BRB No. 06-0156 BLA

LINDA J. KIRK (Widow of TERRY L. KIRK)	)	
Claimant-Petitioner	)	
v.	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 07/26/2006
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 – Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Linda J. Kirk, Pine Grove, West Virginia, *pro se*.

Francesca Tan (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel, the Decision and Order – Denying Benefits (04-BLA-6693) of Administrative Law Judge Daniel L. Leland on a miner's 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). In a Decision and Order dated September 22, 2005, the administrative law judge credited the miner with twenty-six years of coal mine employment[2] and found that the totality of the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b), but failed to establish that the miner's total disability was due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that the miner is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202,

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[1] Claimant is the miner's widow. The miner filed his claim for benefits on May 1, 2001. Director's Exhibit 3. On April 8, 2002, the district director awarded benefits on the miner's claim. Director's Exhibit 30. On June 2, 2002, the miner died. Director's Exhibit 1. Employer requested a hearing on the miner's claim, the case was referred to the Office of Administrative Law Judges, and the ensuing decision is the subject of the instant appeal. Director's Exhibits 31, 40. Claimant filed a claim for survivor's benefits on June 23, 2002, which was denied by the district director on September 26, 2003. Director's Exhibit 1. Claimant's survivor's claim is not at issue here.

[2] The record indicates that the miner's coal mine employment occurred in West Virginia. Director's Exhibits 1, 27. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

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).

In evaluating the x-ray evidence of record pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge properly noted that the relevant x-ray evidence of record consists of three readings of two x-rays. Decision and Order at 3, 6. A July 30, 2001 x-ray was read once as positive by Dr. Noble, a dually qualified B reader and Board-certified radiologist.[3] Director's Exhibit 20; Decision and Order at 3, 6. A September 19, 2001 x-ray was read once as positive by Dr. Altmeyer, a B reader, and was read once as negative by Dr. Wheeler, a dually qualified B reader and Board-certified radiologist. Director's Exhibits 34, 36; Decision and Order at 3, 6. Considering both the quantity and the quality of the x-ray readings of record, the administrative law judge permissibly concluded that the preponderance of positive x-ray readings by B-readers and dually qualified readers established the existence of pneumoconiosis. *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Dempsey v. Sewell Coal Corp*., 23 BLR 1-47, 1-65 (2004)(*en banc*); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc on recon.*); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); Decision and Order at 6. Consequently, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

We further affirm the administrative law judge's finding that the autopsy evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). In their autopsy report dated June 3, 2002, Drs. Farver and Hannahoe stated that "no features of coal workers' pneumoconiosis are seen." Director's Exhibit 1; Decision and Order at 4-5, 6. In addition, the record contains a report dated April 30, 2003 from Dr. Tomashefski, who reviewed the autopsy slides and agreed that the miner did not have coal workers' pneumoconiosis. Director's Exhibit 1; Decision and Order at 5, 6. Thus, the administrative law judge permissibly concluded that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 6.

The administrative law judge then found, correctly, that the presumptions set forth at 20 C.F.R. §§718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982 in which there is no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306; Decision

[3] The July 30, 2001 x-ray was also read for quality only (Quality 2) by Dr. Gaziano, a B reader. Director's Exhibit 21.

and Order at 6. Consequently we affirm the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(3), 718.305, 718.304, and 718.306 as supported by substantial evidence.

Finally, pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the death certificate, treatment records from Wheeling Hospital, and the findings of the West Virginia Occupational Pneumoconiosis Board (WVOPB), in addition to the medical reports and testimony of Drs. Reddy, Altmeyer, Saludes, and Tomashefski. Initially, the administrative law judge noted that neither the death certificate nor the hospital treatment records contained any diagnoses of coal workers' pneumoconiosis or any other chronic dust disease or impairment arising out of coal mine employment. Director's Exhibits 1, 12; Decision and Order at 4, 5. Similarly, Drs. Altmeyer, Saludes and Tomashefski did not diagnose the existence of clinical or legal pneumoconiosis. Director's Exhibits 1, 34; Employer's Exhibit 3; Decision and Order at 6-7. By contrast, Dr. Reddy diagnosed clinical coal workers' pneumoconiosis and chronic bronchitis, by history, due to coal dust exposure, and the WVOPB granted the miner a ten percent award for "occupational pneumoconiosis" on March 30, 1999, despite finding the x-ray evidence insufficient to diagnose pneumoconiosis. Director's Exhibits 1, 16; Decision and Order at 4.

The administrative law judge initially found, as was within his discretion, that as the WVOPB determination letter did not indicate the criteria for a finding of occupational pneumoconiosis, the determination was entitled to little weight. *Schegan v. Waste Management & Processors*, Inc., 18 BLR 1-41 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 7. The administrative law judge further permissibly accorded greater weight to the opinions of Drs. Altmeyer, Saludes and Tomashefski, who did not diagnose either clinical or legal pneumoconiosis, than to the contrary opinion of Dr. Reddy, as their opinions are better reasoned and better supported by the objective evidence of record, including the autopsy evidence which revealed no evidence of coal workers' pneumoconiosis or any chronic dust disease or impairment arising out of coal mine employment. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993); *Clark*, 12 BLR at 1-149; *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); Decision and Order at 7-8.

Weighing the chest x-rays, autopsy evidence and medical opinions together, as required in the Fourth Circuit to determine if pneumoconiosis is established, *see Compton*, 211 F.3d at 203, 22 BLR at 2-162, the administrative law judge found that the preponderance of the evidence failed to establish the existence of pneumoconiosis arising out of coal mine employment. Decision and Order at 8.

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *Grizzle v. Pickands Mather & Co./Chisolm Mines*, 994 F.2d 1093, 1096 (4th Cir. 1993), and the Board may not reweigh the evidence or substitute its own inferences on appeal, *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Clark*, 12 BLR at 1-155; *Anderson*, 12 BLR at 1-111. As the administrative law judge's findings are supported by substantial evidence, we affirm his finding that the existence of pneumoconiosis, an essential element of entitlement, was not established pursuant to 20 C.F.R. §718.202(a). Because claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement to benefits under Part 718, *see Gee. v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*), an award of benefits is precluded.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge