BRB No. 06-0748 BLA

KERMIT W. TOLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: 07/26/2007
	)	
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 Thomas M. Burke, Associate Chief Administrative Law Judge, United States Department of Labor.

Joseph Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2004-BLA-5752) of Associate Chief Administrative Law Judge Thomas M. Burke 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). After determining that the parties had stipulated that claimant was engaged in qualifying coal mine employment for thirty-four years, the administrative law judge adjudicated this claim, filed on October 22, 2001, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge

found that the weight of the evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's weighing of the conflicting x-ray and medical opinion evidence of record in finding that the existence of pneumoconiosis was not established at Section 718.202(a)(1), (4). Claimant also maintains that a proper weighing of the medical opinion and blood gas study evidence would result in a finding of entitlement to benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not filed a brief 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.[1] 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 prove 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. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Claimant initially asserts that the positive x-ray interpretations of films dated December 26, 2001 and February 4, 2004 by Dr. Patel, a Board-certified radiologist and B reader, and the positive interpretation of a film dated August 25, 2004 by Dr. Robinette, a B reader, are sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1). Claimant contends that the administrative law judge erroneously applied a simple head count to find that a preponderance of the x-ray evidence was negative for pneumoconiosis, rather than performing a film-by-film weighing of the conflicting interpretations to determine whether each film is positive or negative for pneumoconiosis, and then weighing the conflicting films in context to determine whether pneumoconiosis is present, as required by applicable Fourth Circuit precedent. Claimant's Brief at 6-7, 10. Claimant's arguments are without merit.

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's last coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

The administrative law judge accurately reviewed the conflicting x-ray evidence of record, consisting of three positive and five negative interpretations of five films taken between December 26, 2001 and August 25, 2004, as well as the qualifications of the readers. After considering both the quality and quantity of the x-ray evidence, the administrative law judge permissibly concluded that the positive interpretations by Drs. Patel and Robinette were outweighed by the negative interpretations of all five films by four different dually-qualified readers. Decision and Order at 4; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). As each film interpreted as positive for pneumoconiosis was reread as negative by an equally-qualified or better-qualified physician, claimant has not shown how a film-by-film weighing of the x-ray evidence could produce a different result. Consequently, we affirm the administrative law judge's findings pursuant to Section 718.202(a)(1), as supported by substantial evidence.

Claimant next asserts that the opinion of Dr. Rasmussen is well-reasoned, documented, and sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). Claimant maintains that the administrative law judge erred in failing to compare the relative qualifications of Drs. Rasmussen and Zaldivar, and notes that the administrative law judge determined, in an unrelated case, that Dr. Rasmussen's qualifications were superior to those of Dr. Zaldivar despite their comparable Board-certifications. Contrary to claimant's arguments, however, the administrative law judge is not bound by prior findings of fact in unrelated cases, and did not accord greater or lesser weight to the conflicting medical opinions in the present case on the basis of the physicians' credentials. Moreover, the record reflects that both physicians are Board-certified in internal medicine, but that only Dr. Zaldivar is Board-certified in pulmonary diseases. *See* Director's Exhibit 11; Employer's Exhibit 7.

In evaluating the conflicting medical opinions at Section 718.202(a)(4), the administrative law judge determined that Dr. Zaldivar's testing and physical examination of the miner supported his conclusion of no pneumoconiosis and no chronic pulmonary impairment, while Dr. Rasmussen relied on a positive x-ray to diagnose clinical pneumoconiosis, contrary to the administrative law judge's findings and the computerized tomography (CT) scan evidence of record. Decision and Order at 7; *see generally Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). The administrative law judge further determined that Dr. Rasmussen's diagnosis of a moderate loss of lung function, caused in part by dust exposure in coal mine employment, supports a finding of legal pneumoconiosis, if credited. *See* 20 C.F.R. §718.201(a)(2); Decision and Order at 7. Because the miner's pulmonary function studies and resting blood gas studies were interpreted as normal, the administrative law judge concluded that Dr. Rasmussen's diagnosis of a moderate loss of lung function was based on the results of post-exercise blood gas studies obtained on December 26, 2001 and February 4, 2004; these results, however, differed significantly from Dr. Zaldivar's

post-exercise blood gas study results obtained on October 23, 2002 and May 12, 2004, in that Dr. Rasmussen's tests showed a decrease in the transfer of oxygen, while Dr. Zaldivar's tests were normal, showing an increase in the transfer of oxygen with exercise.[2] Decision and Order at 5, 7. In resolving the conflict between these test results, the administrative law judge reviewed Dr. Zaldivar's deposition testimony, that the discrepancy could be explained by concluding either that certain test results were wrong or, assuming all tests were valid, that Dr. Rasmussen's results reflected an acute or variable condition, such as a cardiac dysfunction or temporary air flow obstruction caused by smoking. Decision and Order at 8; Employer's Exhibit 14 at 13-16. Dr. Zaldivar indicated that any variable impairment shown on these blood gas tests would be inconsistent with pneumoconiosis, because pneumoconiosis causes permanent destruction of lung tissue, and the blood gases would reflect that condition whenever the miner was exercised. *Id*. Since there was nothing in the record to support a finding that the blood gas study results obtained by either physician were invalid, the administrative law judge reasonably concluded that Dr. Rasmussen's post-exercise results evidenced an acute or variable condition, and not an irreversible condition consistent with pneumoconiosis. Decision and Order at 8; *see generally Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Consequently, the administrative law judge acted within his discretion in finding that the objective evidence of record best supported Dr. Zaldivar's opinion that claimant did not have a clinically significant, chronic respiratory condition, and thus that claimant failed to establish the existence of legal pneumoconiosis pursuant to Sections 718.201(a)(2), 718.202(a)(4). *See Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999); *Henley v. Cowan & Co., Inc.*, 21 BLR 1-147 (1999); *see generally Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Weighing all of the evidence together, the administrative law judge found that the preponderance of the x-ray, CT scan and medical opinion evidence did not support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and we affirm his finding,

[2] The administrative law judge determined that, of the four arterial blood gas tests performed on the miner, only the results of the earliest post-exercise test in 2001 produced qualifying values, while the three most recent tests all contained post-exercise results that did not satisfy the regulatory criteria for establishing disability. Decision and Order at 10. Although claimant contends that the administrative law judge erroneously applied the later evidence rule in evaluating the blood gas study evidence of record, and argues that Dr. Zaldivar's test results are just as likely to be incorrect or flawed as those obtained by Dr. Rasmussen, *see* Claimant's Brief at 7-9, the administrative law judge did not find that either physicians' test results were incorrect. Rather, the administrative law judge concluded that Dr. Rasmussen's results evidenced an acute or variable condition, as set forth *infra*. *See* Decision and Order at 8, 10.

as supported by substantial evidence. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). As claimant has failed to establish the existence of pneumoconiosis, an essential element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. *See Anderson*, 12 BLR at 1-113.

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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BETTY JEAN HALL
Administrative Appeals Judge