BRB No. 07-0933 BLA

G.E.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CUMBERLAND RIVER COAL COMPANY	)	DATE ISSUED: 07/09/2008
	)	
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

G.E.S., Haysi, Virginia, *pro se*.

Denise M. Davidson (Davidson & Associates), Hazard, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order Denying Benefits (2006-BLA-5954) of Administrative Law Judge Linda S. Chapman rendered on a claim filed on June 29, 2005, pursuant to the provisions of Title IV of the

[1] Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Employer conceded, and the administrative law judge found, that claimant worked approximately thirty years in coal mine employment, that employer is the responsible operator, and that the claim was timely filed.[2] The administrative law judge found, however, that the evidence is insufficient to establish that claimant has pneumoconiosis pursuant to 20 C.F.R. §718.202. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the evidence is sufficient to establish that he suffers from pneumoconiosis, which arose out of coal mine employment. In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not submit a response brief on the merits of this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are 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 in a claim filed after March 31, 1980, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204, 718.304; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).[3] 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).

[2] These findings, which have not been challenged on appeal, are not adverse to claimant, and are, therefore, affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant's last coal mine employment was in Virginia. Director's Exhibits 3-6; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and does not contain any error requiring remand or reversal. Pursuant to Section 718.202(a)(1), the administrative law judge considered seven readings of three x-rays. The administrative law judge found that the film taken on November 18, 2003, was read as positive for pneumoconiosis by Dr. Alexander and as negative for pneumoconiosis by Dr. Wiot, both dually qualified as B readers and Board-certified radiologists. Decision and Order at 7; Director's Exhibits 10, 12. The administrative law judge found that the x-ray dated November 22, 2004, also was read by Dr. Ahmed as positive and by Dr. Wiot as negative.[4] Director's Exhibits 10, 12. In addition, the most recent x-ray taken on July 28, 2005, was read as positive by Dr. Alexander and as negative by Dr. Wiot and Dr. Baker, who is a B-reader. The administrative law judge thus found that, taken individually or as a whole, the x-ray evidence is almost evenly balanced. Given this state of equipoise, the administrative law judge rationally found that claimant did not establish the existence of simple pneumoconiosis by x-ray evidence. *See Cole v. East Kentucky Collieries*, 20 BLR 1-50 (1996); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 18 BLR 2A-1 (1994).

The administrative law judge also reviewed the x-rays to determine whether claimant established the existence of complicated pneumoconiosis. 20 C.F.R. §§718.202(a)(3); 718.304. If claimant has complicated pneumoconiosis, he has established the existence of pneumoconiosis as well as his entitlement to an irrebuttable presumption that he is totally disabled due to pneumoconiosis. *Id.* The administrative law judge found that Dr. Alexander read the x-ray taken on November 18, 2003, as showing a two-centimeter large opacity in the right upper zone and a "possible" one-centimeter large opacity in the left upper zone. *See* Director's Exhibit 10. However, Dr. Alexander read a later x-ray taken on July 28, 2005, as showing a ten millimeter mass in the left upper zone, and he did not mention any opacity in the right upper zone. *See* Director's Exhibit 11. The administrative law judge acted within her discretion in finding that the inconsistency regarding the presence of any opacity in the right upper zone "casts doubt on the question of whether such a large opacity actually exists," Decision and Order at 8, and that the mass described by Dr. Alexander in the left upper zone is not

[4] The administrative law judge incorrectly stated that Dr. Alexander read the x-ray taken on November 22, 2004, as positive for the existence of pneumoconiosis. Rather, this x-ray was read as positive by Dr. Ahmed, who, also, is dually qualified as a B-reader and Board-certified radiologist. *See* Director's Exhibit 10. The administrative law judge's error thus does not affect his analysis of the x-ray evidence. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

large enough to qualify as a "large opacity" for purposes of Section 718.304. *Handy v. Director, OWCP*, 1 BLR 1-73 (1990).

Dr. Ahmed noted a category A large opacity in the left upper lung in the November 22, 2004, x-ray and stated that it was likely part of complicated pneumoconiosis, but that cancer could not be excluded. Director's Exhibit 10. Dr. Wiot also reviewed this x-ray and identified stranding and pleural thickening consistent with a past inflammatory process but not with pneumoconiosis.[5] Director's Exhibit 12. The administrative law judge rationally found that as both Dr. Wiot and Dr. Ahmed are dually qualified, their opinions are in equipoise. The administrative law judge concluded that considering the totality of the x-ray evidence, claimant did not establish the presence of a lung opacity greater than one centimeter, and thus, did not meet the requirements for complicated pneumoconiosis at Section 718.304, 20 C.F.R. §718.304; *Cole*, 20 BLR 1-50; *Handy*, 16 BLR 1-73. We affirm this finding as it is rational and supported by substantial evidence.

The administrative law judge correctly found that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(2), as the record contains no biopsy results demonstrating the presence of pneumoconiosis. Claimant's biopsy, which resulted in a notation of anthracotic pigmentation, is not sufficient, by itself, to establish the existence of pneumoconiosis. *Hapney v. Peabody Coal Co.*, 22 BLR 1-104, 1-111 (2001) (*en banc*) (Dolder & Smith, JJ., dissenting); Director's Exhibit 10.

Pursuant to Section 718.202(a)(4), the administrative law judge addressed the medical opinion of Dr. Baker. Decision and Order at 8; Director's Exhibit 13. Dr. Baker opined that claimant has mild bronchitis, which was caused primarily by his cigarette smoking, and with some, but not significant, contribution from his coal dust exposure. Director's Exhibit 13. Dr. Baker also diagnosed claimant as suffering from bilateral pulmonary fibrosis and stated that this condition is not related to claimant's coal dust exposure. Dr. Baker concluded that claimant does not have a chronic lung disease caused by coal mine employment. The administrative law judge properly found that Dr. Baker's opinion does not definitively support a finding that claimant has pneumoconiosis.[6] Decision and Order at 8; 20 C.F.R. §718.201(a)(4); *See U.S. Steel Mining Co. v.*

[5] Claimant underwent a biopsy to determine if he had cancer, and the biopsy was negative in this regard. Director's Exhibit 10. Similarly, a skin test in 2006 for tuberculosis was negative. Claimant's Exhibit 1.

[6] "Legal" pneumoconiosis includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

Director, OWCP [*Jarrell*], 187 F.3d 384, 391, 21 BLR 2-639, 2-652-653 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). As the record does not contain any other medical opinion evidence, we affirm the finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Lastly, we affirm as rational and supported by substantial evidence the administrative law judge's finding that, when weighed together, the evidence relevant to 20 C.F.R. §718.202(a) is insufficient to establish the existence of pneumoconiosis. *Island Creek Coal Co. v. Compton,* 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). In light of our affirmance of the administrative law judge's finding that the evidence does not establish the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of claimant's claim, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

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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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge