

BRB No. 07-0830 BLA

D.L.T.)
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 Claimant-Respondent)
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 v.)
)
 CANNELTON INDUSTRIES,)
 INCORPORATED)
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 and)
)
 ZURICH AMERICAN INSURANCE) DATE ISSUED: 07/24/2008
 GROUP)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

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

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/Carrier (employer) appeals the Decision and Order Awarding Benefits (06-BLA-5693) of Administrative Law Judge Richard A. Morgan on a claim¹ 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). Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited claimant with at least twenty-five years of qualifying coal mine employment. The administrative law judge found that claimant established the existence of both clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b) and that pneumoconiosis was a substantially contributing cause of his total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were awarded.

On appeal, employer² argues that the administrative law judge erred in his weighing of the x-ray and medical opinion evidence and in finding it sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Employer also argues that the administrative law judge erred in finding that claimant's clinical pneumoconiosis arose out of coal mine employment at Section 718.203(b).³ Claimant has filed a response brief, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating his intention not to participate in this appeal.⁴

¹ Claimant filed his application for benefits on August 16, 2004. Director's Exhibit 2.

² In its brief, Employer/Carrier (employer) also states that the administrative law judge erred in finding that carrier waived its right to contest its designation as the responsible carrier based on its failure to raise the issue previously. Employer fails, however, to brief this contention or to provide any support for its argument. Employer's Brief at 2 [unpaginated]. Consequently, because employer failed to adequately brief this issue, we will not address it. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

³ Employer does not cite to specific regulations in making its arguments. Because employer's arguments are relevant to the administrative law judge's findings at 20 C.F.R. §§718.202(a)(1), (4), and 718.203(b), they will be addressed thereunder.

⁴ We affirm the administrative law judge's findings with respect to length of coal mine employment, that the existence of pneumoconiosis could not be established at 20 C.F.R. §718.202(a)(2) and (3), and that claimant established total respiratory disability due to pneumoconiosis at 20 C.F.R. §718.204(b) and (c) because these determinations

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 the applicable law, they are binding upon this Board and may not be disturbed.⁵ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and 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; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Employer first contends that the administrative law judge's resolution of the conflicting x-ray evidence under Section 718.202(a)(1) was irrational and that the administrative law judge erred in finding pneumoconiosis established under Section 718.202(a)(1). Specifically, employer argues that the administrative law judge erred in according greater weight to the positive x-ray interpretations of Drs. Gaziano and Rasmussen over the negative interpretation of Dr. Zaldivar.

In considering the x-ray evidence at Section 718.202(a)(1), the administrative law judge noted that the record contained five x-ray interpretations of four x-ray films dated September 30, 2004, March 8, 2006, March 28, 2006, and December 7, 2006. The administrative law judge further found that the interpretations were rendered by Drs. Gaziano, Rasmussen, and Zaldivar, all of whom were B readers and were, therefore, equally qualified. Director's Exhibit 16; Claimant's Exhibits 1, 2; Employer's Exhibit 1. The administrative law judge assigned determinative weight to the positive interpretations of Drs. Gaziano and Rasmussen because both physicians' readings of irregular opacities consistent with coal workers' pneumoconiosis, supported each other.⁶

were unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 3, 12-13.

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Decision and Order at 2 n.2.

⁶ The September 30, 2004 x-ray film was interpreted by Dr. Gaziano as "q/r, 2/2 coal workers' pneumoconiosis." Director's Exhibit 16. In a report dated October 14, 2004, Dr. Binns, a B reader and Board-certified radiologist, read the September 30, 2004 x-ray for film quality only. Director's Exhibit 16.

Contrary to employer's argument, the administrative law judge acted properly in finding that the preponderance of the x-ray evidence was positive for the existence of clinical pneumoconiosis. Specifically the administrative law judge properly found that the three x-rays which were read as positive for pneumoconiosis outweighed the x-ray which was read as negative. 20 C.F.R. §§718.102(b), 718.202(a)(1); *see Trent*, 11 BLR at 1-27; *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see generally Allen v. Union Carbide Corp.*, 8 BLR 1-393, 1-395 (1985); Decision and Order at 11. Accordingly, we affirm the administrative law judge's weighing of the x-ray evidence on this basis as the administrative law judge provided both a qualitative and quantitative assessment of the x-ray evidence. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1994). We, therefore, affirm the administrative law judge's finding that the x-ray evidence established clinical pneumoconiosis pursuant to Section 718.202(a)(1), as that determination was rational and supported by substantial evidence.

Employer also contends that the administrative law judge erred in finding that employer failed to rebut the presumption that claimant's clinical pneumoconiosis arose out of coal mine employment at Section 718.203(b). Employer contends that Dr. Gaziano's x-ray interpretation of coal workers' pneumoconiosis was entitled to less weight because Dr. Gaziano was unaware of claimant's rheumatoid arthritis and, therefore, could not opine as to whether the abnormalities found on x-ray were attributable to this condition. Likewise, employer asserts that Dr. Rasmussen's x-ray interpretation was equivocal because Dr. Rasmussen was unable to determine whether the changes on x-ray were due to rheumatoid arthritis or coal workers' pneumoconiosis. In addition, employer avers that, notwithstanding the fact that there were alternative conditions that could cause the abnormalities on claimant's x-ray, Dr. Rasmussen attributed the x-ray findings to coal workers' pneumoconiosis merely because claimant had a history of exposure to coal mine dust.

The March 8, 2006 x-ray was interpreted by Dr. Zaldivar as negative for pneumoconiosis. He attributed the abnormalities to diffuse pulmonary fibrosis. Employer's Exhibit 1. (The administrative law judge mistakenly referred to the chest x-ray read by Dr. Zaldivar as dated March 5, 2008. A review of the report indicates that this film was dated March 8, 2008.)

The March 28, 2006 x-ray film was interpreted by Dr. Rasmussen as "q/s, 2/1 coal workers' pneumoconiosis."

The December 7, 2006 x-ray film was interpreted by Dr. Rasmussen as "t/q, 1/2 coal workers' pneumoconiosis." Claimant's Exhibits 1, 2.

The administrative law judge found that claimant was entitled to the presumption that his clinical pneumoconiosis arose out of coal mine employment, based on his length of coal mine employment, at Section 718.203(b) and that the presumption was not rebutted. The administrative law judge properly found the evidence did not establish that claimant's clinical pneumoconiosis was due to other causes. Contrary to employer's argument, a review of Dr. Gaziano's opinion shows that he was aware of claimant's rheumatoid arthritis. Director's Exhibit 16. The administrative law judge, therefore, properly credited his opinion attributing the abnormalities on x-ray to clinical pneumoconiosis. Further, contrary to employer's contention, Dr. Rasmussen's opinion was not equivocal as he affirmatively identified the abnormalities seen on x-ray as due to clinical pneumoconiosis. Further, the administrative law judge permissibly found Dr. Rasmussen's opinion, concerning abnormalities on x-ray caused by clinical pneumoconiosis and rheumatoid arthritis, bolstered by supportive medical authority. Employer has proffered no support in the record for its contention that Dr. Rasmussen had a predisposition for finding claimant's x-ray changes consistent with clinical pneumoconiosis solely because claimant worked in coal mine employment. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-5 (2004). The administrative law judge permissibly found Dr. Zaldivar's opinion regarding the cause of the abnormalities seen on x-ray to be entitled to diminished weight because Dr. Zaldivar failed to explain why the irregular opacities seen on claimant's x-ray, which were attributed to coal workers' pneumoconiosis by Drs. Gaziano and Rasmussen, could not be reflective of both coal workers' pneumoconiosis and rheumatoid arthritis. We, therefore, affirm the administrative law judge's finding that employer failed to rebut the presumption that claimant's pneumoconiosis arose out of coal mine employment at Section 718.203(b) by showing that the clinical pneumoconiosis, identified on x-ray, was due to other causes. *See Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-4-5 (1999)(*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*).

Finally, challenging the administrative law judge's weighing of the conflicting medical opinions of record at Section 718.202(a)(4), employer argues that the administrative law judge erred in according the findings of clinical and legal pneumoconiosis by Drs. Rasmussen and Gaziano greater weight than the contrary opinion of Dr. Zaldivar. Employer contends that the administrative law judge erred in rejecting Dr. Zaldivar's opinion as contrary to the Act on the ground that his determination, that claimant did not have clinical or legal pneumoconiosis, was based on his finding that claimant did not have an obstructive impairment. Employer contends that Dr. Zaldivar's opinion was not contrary to the Act and regulations because his finding that claimant did not have clinical or legal pneumoconiosis did not rest on his finding that claimant did not have an obstructive impairment. Rather, employer contends that Dr. Zaldivar was only explaining that claimant's restrictive defect with reduced diffusion capacity, as demonstrated by a pulmonary function study, was inconsistent with coal workers' pneumoconiosis, and was more consistent with interstitial fibrosis caused by

rheumatoid arthritis. Employer also avers that the administrative law judge erred in failing to discount the opinion of Dr. Rasmussen, as contrary to the Act and regulation, because Dr. Rasmussen assumed that claimant had clinical and legal pneumoconiosis based solely on the history of coal mine employment, without any additional supportive evidence and even though claimant's rheumatoid arthritis explained claimant's abnormal clinical findings. In addition, employer contends that the administrative law judge erred in crediting Dr. Gaziano's opinion of pneumoconiosis on the ground that because he was unaware of claimant's rheumatoid arthritis and did not, therefore, have a complete picture of claimant's health.

The administrative law judge noted that the Act and the regulations clearly provide that both obstructive and restrictive impairments can be related to coal mine employment. The administrative law judge, therefore, properly accorded little weight to Dr. Zaldivar's opinion that claimant did not have clinical or legal pneumoconiosis merely because he did not have an obstructive lung impairment. *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). Instead, the administrative law judge accorded determinative weight to the opinion of Dr. Rasmussen, that claimant had both pneumoconiosis and rheumatoid arthritis, as it was supported by the medical literature to which Dr. Rasmussen referred, the preponderance of the x-ray evidence demonstrating the existence of coal workers' pneumoconiosis, and the opinion of Dr. Gaziano, finding coal workers' pneumoconiosis.

A review of Dr. Zaldivar's reports shows that Dr. Zaldivar opined that claimant's physiological abnormalities were not consistent with an obstructive lung disease since coal workers' pneumoconiosis is demonstrated by obstructive impairments, not restrictive impairments. Employer's Exhibit 1. Consequently, the administrative law judge found that Dr. Zaldivar's opinion was based on a premise contrary to the Act and he properly found it entitled to little weight. *See Underwood v. Elkay Mining Inc.*, 105 F.3d 946, 951, 21 BLR 2-23 (4th Cir. 1997); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993); *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 1119, 10 BLR 2-69, 2-72-73 (6th Cir. 1987); Decision and Order at 11; *see also Peabody Coal Co. v. Odom*, 342 F.3d 486, 491, 22 BLR 2-612, 2-621 (6th Cir. 2003); *Penn Allegheny Coal Co. v. Mercatell*, 878 F.2d 106, 108, 12 BLR 2-305, 2-308-309 (3d Cir. 1989).

Instead, the administrative law judge rationally found that Dr. Rasmussen's opinion, finding pneumoconiosis, outweighed that of Dr. Zaldivar because Dr. Rasmussen's opinion was supported by the preponderance of the positive x-ray interpretations of record, his own physical examination findings and test results, Dr.

Gaziano's physical examination findings and test results, and medical literature.⁷ See *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Clark*, 12 BLR at 1-155; *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 (1984); Decision and Order at 12; Claimant's Exhibits 1, 2. Hence, the administrative law judge reasonably found Dr. Rasmussen's opinion worthy of determinative weight in this case. See *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985); Decision and Order at 12. Consequently, employer's argument that the administrative law judge erred in crediting the opinion of Dr. Rasmussen on the issue of clinical and legal pneumoconiosis is rejected.

Likewise, employer's contention that Dr. Gaziano did not possess a complete picture of the miner's health because he was unaware of claimant's rheumatoid arthritis lacks merit, since a review of Dr. Gaziano's September 30, 2004 report reveals that, under the medical history portion of the report, he checked the box designating the presence of arthritis. Director's Exhibit 16. Accordingly, we affirm the administrative law judge's determination that claimant satisfied his burden of establishing the existence of clinical and legal pneumoconiosis by medical opinion evidence at Section 718.202(a)(4). See 20 C.F.R. §§718.201, 718.202(a)(4); *Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47; Decision and Order at 12. We also affirm the administrative law judge's determination that claimant established the existence of clinical and legal pneumoconiosis by a preponderance of x-ray and medical opinion evidence at Section 718.202(a). See *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000). As claimant established all the elements of entitlement, the administrative law judge properly found that he was entitled to benefits. See *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-1.

⁷ After administering a complete pulmonary evaluation of claimant on March 28, 2006, Dr. Rasmussen opined that the causes of claimant's lung disease were clinical pneumoconiosis, rheumatoid arthritis, and certain medications used to treat rheumatoid arthritis. Claimant's Exhibit 1. On December 7, 2006, Dr. Rasmussen reiterated his opinion that both coal workers' pneumoconiosis and rheumatoid arthritis contributed to claimant's lung disease and discussed his disagreement with Dr. Zaldivar's opinion that these two conditions could be distinguished on x-ray. Claimant's Exhibit 2.

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge