BRB No. 04-0953 BLA

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<tr><td>ROY E. PATRICK

Claimant-Petitioner

v.

CLINCHFIELD COAL COMPANY

Employer-Respondent

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest</td><td>)
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DATE ISSUED: 07/28/2005

DECISION and ORDER</td></tr>
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Appeal of the Decision and Order Denying Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and W. Andrew Delph, Jr. (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2003-BLA-5122) of Administrative Law Judge Alice M. Craft 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 a coal mine employment history of twenty-seven years, and found that, because employer conceded the presence of a totally disabling respiratory impairment, claimant had established a change in a condition of entitlement pursuant to 20 C.F.R. §725.309 in this subsequent claim.[1] Decision and Order at 2-3; *see Lisa Lee Mines v. Director, OWCP [Rutter]*, 86

[1] Claimant initially filed a claim for benefits on July 1, 1982 which was finally denied by Administrative Law Judge Robert D. Kaplan in a Decision and Order on Remand issued on March 18, 1991. Director's Exhibit 1. No further action was taken until the filing of the instant claim on February 1, 2001. After a hearing on April 30,

F.3d 1358, 1364, 20 BLR 2-227, 2-234 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 510 U.S. 1090 (1997). Turning to the merits of entitlement, the administrative law judge found that the x-ray evidence of record did not support a finding of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), that claimant was unable to establish the existence of the disease pursuant to 20 C.F.R. §718.202(a)(2), (3), and that the CT scan evidence and medical opinion evidence did not support a finding of the disease pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 26-30. The administrative law judge thus concluded, therefore, pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), that all of the relevant evidence, considered together, failed to support a finding of the existence pneumoconiosis, and accordingly, denied benefits.

On appeal, claimant contends that the administrative law judge erred in not finding the existence of pneumonconiosis established pursuant to Section 718.202(a)(1). Claimant also argues that the administrative law judge erred in not finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(4), contending that the administrative law judge impermissibly rejected the opinion of Dr. Rasmussen in favor of Dr. Hippensteel's. Lastly, claimant contends that the evidence of record supports a finding that claimant's pneumoconiosis arose out of coal mine employment, and that claimant's totally disabling respiratory impairment was due to pneumoconiosis. Neither employer, nor the Director, Office of Workers' Compensation Programs (the Director), has filed a brief 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 rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b) (3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising

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2003, the administrative law judge issued the Decision and Order of August 30, 2004 denying benefits, from which claimant now appeals, on August 30, 2004.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), as well as her length of coal mine employment determination and her finding that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant first contends that the administrative law judge erred in finding that the x-ray evidence did not support a finding of the existence of pneumoconiosis, noting that no claim shall be denied solely on the basis of a negative chest x-ray. Claimant's assertion regarding the x-ray evidence of record is, however, no more than a request that the Board reweigh the evidence of record which is outside its scope of review. *See Anderson*, 12 BLR at 1-113. Moreover, substantial evidence supports the administrative law judge's finding that the x-ray evidence in this case does not support a finding of the existence of pneumoconiosis. In reaching this determination, the administrative law judge concluded that as the great weight of the x-ray readings by those physicians with the dual qualifications of B-reader and board-certified radiologist[3] was negative for the existence of pneumoconiosis,[4] claimant was unable to establish the existence of the disease pursuant to Section 718.202(a)(1). This was rational. 20 C.F.R. §718.202(a)(1); *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990). Accordingly, we affirm the administrative law judge's determination that claimant has failed to demonstrate the presence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

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[3] A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by the successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16 , 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

[4] As the administrative law judge found, the record consists of multiple readings of thirty-one different x-rays taken between the years of 1972 and 2003. Of these multiple readings, only five were read as positive by either a B-reader and/or board-certified radiologist, Director's Exhibits 1 (at Director's Exhibits 9, 36), 16; Claimant's Exhibits 1, 10, while at least seventy were read negative readings by physicians with the same qualifications. Director's Exhibits 1 (at Director's Exhibits 22-26; at Employer's Exhibits 1-37, 39-51, 57-64), 50; Employer's Exhibit 4.

Claimant also argues that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to Section 718.202(a)(4). Specifically, claimant contends that the reasoned medical opinions of Dr. Rasmussen, an examining physician, Director's Exhibit 11; Claimant's Exhibit 1, clearly support a finding of "legal pneumoconiosis," i.e., a chronic dust disease of the lungs arising out of coal mine employment, *see* 20 C.F.R §718.201, since Dr. Rasmussen's statement, that claimant's coal mine dust exposure and cigarette smoking caused the same type and degree of lung tissue damage, was adequately explained and sufficient to support a finding of the presence of the disease. Further claimant contends that, contrary to the administrative law judge's determination, Dr. Rasmussen's diagnosis of legal pneumoconiosis, *i.e.*, chronic obstructive pulmonary disease (COPD) and emphysema due to claimant's coal mine employment history, was not based on a positive x-ray interpretation. Claimant argues that there is ample support in the medical literature for Dr. Rasmussen's findings regarding legal pneumoconiosis. In addition, claimant contends that the administrative law judge erred in according greatest weight to the opinions of Dr. Hippensteel, an examining physician, that claimant did not suffer from pneumoconiosis, Director's Exhibit 50; Employer's Exhibits 3, 6. Claimant asserts that Dr. Hippensteel's opinions are unreliable and hostile to the Act because it is clear from the physician's testimony that the physician believed there "can be no COPD caused by coal mine dust exposure unless there is evidence of 'medical' pneumoconiosis." Claimant's Brief at 7.

In finding that the medical opinion evidence of record did not support a finding of the existence of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Hippensteel and Rasmussen, along with the medical reports of Dr. Kanwal, who diagnosed chronic bronchitis attributable to coal mine employment, Director's Exhibit 4, Dr. Robinette, who concluded that he was unable to state whether claimant's respiratory symptoms, i.e., emphysema and hyperinflation, were due to coal mine dust exposure, Employer's Exhibit 56, Dr. Sargent, who opined that claimant did not suffer from pneumoconiosis, Employer's Exhibit 51, Dr. Dahhan, who found no disease arising out of coal mine employment or dust exposure, Employer's Exhibit 4, and Dr. Smiddy, claimant's treating physician, who concluded that claimant suffered from severe pneumoconiosis, Claimant's Exhibit 10. In a permissible exercise of his discretion, the administrative law judge found that the "comprehensive and detailed" opinions of Dr. Hippensteel were entitled to the greatest weight based on his qualifications as a board-certified internist and pulmonologist, as well as the fact that his opinions were the best detailed and most thoroughly explained of record. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996) (credibility of medical opinion is for administrative law judge to determine); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Likewise, claimant's assertion that Dr. Hippensteel's opinions were

hostile to the Act is rejected. As the administrative law judge found, Dr. Hippensteel did not rule out the possibility that coal mine employment can cause an obstructive disease. *Stiltner*, 86 F.3d 337, 20 BLR 2-246. In fact, the physician specifically stated that thirty years of coal mine employment was sufficient to support a finding of coal workers' pneumoconiosis, but that, in the instant case, pneumoconiosis was not present. Employer's Exhibit 3; *Stiltner*, 86 F.3d 337, 2 BLR 2-246. We thus reject claimant's assertion that Dr. Hippensteel's opinion was unreliable and hostile to the Act, and hold that the opinion comported with the standard enunciated in *Stiltner*. Accordingly, we affirm the administrative law judge's decision to accord greatest weight to the opinion of Dr. Hippensteel.

Further, contrary to claimant's assertion, the administrative law judge permissibly accorded less weight to the opinion of Dr. Rasmussen as he failed to fully explain how claimant's coal mine dust exposure contributed to his lung disease, *see Hicks*, 138 F.3d at 524, 21 BLR at 2-323; *Akers*, 131 F.3d at 438, 21 BLR at 2-269; *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985), and he did not rely upon an accurate length of claimant's smoking history, *see Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984); *see also Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). We conclude, therefore, that the administrative law judge rationally accorded diminished weight to the opinions of Dr. Rasmussen and, as claimant has offered no further challenges to the administrative law judge's analysis of the evidence at Section 718.202(a)(4), *see Skrack*, 6 BLR 1-710, we affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to that subsection.

Additionally, we affirm the administrative law judge's finding that the entirety of the relevant evidence of record does not support a finding of the existence of pneumoconiosis at Section 718.202(a) as the administrative law judge has considered all such relevant evidence and has provided affirmable bases for crediting and/or discrediting such evidence. *See Compton*, 211 F.3d 203, 22 BLR 2-162. Since claimant is unable to establish the existence of pneumoconiosis, a requisite element of entitlement pursuant to Part 718, we must affirm the denial of benefits, and we need not address claimant's assertions regarding the cause of pneumoconiosis at Section 718.203 or the cause of disability at Section 718.204(c) as such assertions are rendered moot by the administrative law judge's finding that the existence of pneumoconiosis was not established. *See Trent*, at 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

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