous disease, and for ruling out coal mine employment. Specifically, the administrative law judge found that Dr. Robinette had ruled out tuberculosis and malignancy as a cause of the large opacity seen on claimant's x-ray, while Dr. Hippensteel's test results for other disease were inconclusive and the record did not support the x-ray readings and CT scan readings attributing claimant's large mass to tuberculosis. In addition, the administrative law judge noted that Dr. Hippensteel conceded that coal mine dust can cause a purely obstructive impairment and combine with smoking to cause emphysema. *See* Decision and Order at 19-23. The administrative law judge concluded, therefore, based on his consideration of all of this evidence that claimant had established the presence of simple pneumoconiosis at Section 718.202(a)(4).

Contrary to employer's argument, we conclude that the administrative law judge did sufficiently weigh the medical opinions and the x-ray evidence together. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Moreover, contrary to employer's argument, the administrative law judge properly found the opinions of Drs. Robinette and Forehand better reasoned than the opinion of Dr. Hippensteel. The opinions of Drs. Robinette and Forehand were, not as employer contends, based solely on x-ray readings. Rather, both opinions were based on, in addition to x-ray findings, findings on examination, history, and the results of objective testing. Claimant's Exhibit 1; Director's Exhibits 2, 13, 29. Accordingly, we reject employer's argument that the administrative law judge erred in finding the existence of simple pneumoconiosis established based on the medical opinion evidence at Section 718.202(a)(4). *See* 20 C.F.R. §718.104(d); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-22 (4th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Further, because employer has not challenged the administrative law judge's findings that claimant also established that his pneumoconiosis arose out of coal mine employment, that he was totally disabled, and that his disability was due to pneumoconiosis, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1986). Thus, because claimant has established all the requisite elements of entitlement, 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b), (c), we need not address employer's argument as to whether the administrative law judge also properly found the existence of complicated pneumoconiosis established and that claimant was entitled to the irrebuttable presumption of totally disabling pneumoconiosis at 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.304. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge