BRB No. 10-0674 BLA

WILLIAM C. BROWN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HARLAN BELL COAL, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 07/21/2011
	)	
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 Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

William C. Brown, Harlan, Kentucky, *pro se*.

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

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order Denying Benefits (2008-BLA-05332) of Kenneth A. Krantz on a claim filed on January 22, 2007, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*))(the Act). The administrative law judge credited claimant with a coal mine employment history of 12.67 years, but found that claimant failed to establish the existence of either clinical or legal pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied.

On appeal, claimant generally asserts that he is entitled to benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response.

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 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 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish 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 (1989).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to

[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).

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

At the outset, we affirm the administrative law judge's length of coal mine employment finding. In this case, the evidence regarding length of coal mine employment consists of claimant's Social Security records, his history of coal mine employment form, and his deposition testimony.[3] The administrative law judge found that 12.67 years of coal mine employment were established, 9.88 years of which were in underground mining. The administrative law judge acknowledged that claimant testified that he was self-employed during some of his coal mine employment, particularly during the time he was hauling coal. The administrative law judge, however, declined to credit claimant's testimony, regarding coal mine employment that was not reflected in his Social Security records, without other evidence that supported such employment. Decision and Order at 16. Instead, the administrative law judge based his length of coal mine employment finding on claimant's Social Security records. *See* Decision and Order at 11-14. Because the administrative law judge properly relied on this evidence,[4] we affirm the administrative law judge's length of coal mine employment finding, as supported by substantial evidence.[5] *Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985).

Next, we affirm the administrative law judge's finding that claimant failed to establish the existence of clinical pneumoconiosis at Section 718.202(a), because the five x-rays of record were read equally as both positive and negative by like-credentialed radiologists and were, therefore, in "equipoise."[6] Because the administrative law judge

[3] The administrative law judge specifically noted that claimant had not submitted any "pay stubs, affidavits, or other documentation" relevant to the length of his coal mine employment. Decision and Order at 11.

[4] The administrative law judge delineated the earnings claimant received for each period of coal mine employment reflected in his Social Security records. Decision and Order at 14-17.

[5] Because we affirm the administrative law judge's finding that only 12.67 years of coal mine employment were established, claimant is not entitled to consideration under Section 411(c)(4) in this case. *See* 30 U.S.C. §921(c)(4).

[6] The administrative law judge properly found the positive and negative readings of the February 20, 2007 x-ray to be in equipoise because, even though Dr. Baker, a B reader, interpreted the x-ray as positive, Drs. Alexander and Poulos, dually-qualified B readers and Board-certified radiologists, read it as positive, and as negative. *See* 20 C.F.R. §718.202(a); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Director's

properly found the readings to be in "equipoise," as to the existence of pneumoconiosis, he properly found that claimant failed to establish the existence of clinical pneumoconiosis at Section 718.202(a)(1). *See* 20 C.F.R. §718.202(a)(1); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Turning to Section 718.202(a)(2) and (3), the administrative law judge properly found that the existence of clinical pneumoconiosis was not established at Section 718.202(a)(2), as the record did not contain any biopsy evidence, and that the existence of clinical and legal pneumoconiosis was not established at Section 718.202(a)(3), as the evidence was insufficient to invoke the presumptions at Section 718.202(a)(3). 20 C.F.R. §§718.202(a)(2), (3); 718.304, 718.305, 718.306; Decision and Order at 22-23.

Finally, the administrative law judge properly found that the only medical opinion evidence that found the existence of clinical and legal pneumoconiosis was unreasoned.[7] The administrative law judge, therefore, properly found that neither the existence of clinical or legal pneumoconiosis was established at Section 718.202(a)(4). The administrative law judge properly discounted the opinion of Dr. Augustine, diagnosing

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Exhibits 14, 18, 19. Likewise, the administrative law judge properly found the readings of the July 5, 2007 x-ray to be in equipoise because Dr. Alexander read the x-ray as positive and Dr. Poulos read it as negative. 20 C.F.R. §718.202(a)(1); Director's Exhibits 19, 24, 26; Decision and Order at 21. Regarding the readings of the August 2, 2007 x-ray, the administrative law judge properly found them to be in equipoise because Dr. Miller, a dually-qualified B reader and Board-certified radiologist, read the x-ray as positive, while Dr. Kendall, a dually-qualified B reader and Board-certified radiologist, read it as negative. 20 C.F.R. §718.202(a)(1); Director's Exhibits 23, 25; Employer's Exhibit 1; Decision and Order at 21-22. Similarly, regarding the May 5, 2008 x-ray, the administrative law judge properly found its readings to be in equipoise, as it was read as positive by Dr. Ahmed and as negative by Dr. West, dually-qualified B readers and Board-certified radiologists. 20 C.F.R. §718.202(a)(1); Claimant's Exhibit 2; Employer's Exhibit 3; Decision and Order at 22. Finally, the administrative law judge properly found the positive reading by Dr. Ahmed and the negative reading by Dr. Halbert of the January 5, 2009 x-ray to be in "equipoise," as these doctors were both dually-qualified B readers and Board-certified radiologists. 20 C.F.R. §718.202(a); Claimant's Exhibit 1; Employer's Exhibit 7; Decision and Order at 22.

[7] The record also includes the opinions of Drs. Dahhan and Rosenberg, who found that claimant did not have either clinical or legal pneumoconiosis, *i.e.*, a respiratory impairment related to coal mine employment. Employer's Exhibits 1, 2.

coal workers' pneumoconiosis, as it was based primarily on positive x-ray readings. The administrative law judge properly found that the credibility of Dr. Augustine's diagnosis was undermined because the x-ray evidence the doctor relied on was, in fact, in "equipoise." *See Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-216, 1-225-26 (2002); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). Similarly, the administrative law judge properly discounted Dr. Augustine's diagnosis of legal pneumoconiosis[8] because it was based on inaccurate length of coal mine employment and smoking histories.[9] *See Creech v. Benefits Review Board*, 841 F.2d 706, 709, 11 BLR 2-86-91 (6th Cir. 1988); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Considering Dr. Baker's opinion, diagnosing the existence of both clinical and legal pneumoconiosis, the administrative law judge properly discounted it because Dr. Baker relied on a positive x-ray, when the x-ray evidence was, in fact, in equipoise, and because Dr. Baker's diagnosis of legal pneumoconiosis was not sufficiently reasoned.[10] *See Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-113, 117 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Accordingly, we affirm the administrative law judge's finding that the medical opinion evidence failed to establish the existence of either clinical or legal pneumoconiosis at Section 718.202(a)(4).[11]

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[8] Dr. Augustine appeared to have found that claimant's chronic obstructive pulmonary disease was related to his coal mine employment. Claimant's Exhibit 6; Employer's Exhibit 9.

[9] The administrative law judge found that claimant had a 12.67 year coal mine employment history, while Dr. Augustine relied on an over twenty-year coal mine employment history. The administrative law judge also noted that Dr. Augustine under-estimated claimant's smoking history by reporting a ten year smoking history of a quarter-pack per day, while he found a twenty-seven year smoking history at a half-pack per day. Decision and Order at 23.

[10] The administrative law judge noted that Dr. Baker's comments, that "some studies" suggest the synergistic or additive effects of coal mine dust exposure and cigarette smoking and that "[t]his may be evident in [claimant]," Director's Exhibit 14 at 15, were, "standing alone," "too equivocal and vague to support Dr. Baker's diagnosis of legal pneumoconiosis." *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-113, 117 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Decision and Order at 24.

[11] The administrative law judge properly excluded the opinion of Dr. Alam, as he found that it was based on an inadmissible x-ray and pulmonary function study and that there was no way to ascertain whether Dr. Alam would have reached his finding on the

As the administrative law judge properly found that the existence of pneumoconiosis was not established at Section 718.202(a)(1)-(4), an essential element of entitlement, he properly found that claimant was not entitled to benefits. *See Anderson*, 12 BLR at 1-112

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

existence of pneumoconiosis without relying on this inadmissible evidence. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007)(*en banc*); Decision and Order at 6.