BRB No. 07-0877 BLA

A. E. W.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: 07/24/2008
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE 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-Denying Benefits of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Juliet W. Rundle & Associates), Pineville, West Virginia, for claimant.

Paul E. Frampton (Bowles, Rice, McDavid, Graff & Love), Charleston, West Virginia, for employer/carrier.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (04-BLA-6582) of Administrative Law Judge Stephen L. Purcell rendered on a subsequent 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).[1] Claimant filed this claim for benefits on July 29, 2003. Director's Exhibit 4. The administrative law judge credited claimant with at least eleven years and five months of coal mine employment[2] pursuant to the parties' stipulation. Decision and Order at 4. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the medical evidence developed since the prior denial of benefits established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), an element of entitlement that was previously adjudicated against claimant. The administrative law judge therefore determined that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). In considering the claim on the merits, however, the administrative law judge found that claimant did not establish the existence of pneumoconiosis or that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(c).[3] Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that Dr. Rasmussen's medical opinion did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and erred in the manner in which he weighed together all of the relevant evidence regarding the existence of pneumoconiosis. Claimant further asserts that Dr. Rasmussen's opinion was the only reasoned medical opinion of record regarding the existence of pneumoconiosis and whether claimant's total disability is due to pneumoconiosis. Employer responds, urging affirmance of the denial

[1] Claimant filed claims on May 19, 1977 and July 16, 1984, which were finally denied and administratively closed. Director's Exhibits 1, 2. Claimant's 1984 claim was denied on November 8, 1984, because claimant did not establish that he had pneumoconiosis or was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 2.

[2] The record indicates that claimant's last coal mine employment was in West Virginia. Director's Exhibits 5, 8. Accordingly, the Board will apply the law 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*).

[3] In considering all of the record evidence on the merits of the claim, the administrative law judge accorded little weight to the "significantly older" medical evidence associated with claimant's 1977 and 1984 claims. Decision and Order at 5, n. 5. On appeal, no party challenges this aspect of the administrative law judge's decision.

of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response in this appeal.[4]

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he 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, 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, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge discussed three new medical opinions of record. In a report dated September 25, 2003, Dr. Rasmussen, based on physical examination, medical and work histories, and objective studies, diagnosed "CWP 12+ years coal mine employment and x-ray evidence of pneumoconiosis" and "COPD/Emphysema-Chronic productive cough, airflow obstruction and reduced SBDLCO." Director's Exhibit 15 at 4. Dr. Rasmussen listed coal dust exposure as the etiology of the pneumoconiosis, and coal dust exposure and cigarette smoking as the etiologies of the chronic obstructive pulmonary disease and emphysema. *Id.*

By contrast, Drs. Crisalli and Zaldivar examined and tested claimant and reviewed other medical evidence of record, and opined that claimant does not have coal workers' pneumoconiosis, but has a severe pulmonary impairment due to emphysema that is due entirely to his history of heavy smoking. Employer's Exhibits 2, 6, 11, 12.

The administrative law judge noted that Dr. Rasmussen was the only physician to diagnose pneumoconiosis and to opine that coal dust was a significant contributing factor in claimant's impairment. The administrative law judge explained that he accorded less weight to Dr. Rasmussen's opinion, because Dr. Rasmussen relied on a "questionable

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(a)(3), and that the CT scan readings of record did not establish the existence of pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

positive x-ray reading and [he] understated Claimant's cigarette smoking history."[5] Decision and Order at 11. The administrative law judge also found that Dr. Rasmussen's opinion was based on comparatively limited medical data, as Dr. Rasmussen relied on his own examination and testing results, while Drs. Zaldivar and Crisalli relied on more recent and extensive data, and had reviewed the opinions of other physicians of record. The administrative law judge further found that the opinions of Drs. Zaldivar and Crisalli were more consistent with the preponderance of the negative chest x-ray evidence, the negative CT scan evidence, claimant's "extensive, ongoing cigarette smoking history, and [c]laimant's comparatively limited coal mine employment history, which ended in the 1970's." Decision and Order at 11. He therefore accorded their opinions greater weight.

Claimant contends that the administrative law judge erred, because he discredited Dr. Rasmussen's entire opinion and denied the claim based primarily on a negative x-ray, contrary to 20 C.F.R. §718.202(b).[6] Claimant's Brief at 7. This contention lacks merit. As just discussed, the administrative law judge weighed Dr. Rasmussen's opinion not only based on the x-ray evidence, but also with reference to the documentation and support for Dr. Rasmussen's diagnosis of legal pneumoconiosis, and the quality of his opinion compared to those of Drs. Crisalli and Zaldivar. The administrative law judge's weighing of the medical opinions was proper. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Claimant's assertion that Dr. Rasmussen's opinion was the only reasoned opinion essentially asks the Board to reweigh the evidence, which we are not authorized to do. *Anderson*, 12 BLR at 1-113. Therefore, we reject claimant's argument and affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

The United States Court of Appeals for the Fourth Circuit has held that although 20 C.F.R. §718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-

[5] Earlier in his decision the administrative law judge had found, based on claimant's testimony, that "[c]laimant has an extensive cigarette smoking history which dwarfs his coal mine employment history." Decision and Order at 5. Claimant has not challenged this finding on appeal. It is therefore affirmed. *See Skrack*, 6 BLR at 1-711.

[6] Section 718.202(b) provides that "[n]o claim for benefits shall be denied solely on the basis of a negative chest x-ray." 20 C.F.R. §718.202(b).

162 (4th Cir. 2000). The administrative law judge weighed together the preponderantly negative x-rays, CT scans, and medical opinions, and found that the existence of pneumoconiosis was not established. Decision and Order at 11-12. Claimant contends that the administrative law judge misapplied *Compton*, because he first weighed each category of evidence separately, and only then weighed the evidence together. Claimant's Brief at 7. Claimant's allegation of error is unclear, but it appears to be that the administrative law judge should have weighed the medical opinions at subsection (a)(4) with reference to the medical evidence in the other subsections of 20 C.F.R. §718.202(a). As discussed above, however, the administrative law judge specifically factored in the x-rays and CT scan readings, the only other types of evidence presented, when he weighed the medical opinions of Drs. Crisalli, Zaldivar, and Rasmussen at 20 C.F.R. §718.202(a)(4). Moreover, claimant does not explain how it would be error for an administrative law judge to first evaluate the evidence within each category of 20 C.F.R. §718.202(a), and to then weigh the relevant evidence together to determine whether a preponderance of all the evidence establishes the existence of pneumoconiosis. We therefore reject claimant's allegation and affirm the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

Because claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a necessary element of entitlement under Part 718, we affirm the denial of benefits. *See Anderson*, 12 BLR at 1-112.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge