BRB No. 06-0987 BLA

J.B. o/b/o of B.G.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PERFORMANCE COAL COMPANY	)	DATE ISSUED: 07/25/2007
	)	
	)	
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2005-BLA-5675) of Administrative Law Judge Daniel F. Solomon denying benefits on a miner's claim filed on June 21, 2004, 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).[1] The administrative law judge found,

[1]Claimant is the miner, who died on June 13, 2005. The miner's surviving spouse is

and the parties stipulated to, twenty-five years of coal mine employment, that claimant is a miner under the Act, and that employer was the responsible operator. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the medical opinion evidence sufficient to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. Employer responds, asserting that substantial evidence supports the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[3]

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).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(en banc). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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pursuing the miner's claim on behalf of his estate.

[2]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was last employed in the coal mine industry in West Virginia. *See* Director's Exhibit 3; *Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3]As the administrative law judge's length of coal mine employment and responsible operator determinations, as well as his finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(3) are unchallenged on appeal, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Mullins, Crisalli, Hippensteel, and Naeye, and the CT scan reading performed by Dr. Wiot. Director's Exhibit 12; Employer's Exhibits 2, 4, 8. Dr. Mullins indicated that claimant had an "abnormal x-ray consistent with coal dust exposure/rock dust exposure" and chronic obstructive pulmonary disease (COPD) due to coal workers' pneumoconiosis, silicosis, and smoking. Director's Exhibit 12. Dr. Crisalli reviewed the evidence of record and concluded that claimant did not have coal workers' pneumoconiosis and that his emphysema was caused by smoking. Employer's Exhibit 4. Dr. Hippensteel reviewed the evidence of record and determined that claimant did not have medical or legal pneumoconiosis, but suffered from emphysema caused by cigarette smoking. Employer's Exhibit 2. Dr. Naeye examined the autopsy report and tissue slides and diagnosed severe emphysema related to a lengthy smoking history. Employer's Exhibit 8. Dr. Naeye further opined that coal workers' pneumoconiosis was not "histologically present." *Id*. Dr. Wiot interpreted the CT scan, dated December 8, 2004, as negative for pneumoconiosis. Employer's Exhibit 2.

The administrative law judge determined that the report of Dr. Mullins was not adequately reasoned, as the doctor relied primarily upon a positive x-ray reading that was contrary to the weight of the x-ray interpretations of record. Decision and Order at 6, 7. The administrative law judge credited the opinions of Drs. Crisalli and Hippensteel and found that Dr. Naeye's opinion was entitled to the most weight. *Id*. at 7. The administrative law judge determined, therefore, that claimant did not prove the existence of pneumoconiosis under Section 718.202(a)(4). *Id*. The administrative law judge then concluded that when weighed together, the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *Id*.

Claimant argues that the administrative law judge erred in relying upon the fact that the preponderance of the x-ray readings was negative to discredit the opinion in which Dr. Mullins diagnosed coal workers' pneumoconiosis and COPD related to coal dust exposure and cigarette smoking. This allegation of error is without merit. The administrative law judge's determination that the opinion of Dr. Mullins was inadequately reasoned, because she relied primarily upon a positive x-ray interpretation that was outweighed by the contrary interpretations of record, is rational and supported by substantial evidence. As revealed by the administrative law judge's summary of Dr. Mullins's report, the doctor did not identify any evidence, other than the positive x-ray reading and claimant's history of coal mine employment, that supported her diagnosis of coal workers' pneumoconiosis and COPD related to coal dust exposure. Decision and Order at 6-7; Director's Exhibit 12; *see Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989). The administrative law judge also acted rationally in determining that the report in which Dr. Naeye ruled out the presence of both clinical and legal pneumoconiosis was the most probative medical opinion of record, as it was based upon a review of the autopsy report and tissue slides. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Terlip v. Director, OWCP*, 8 BLR 1-363

(1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). We affirm, therefore, the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

We affirm, as rational and supported by substantial evidence, the administrative law judge's finding that when considered together, the medical opinions of Drs. Crisalli, Hippensteel and Naeye, the negative x-ray evidence, and the negative CT scan evidence outweigh Dr. Mullins's opinion and the positive x-ray interpretation. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). We affirm, therefore, the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis under Section 718.202(a), a requisite element of entitlement, and the denial of benefits.[4] *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[4] In light of our affirmance of the administrative law judge's finding pursuant to Section 718.202(a) and the denial of benefits, we need not address claimant's argument that Dr. Mullins's opinion is sufficient to establish total disability due to pneumoconiosis under 20 C.F.R. §718.204(c). Moreover, even if we were to reach claimant's allegation of error in this regard, we would be required to reject it, as the administrative law judge did not render a finding on the issue of total disability causation and the Board is not empowered to weigh the evidence or make factual findings. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

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