BRB No. 98-1353 BLA

JENNINGS R. MANGUS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 7/27/99
	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	
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 Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Jennings R. Mangus, Man, West Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order - Denying Benefits (97-BLA-1166) of Administrative Law Judge Paul H. Teitler 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). This case involves a duplicate claim,[1] which was filed on

[1]Claimant filed a previous claim on May 28, 1985. Director's Exhibit 30. Administrative Law Judge Peter McC. Giesey considered the claim pursuant to the applicable regulations at 20 C.F.R. Part 718 in a Decision and Order dated January 17, 1990. *Id*. After noting that employer stipulated that claimant had sixteen and one-half years of coal mine employment, Judge Giesey found that although claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) upon application of the true doubt rule, and pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.203(b), claimant failed to establish total disability pursuant to 20 C.F.R.

July 24, 1996. After crediting claimant with at least twenty years of coal mine employment based upon the stipulation of the parties, the administrative law judge considered the instant claim pursuant to the applicable regulations at 20 C.F.R. Part 718. The administrative law judge determined initially that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 inasmuch the evidence unanimously supported a finding that claimant had become totally disabled pursuant to 20 C.F.R. §718.204(c) since the denial of claimant's prior claim. Considering the claim on the merits, the administrative law judge then found the evidence of record insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4). Accordingly, he denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he does not presently intend to participate in this appeal.[2]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We 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. 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 under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en*

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§718.204(c). *Id.* Accordingly, Judge Giesey denied benefits. *Id*. Claimant did not take any further action in pursuit of benefits until filing the instant duplicate claim on July 24, 1996. Director's Exhibit 1.

[2]We affirm the administrative law judge's findings under 20 C.F.R. §§718.204(c) and 725.309, as well as his length of coal mine employment finding, as these findings do not prejudice claimant and are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983); Decision and Order at 3-4.

banc).

In considering whether the x-ray evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), the administrative law judge correctly found that the record contains thirty-seven x-ray interpretations of thirteen different films, Director's Exhibits 12-14, 24, 25, 30; Employer's Exhibits 2-5, and accurately stated that a majority of the readings, *i.e.*, twenty-six, were negative for pneumoconiosis. Decision and Order at 7; Director's Exhibits 12, 24, 25, 30; Employer's Exhibits 2-5. The administrative law judge further correctly noted that eight of the thirteen x-ray films were only read as negative, and that none of the films was exclusively read as positive for the disease.[3] *Id*. The administrative law judge then found that conflicting interpretations of the five x-rays for which both parties obtained readings were made by equally-qualified Board-certified radiologist/B readers.[4] *Id*. The administrative law judge thus determined that all of the readings, both positive and negative, were credible, and that there was no basis for differentiating these conflicting readings based on the quality of the films, as all were found to be of sufficient quality for interpretation. *Id*. The administrative law judge acted within his discretion in determining that, for these reasons, the evidence was, at best, in equipoise. *Id*. The administrative law judge, therefore, properly found that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a)(4), as the existence of the disease was not established by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries [Ondecko],* 512 U.S. 267, 18 BLR 2A-1 (1994); *Perry, supra; see also Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); Decision and Order at 7. We thus affirm the administrative law judge's finding under Section 718.202(a)(1).

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[3]The record indicates that eight films, dated February 25, 1976, January 1, 1981, August 7, 1985, July 6, 1988, April 26, 1993, March 26, 1994, September 11, 1995 and January 11, 1997, were exclusively read as negative. Director's Exhibits 24, 30; Employer's Exhibit 4.

[4]The film dated August 15, 1984 was interpreted as negative by Drs. Wiot and Spitz, who are Board-certified radiologist/B readers, and read as positive by an equally-qualified physician, Dr. Speiden. Director's Exhibit 30; Employer's Exhibit 4. The July 31, 1985 film was interpreted as negative by Drs. Wiot and Spitz, and read as positive by Dr. Al-Asbahi, a Board-certified radiologist. Director's Exhibit 30. The March 11, 1987 x-ray was interpreted as negative by Drs. Scott, Gayler, Saba and Wheeler, all of whom are Board-certified radiologist/B readers, and read as positive by two equally-qualified physicians, Drs. Deardorff and Brandon. *Id*. The February 25, 1986 film was interpreted as negative by Dr. Renn, a B reader, and read as positive by Drs. Brandon, Bassali and Speiden, dually-qualified Board-certified radiologist/B readers. *Id*. Finally, the film dated September 20, 1996 was interpreted as negative by Dr. Ranavaya, a B reader, and Drs. Wiot, Shipley, and Spitz, dually-qualified radiologists, and was read as positive by Dr. Gaziano, a B reader, and Dr. Francke, a Board-certified radiologist/B reader. Director's Exhibits 12-14, 25; Employer's Exhibit 2.

Additionally, we affirm the administrative law judge's finding that claimant was precluded from establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(2), since there is no autopsy or biopsy evidence in the record. Decision and Order at 7-8. We also affirm the administrative law judge's finding that claimant could not establish the existence of pneumoconiosis under Section 718.202(a)(3), as none of the presumptions thereunder applies.[5] Decision and Order at 8.

[5]The record does not contain evidence of complicated pneumoconiosis and, consequently, claimant does not qualify for the presumption at 20 C.F.R. §718.304. The instant duplicate claim was filed after January 1, 1982 and, therefore, the presumption at 20 C.F.R. §718.305 is inapplicable. Additionally, as this is not a survivor's claim, the presumption at 20 C.F.R. §718.306 does not apply.

In considering whether the medical opinion evidence was sufficient to establish pneumoconiosis under Section 718.202(a)(4), the administrative law judge properly discounted, as unreasoned, the opinion of Drs. MacCallum and Leef on the basis that the two doctors failed to provide reasoning for their diagnosis of occupational pneumoconiosis in their joint report of their examination of claimant on August 15, 1984 for the West Virginia Occupational Pneumoconiosis Board.[6] *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); Decision and Order at 19; Director's Exhibit 30. The administrative law judge further found that the opinions of Drs. Rasmussen, Lee and Gaziano,[7] which indicate that claimant has pneumoconiosis, were documented opinions, but not as well-reasoned as, and therefore outweighed by, the contrary opinions of Drs. Zaldivar, Sobieski, Kress, Crisalli, Fino, Dahhan and Morgan.[8] *See Clark, supra; Tackett, supra*; Decision and Order at 20;

[6]The administrative law judge erred in stating that Drs. MacCallum and Leef did not consider claimant's smoking history. Decision and Order at 19; Director's Exhibit 30. The doctors did, in fact, note that claimant was smoking one pack of cigarettes per day, and had been doing so for thirty years. Director's Exhibit 30. The administrative law judge's error in this regard was harmless, however, as the administrative law judge, in finding that the doctors did not provide any reasoning for their diagnosis of occupational pneumoconiosis, provided an otherwise proper basis for discounting the doctors' opinion and provided a proper basis for crediting the contrary opinions of record, as discussed *infra*. *See Kozele v. Rochester and Pittsburgh Coal Co.,* 6 BLR 1-378 (1983).

[7]Dr. Rasmussen examined claimant on February 25, 1986, and indicated that claimant was "obviously incapable of performing his former coal mine employment" due to a significant pulmonary impairment. Director's Exhibit 30. Dr. Rasmussen did not indicate a diagnosis that claimant has pneumoconiosis or any other condition arising out of coal dust exposure. *Id*. Subsequently, in 1988, Dr. Rasmussen reviewed the medical evidence which was available up until that time, and diagnosed pneumoconiosis based upon his review of that evidence. *Id*. Dr. Lee examined claimant on November 22, 1988, and diagnosed claimant with coal workers' pneumoconiosis and chronic obstructive pulmonary disease due to a twenty-five pack year smoking history. *Id*. Dr. Lee found that claimant was totally disabled at that time due in part to his coal mine employment, but that it was not possible to determine how much of claimant's impairment was due to cigarette smoking as opposed to coal dust exposure. *Id*. Dr. Gaziano examined claimant on September 20, 1996 and, in a standard form report, indicated that claimant has coal workers' pneumoconiosis, hypertensive cardiovascular disease, and chronic bronchitis due to smoking. Director's Exhibit 10. With regard to the issue of total disability, Dr. Gaziano stated that claimant is "disabled from coal mining due to lung diseases." *Id*.

[8]Drs. Zaldivar, Sobieski, Kress, Crisalli, Fino, Dahhan and Morgan all opined that claimant was not suffering from coal workers' pneumoconiosis, but rather from emphysema, and possibly bronchitis, due to cigarette smoking. Director's Exhibits 26, 30; Employer's Exhibits 3-7, 9. Drs. Zaldivar and Crisalli examined claimant in addition to reviewing the medical evidence of record in forming their opinions, while Drs. Fino, Dahhan

Director's Exhibits 10, 26, 30; Employer's Exhibits 3, 5-7, 9. The administrative law judge acted within his discretion in finding that the reasoning of Drs. Zaldivar, Sobieski, Kress, Crisalli, Fino, Dahhan and Morgan was persuasive as to why claimant was suffering from emphysema, and possibly bronchitis due to cigarette smoking, noting that the doctors explained how the results of claimant's objective studies over time lead them to their conclusions, and that the doctors provided reasoning in common with one anothers' reasoning, which Drs. Rasmussen, Lee and Gaziano did not rebut. *Id*. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Inasmuch as the administrative law judge properly found that the evidence of record did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), a requisite element of entitlement under Part 718, the administrative law judge properly denied benefits. *Trent*, *supra*; *Gee*, *supra*; *Perry*, *supra*.

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

SO ORDERED.

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and Morgan based their opinions exclusively on a review of the entire record of medical evidence. *Id*. Drs. Sobieski and Kress based their opinions on a review of the medical evidence available at the time they submitted their 1988 reports. Director's Exhibit 30.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge