

BRB No. 05-0990 BLA

OAKLEY GILBERT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	DATE ISSUED: 07/27/2006
	)	
and	)	
	)	
JAMES RIVER COAL COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denying Benefits (03-BLA-5373) of Administrative Law Judge Jeffrey Tureck (the administrative law judge) rendered 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). This case is before the Board for the second time. In his original Decision and Order, the

administrative law judge credited claimant with twenty-eight years of coal mine employment pursuant to the parties' stipulation, and adjudicated the claim under 20 C.F.R. Part 718, based on claimant's February 21, 2001 application for benefits. Weighing the medical evidence of record, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied.

Pursuant to claimant's appeal, the Board vacated the administrative law judge's denial of benefits and remanded the case to the administrative law judge for further consideration of the evidence. *Gilbert v. Leeco, Inc.*, BRB No. 04-0563 BLA (Mar. 30, 2005)(unpub.). The Board affirmed the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(3). *Gilbert*, slip op. at 2 n.2, 4. However, the Board vacated the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *Gilbert*, slip op. at 6. Specifically, the Board held that the administrative law judge did not adequately explain his reasoning for discrediting Dr. Vaezy's diagnosis of pneumoconiosis. *Gilbert*, slip op. at 6-7. The Board instructed the administrative law judge on remand to reconsider whether the medical opinion evidence established the existence of pneumoconiosis.<sup>1</sup>

On remand, the administrative law judge found the medical opinion of Dr. Vaezy not credible and, thus, determined that it is insufficient to establish the existence of pneumoconiosis. Consequently, the administrative law judge found that since the opinion of Dr. Vaezy, the only opinion supportive of claimant's burden, failed to establish the existence of pneumoconiosis, claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). In light of the Board's affirmance of his prior findings that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1)-(3), the administrative law judge found that the existence of pneumoconiosis was not established pursuant to Section 718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding Dr.

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<sup>1</sup> The Board also instructed the administrative law judge to apply the evidentiary limitations of 20 C.F.R. §725.414 and determine which of employer's medical reports were admissible. *Gilbert v. Leeco, Inc.*, BRB No. 04-0563 BLA, slip op. at 3-4 (Mar. 30, 2005)(unpub.). On remand, because the administrative law judge again discredited Dr. Vaezy's diagnosis of pneumoconiosis and there were no other diagnoses of pneumoconiosis, he found it unnecessary to determine which medical reports submitted by employer were admissible. Decision and Order on Remand at 2 n.1. No party alleges any error by the administrative law judge on this issue.

Vaezy's opinion insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs has filed a letter stating that he will not respond in this appeal.

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 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 of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to Section 718.202(a)(4), the administrative law judge found that the opinion of Dr. Vaezy was not a credible diagnosis of pneumoconiosis. In particular, the administrative law judge noted that Dr. Vaezy was claimant's treating pulmonologist since July 1995, and that the physician had obtained histories of twenty-eight years of coal mine employment and ten to eleven pack-years of smoking. Decision and Order on Remand at 2. Based on Dr. Vaezy's statement that claimant's "[p]hysical examination was essentially unremarkable," the administrative law judge determined that Dr. Vaezy's "physical examinations played no role in his diagnosis of pneumoconiosis." Decision and Order on Remand at 2.

Additionally, the administrative law judge observed that the doctor "did not just diagnose 'pneumoconiosis'; he diagnosed 'stage 1/0 pneumoconiosis.'" Decision and Order on Remand at 2. The administrative law judge explained that "[a] diagnosis of stage 1/0 pneumoconiosis is a diagnosis based on an x-ray interpretation, category 1/0 pneumoconiosis being the mildest x-ray diagnosis under the ILO-U/C criteria for interpreting x-rays. See 20 C.F.R. §718.102(b)." *Id.* Since the administrative law judge had previously found Dr. Vaezy's "1/0" reading of claimant's June 4, 2001 x-ray outweighed by negative readings from "better-qualified experts," [2004] Decision and Order at 3, he determined that Dr. Vaezy's diagnosis of "stage 1/0" pneumoconiosis was not credible, "regardless of the number of times [Dr. Vaezy] examined the claimant or the smoking and coal mine employment histories he obtained." Decision and Order on Remand at 2.

Claimant contends that the administrative law judge erred in discounting Dr.

Vaezy's opinion as based on a positive x-ray reading that was "contrary to the [administrative law judge's] findings." Claimant's Brief at 3. Claimant's contention lacks merit. Because the administrative law judge found that Dr. Vaezy based his diagnosis of pneumoconiosis on a positive x-ray reading that the administrative law judge discredited, the administrative law judge reasonably declined to credit Dr. Vaezy's diagnosis of pneumoconiosis.<sup>2</sup> See *Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003).

Claimant's additional argument that Dr. Vaezy's opinion was documented and reasoned and thus should not have been discredited, essentially requests a reweighing of the evidence, which we cannot do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because substantial evidence supports the administrative law judge's finding that Dr. Vaezy's opinion, the only opinion supportive of claimant's burden, was not credible, we affirm his finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a miner's claim under Part 718, we affirm the administrative law judge's denial of benefits. *Trent*, 11 BLR at 1-27; *Anderson*, 12 BLR at 1-112; *Perry*, 9 BLR at 1-2.

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<sup>2</sup> Although Dr. Vaezy also diagnosed chronic obstructive pulmonary disease, he did not identify an etiology for the disease. Consequently, the Board held that the diagnosis did not support a finding of legal pneumoconiosis. *Gilbert*, slip op. at 5 n.7; 20 C.F.R. §718.201(a)(2).

Accordingly, the administrative law judge's Decision and Order on Remand Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge