BRB No. 07-0899 BLA

A.G.P.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHANNOPIN MINING COMPANY	)	
	)	DATE ISSUED: 07/23/2008
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

James M. Poerio (Poerio, Walter & Mason), Pittsburgh, Pennsylvania, for employer.

Jeffrey S. Goldberg (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

SMITH, Administrative Appeals Judge:

Claimant appeals the Decision and Order – Denying Benefits (2006-BLA-05191) of Administrative Law Judge Michael P. Lesniak with respect to 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). The administrative law judge accepted the parties' stipulation to 37.5 years of coal mine employment and considered the claim, filed on September 15, 2004, pursuant to the regulations set forth in 20 C.F.R Part 718. The

administrative law judge determined that although the evidence of record was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant did not prove that he has pneumoconiosis under 20 C.F.R. §718.202(a) or that he is totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge did not properly weigh the medical opinion evidence pursuant to Sections 718.202(a)(4) and 718.204(c). Claimant also alleges that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete pulmonary evaluation as required under the Act. Employer responds, urging affirmance of the denial of benefits and rejection of claimant's request that the case be remanded for a second pulmonary evaluation. The Director also responds, requesting that the Board find no merit in claimant's contention that he did not receive a complete pulmonary evaluation.[1]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.[2] 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, 363 (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*).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Ewald, Fino, and Schaaf. Dr. Ewald examined claimant on December 22, 2004 at the request of the Department of Labor. Dr. Ewald obtained a chest x-ray, a pulmonary function study, and a blood gas study and obtained claimant's

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[1] The parties do not challenge the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §§718.202(a)(1)-(3) or that total disability was established under 20 C.F.R. §718.204(b). These findings are therefore affirmed, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989); Director's Exhibit 1.

employment and medical histories. Dr. Ewald completed Form CM-988, diagnosing chronic obstructive pulmonary disease (COPD), based upon the results of claimant's pulmonary function study, and identifying the cause as "coal dust." Director's Exhibit 14. Dr. Fino examined claimant on May 21, 2005 and reviewed claimant's hospital records. Dr. Fino indicated that claimant does not have pneumoconiosis, but is suffering from triad asthma, which is unrelated to coal dust exposure. Employer's Exhibit 1. At his deposition, Dr. Fino reiterated the conclusions expressed in his written report and discussed medical literature supporting the view that coal dust exposure does not cause asthma. Employer's Exhibit 3. Dr. Schaaf examined claimant on December 15, 2005 and determined that claimant has reactive airways dysfunction syndrome caused by mold exposure in coal mine employment. Claimant's Exhibit 1. After reviewing a CT scan obtained on February 28, 2002, Dr. Schaaf stated in a letter dated March 30, 2006, that the scan was not appropriate for the diagnosis of pneumoconiosis, as it did not include the upper lungs. Claimant's Exhibit 3. Dr. Schaaf was deposed on February 9, 2007 and after being apprised of the definition of legal pneumoconiosis, the doctor indicated that coal dust exposure is a contributing cause of claimant's reactive airways dysfunction syndrome and cited medical literature in support of his opinion.[3] Claimant's Exhibit 6.

The administrative law judge reviewed each of the medical opinions and noted that Drs. Fino and Schaaf are Board-certified pulmonologists.[4] Decision and Order at 4, 5; Claimant's Exhibits 1, 6; Employer's Exhibits 1, 3. The administrative law judge determined that the opinion in which Dr. Ewald diagnosed COPD caused by coal dust exposure was "not well[-]reasoned since he includes only a brief conclusion, without any explanation nor (sic) discussion of why the changes on Claimant's pulmonary function study support a diagnosis of pneumoconiosis." Decision and Order at 6; Director's Exhibit 14. With respect to the opinions of Drs. Fino and Schaaf, the administrative law judge stated:

> Both physicians agree that Claimant does not have medical pneumoconiosis and that his x-ray does not include changes of pneumoconiosis. In addition, both physicians agree Claimant is totally disabled by his pulmonary condition. On consideration of their respective examination findings and

[3] Pursuant to 20 C.F.R. §718.201(a)(2), legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment" and includes "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). For the purposes of the regulation, a disease "arising out of coal mine employment" means a disease that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[4] Dr. Ewald's credentials are not of record.

> review [of] Claimant's medical documents, however, these physicians reach contradictory conclusions regarding the cause of Claimant's pulmonary impairment. Dr. Fino concludes that Claimant's pulmonary condition is not due at all to exposure to coal mine dust but is due to triad asthma. In contrast, Dr. Schaaf concludes that Claimant has legal pneumoconiosis since he concludes Claimant's work in the coal mines and exposure to dust and mold aggravated and exacerbated asthma. Both physicians also state that the medical literature supports their conclusions.

Decision and Order at 6; Claimant's Exhibits 1, 6; Employer's Exhibits 1, 3. The administrative law judge found that the opinions of Drs. Fino and Schaaf were "equally persuasive" because both physicians are qualified as pulmonologists and both physicians explained their diagnoses in detail. *Id*. The administrative law judge determined that because the evidence on the issue was evenly balanced, claimant did not satisfy his burden of establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *Id*.

Claimant argues that in concluding that the medical opinion evidence regarding the existence of pneumoconiosis was in equipoise, the administrative law judge did not adequately perform his duty as fact-finder to determine which medical opinion was "more persuasive, credible or compelling." Claimant's Brief at 2. Claimant also maintains that because Dr. Ewald performed a thorough examination and provided responses to all of the questions on Form CM-988 concerning claimant's cardiopulmonary condition, the administrative law judge erred in apparently determining that Dr. Ewald's opinion was of no value. These contentions are without merit.

The administrative law judge rationally determined that Dr. Ewald's diagnosis of COPD caused by coal dust exposure was not well-reasoned on the ground that his written responses on Form CM-988 did not explain how claimant's pulmonary function study results supported his identification of coal dust exposure as the cause of claimant's COPD. *See Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); Decision and Order at 6. Based upon the administrative law judge's rational finding that Dr. Ewald's opinion was not well-reasoned, the administrative law judge did not err in according it no dispositive weight when considering whether the medical opinion evidence of record was sufficient to support a finding of pneumoconiosis under Section 718.202(a)(4). *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Regarding the administrative law judge's weighing of the opinions of Drs. Fino and Schaaf, contrary to claimant's argument, the administrative law judge properly performed his role as fact-finder. The administrative law judge considered the respective qualifications of the physicians and reviewed the contents of each opinion in detail,

noting that each physician provided a thorough explanation of his conclusions and cited medical literature in support of his diagnosis. *See* Decision and Order at 4-6. The administrative law judge then rationally determined that because Drs. Fino and Schaaf had provided diagnoses that were equally documented and reasoned, their opinions were equally persuasive. *See Mancia*, 130 F.3d at 591, 21 BLR at 2-239; *Lango*, 104 F.3d at 577, 21 BLR at 2-20-21. We affirm, therefore, the administrative law judge's finding that claimant did not satisfy his burden of establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(4) by a preponderance of the medical opinion evidence. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81, 18 BLR 2A-1, 2A-12 (1994).

Because claimant has not alleged error in the administrative law judge's finding that all of the evidence of record, when considered together, is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4), we also affirm this finding. *See Skrack v. Island Creek Coal Co.*, 7 BLR 1-710 (1983); Decision and Order at 6, citing *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

We also reject claimant's assertion that the Director failed to fulfill his statutory obligation to provide a complete pulmonary evaluation pursuant to Section 413(b) of the Act.[5] The record reflects that Dr. Ewald conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. Director's Exhibit 14; *see* 20 C.F.R. §§718.101(a), 718.104. The administrative law judge did not find, nor does claimant contend, that Dr. Ewald's opinion was incomplete because it failed to address one of the essential elements of entitlement. Indeed, claimant acknowledges that Dr. Ewald's evaluation was complete, as he "performed a thorough physical examination, relied on clinical findings, [claimant's] history, and completed a form prescribed by the U.S. Department of Labor, Form CM-988 as required." Claimant's Brief at 3.

Rather, claimant asserts that the Director failed to provide a complete, credible pulmonary evaluation because the administrative law judge found that Dr. Ewald's opinion regarding the existence of pneumoconiosis was not well-reasoned. The Director maintains that whether the administrative law judge gave any weight to Dr. Ewald's diagnosis is not relevant under Section 413(b), as the Director is required to provide claimant with a complete pulmonary evaluation, not a dispositive one. We agree with the Director. Given the fact that Dr. Ewald's opinion addressed all of the essential elements of entitlement, Director's Exhibit 14, we reject claimant's argument that the Director failed to provide him with a full pulmonary evaluation and decline to remand this case for

[5] The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406.

a second pulmonary evaluation. *See Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984); *cf. Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-89-90 (1994).

Because we have affirmed the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a), a requisite element of entitlement, an award of benefits is precluded. *Trent*, 11 BLR at 1-26; *Perry*, 9 BLR at 1-1.

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

I concur:

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JUDITH S. BOGGS
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to affirm the administrative law judge's decision denying benefits because I agree with claimant's argument that the case should be remanded to the district director to provide claimant with a complete pulmonary evaluation pursuant to 30 U.S.C. §923(b).

In the instant case, the Department of Labor provided claimant with a pulmonary evaluation conducted by Dr. Ewald. The administrative law judge discredited Dr. Ewald's report, stating:

> Dr. Ewald did not explain the basis for his diagnosis of pneumoconiosis other than "the results of pulmonary function study." I find his report is not well reasoned since he includes only a brief conclusion, without any explanation nor discussion of why the changes on pulmonary function study support a diagnosis of pneumoconiosis.

Decision and Order at 6.

The Director, Office of Workers' Compensation Programs (the Director), implicitly acknowledges that the administrative law judge correctly determined that Dr.

Ewald's report is not well-reasoned, but contends that his statutory duty to provide a complete pulmonary evaluation has been discharged in the case at bar because the doctor performed all appropriate tests, recorded relevant histories and clinical information, and concluded that claimant's pulmonary impairment was due to coal mine employment. Director's Brief at 2.

This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, which disagrees with the Director. The Third Circuit has cautioned administrative law judges not to do exactly what the administrative law judge did in the case at bar. The Third Circuit has declared:

> Where the administrative law judge believes additional medical testimony is needed to explain the clinical evidence, an effort to obtain such information should be made, rather than discrediting medical opinions because of its absence. *See Newman v. Director, Office of Workers' Compensation Programs*, 745 F.2d 1162, 1165 (8th Cir. 1984).

Kertesz v. Crescent Hills Coal Co., 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986).

Hence, in accordance with the teaching of the Third Circuit in *Kertesz*, I would remand the case for the Department to obtain an explanation from Dr. Ewald for his opinion that the pulmonary function evidence supports a diagnosis of pneumoconiosis. In all other respects, I concur in my colleagues' decision.

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REGINA C. McGRANERY
Administrative Appeals Judge