BRB No. 08-0860 BLA

K.S.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COAL PREPARATION, INCORPORATED	)	
	)	DATE ISSUED: 07/29/2009
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 Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

John Earl Hunt, Allen, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (07-BLA-5008) of Administrative Law Judge Stephen L. Purcell on 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).[1] The administrative law judge credited claimant with

[1] Claimant filed his claim for benefits on October 5, 2005. Director's Exhibit 2. The district director issued a proposed decision and order denying benefits on May 31, 2006. Director's Exhibit 27. Claimant requested a formal hearing and the claim was

thirteen years of coal mine employment.[2] Decision and Order at 3. The administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further found that although the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), since claimant did not establish that he has pneumoconiosis, he could not establish that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in determining that the evidence did not establish the existence of pneumoconiosis or total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1), (2), (4), 718.204(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to claimant's appeal.

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).

Claimant contends that the administrative law judge erred in finding that the x-ray evidence does not establish the existence of clinical pneumoconiosis[3] pursuant to 20 C.F.R. §718.202(a)(1). We disagree.

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transferred to the Office of Administrative Law Judges for a hearing on September 26, 2006. Director's Exhibits 30, 33.

[2] The record indicates that claimant's last coal mine employment was in Kentucky. Director's Exhibits 3, 5. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

[3] Clinical pneumoconiosis "consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by [the] permanent

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered eight readings of six x-rays. The administrative law judge noted that the February 28, 2006 x-ray was read as 3/3, q, p [positive for pneumoconiosis] by Dr. Halbert, a B reader. Claimant's Exhibit 3. The administrative law judge found that the February 28, 2006 x-ray supported a finding of pneumoconiosis, based on Dr. Halbert's uncontradicted reading. The administrative law judge next noted that the February 23, 2006 x-ray was interpreted as 3/3, t, t [positive for pneumoconiosis] by Dr. Fino, a B reader, but was read as negative for pneumoconiosis by Dr. Wiot, who is dually qualified as a B reader and Board-certified radiologist. Director's Exhibit 14; Employer's Exhibit 2. Similarly, the administrative law judge noted that the November 12, 2005 x-ray was interpreted as 2/3, q/s [positive for pneumoconiosis] by Dr. Dahhan, a B reader, but was read as negative by Dr. Wiot. Director's Exhibit 13; Employer's Exhibits 2, 5. The administrative law judge noted that the November 10, 2005 x-ray[4] was interpreted as 3/3, q, t [positive for pneumoconiosis] by Dr. Broudy, a B reader, and as negative by Dr. Wiot. Director's Exhibits 10, 11; Employer's Exhibit 1. Finally, the administrative law judge noted that the February 8, 2006 x-ray was read as negative for pneumoconiosis by Dr. Wiot. Employer's Exhibit 8. Finding that "[t]he majority of the x-ray interpretations by dually qualified physicians were negative for the presence of pneumoconiosis," the administrative law judge permissibly concluded that claimant "failed to establish pneumoconiosis by a preponderance of the x-ray evidence." Decision and Order at 13.

Contrary to claimant's arguments, the administrative law judge properly considered both the quantity and the quality of the x-ray readings, and permissibly found that the preponderance of negative readings by dually qualified readers outweighed the positive readings by lesser qualified physicians. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004); Decision and Order at 13; Claimant's Brief at 16. We therefore affirm the administrative law judge's finding that the x-ray evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Claimant next contends that the administrative law judge erred in his evaluation of the biopsy evidence pursuant to 20 C.F.R. §718.202(a)(2). Claimant's Brief at 16.

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deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[4] The November 10, 2005 x-ray was also read for quality purposes only by Dr. Barrett. Director's Exhibit 11.

Contrary to claimant's contention, the administrative law judge noted, correctly, that while the results of the biopsy performed on November 5, 2005 include a diagnosis of interstitial lung disease, they do not contain a diagnosis of pneumoconiosis. Decision and Order at 15; Claimant's Exhibit 1.

Claimant further asserts that the administrative law judge erred in his weighing of the medical opinions of record in determining that the existence of pneumoconiosis is not established pursuant to 20 C.F.R. §718.202(a)(4). Claimant's Brief at 16-18. We disagree.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the opinions of Drs. Milstone, Broudy, Dineen, Fino, and Dahhan, together with claimant's medical treatment records. Drs. Milstone, Broudy, and Dineen diagnosed claimant with pneumoconiosis, while Drs. Fino and Dahhan opined that claimant does not have pneumoconiosis. The June 2002 treatment records document claimant's heart symptoms. Director's Exhibit 12. The treatment notes of February 20, 2004 through November 2, 2006, indicate the presence of chronic obstructive pulmonary disease (COPD), chronic obstructive airways disease and pulmonary fibrosis. Claimant's Exhibit 5. Further, as the administrative law judge noted, all of the physicians agree on the existence of pulmonary fibrosis, but disagree as to whether the fibrosis was caused by coal dust exposure or non-coal mine employment factors. The administrative law judge accorded greater weight to the opinion of Dr. Fino, than to the opinions of Drs. Milstone, Broudy, Dineen, and Dahhan, to conclude that claimant failed to establish the existence of pneumoconiosis by means of the medical opinion evidence.

The administrative law judge permissibly accorded less weight to Dr. Milstone's diagnosis of pneumoconiosis, in part, because he found that Dr. Milstone's statement that "'a coal miner's pneumoconiosis could certainly be responsible for [claimant's] symptoms'" was "somewhat equivocal." *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Decision and Order at 14; Director's Exhibit 9. Moreover, the administrative law judge permissibly found that Dr. Milstone failed to provide adequate rationale for his opinion that claimant's fibrosis is due to his coal mine employment rather than to non-coal mine employment factors. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 14.

The administrative law judge also acted within his discretion in discounting the opinions of Drs. Broudy and Dineen, that claimant has pneumoconiosis, as inadequately supported and explained. *See Gray*, 176 F.3d at 388, 21 BLR at 2-626; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-19. Moreover, the administrative permissibly found Dr. Dineen's 1993 opinion outweighed as the

"significantly" more recent opinions provide a more "accurate picture of [c]laimant's physical condition." *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); Decision and Order at 14.

By contrast, the administrative law judge found that Dr. Fino rendered the most reasoned and supported opinion on the existence of pneumoconiosis. The administrative law judge found that, unlike Drs. Milstone and Broudy, Dr. Fino explained his conclusion that claimant's pulmonary fibrosis was not caused by coal dust and is more consistent with usual interstitial pneumonitis and idiopathic pulmonary fibrosis. Employer's Exhibit 3. As the administrative law judge noted, Dr. Fino explained that computerized tomography (CT) scans are more sensitive than x-rays and that the CT scans were not consistent with pneumoconiosis. Decision and Order at 14. Dr. Fino specifically found,

> CT scans are much more sensitive than regular chest x-rays for determining the etiology of a lung condition. The fact that the CT scan performed on 5/10/05 revealed honeycombing in a peripheral and basilar distribution is classic for usual interstitial pneumonitis and idiopathic pulmonary fibrosis. Coal workers' pneumoconiosis does not cause honeycombing and is not predominantly in a peripheral and basilar distribution.

Employer's Exhibit 3 at 5. Thus, the administrative law judge permissibly found Dr. Fino's opinion better reasoned and supported than the other opinions of record. *See Gray*, 176 F.3d at 382, 388, 21 BLR at 2-615, 2-626); *Rowe*, 710 F.2d at 251, 255 n.6, 5 BLR at 2-99, 2-103; *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-19. Thus, we affirm the administrative law judge's finding that the medical opinion evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) as supported by substantial evidence.

Based on the foregoing, we affirm the administrative law judge's finding that the evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a miner's claim under Part 718, we affirm the administrative law judge's denial of benefits.[5] *Anderson*, 12 BLR at 1-112.

[5] Consequently, we need not address claimant's argument concerning the administrative law judge's finding that claimant did not establish total disability due to pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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