BRB No. 99-1017 BLA

JIMMY D. PHILLIPS	)	
Claimant-Petitioner	)	
	)	DATE ISSUED:
v.	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION and ORDER
Party-in-Interest		

Appeal of the Decision and Order on Remand Denying Benefits of Daniel L. Stewart, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Paul E. Frampton (Bowles, Rice, McDavid, Graff & Love, P.L.L.C.), Fairmont, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denying Benefits (97-BLA-1482) of Administrative Law Judge Daniel L. Stewart rendered 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 is before the Board for the second time. Initially, the administrative law judge credited claimant with at least twenty-five years of coal mine employment and found that claimant was totally disabled due to pneumoconiosis arising out of coal mine employment pursuant

to 20 C.F.R. §§718.202(a)(1), 718.203(b), 718.204. Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's award of benefits because he mischaracterized certain x-ray evidence under Section 718.202(a)(1), combined the analyses of total respiratory disability and disability causation at Sections 718.204(c) and 718.204(b), and did not render findings sufficient to comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). *Phillips v. Eastern Associated Coal Corp.*, BRB No. 97-1482 BLA (Jul. 23, 1998)(unpub.). Consequently, the Board remanded the case for further consideration.

On remand, the administrative law judge found that claimant did not establish the existence of pneumoconiosis by a preponderance of the x-ray readings or medical opinions pursuant to Section 718.202(a)(1), (4). The administrative law judge therefore denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray readings and medical opinions pursuant to Section 718.202(a)(1), (4). Claimant argues further that the administrative law judge erred in not addressing whether claimant established the presence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c), or whether claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(b). Employer responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this 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 supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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

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[1] There was no biopsy evidence to be considered under Section 718.202(a)(2), nor were any of the presumptions set forth at Section 718.202(a)(3) applicable in this living miner's claim filed on June 3, 1994 in which there was no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(2), (3).

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).

Pursuant to Section 718.202(a)(1), the administrative law judge found that the x-ray readings did not support a finding of the existence of pneumoconiosis because the positive and negative classifications by highly qualified readers were in equipoise. Decision and Order on Remand at 7; *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 67, 114 S.Ct. 2251, 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); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Claimant argues that the administrative law judge erred in so finding because, claimant alleges, employer's physicians did not explain their conclusion that the abnormalities they saw on claimant's x-rays were not pneumoconiosis. Claimant's Brief at 6.

Contrary to claimant's contention, however, review of the record does not reveal any x-ray report in which the reading physician left an x-ray abnormality unexplained. The administrative law judge accurately characterized all twenty-five readings of the seven x-rays in the record. There were nine positive readings, fourteen negative readings, and two readings which were not classified for the presence or absence of pneumoconiosis. Director's Exhibits 18-20, 33, 34; Claimant's Exhibits 1-3, 5; Employer's Exhibits 1, 2, 6. Of the positive readings, three were rendered by physicians qualified as both Board-certified radiologists and B-readers, five were rendered by B-readers, and one was rendered by a Board-certified radiologist. Of the negative readings, twelve were rendered by physicians qualified as both Board-certified radiologists and B-readers, and two were rendered by B-readers. Claimant does not allege that any specific negative reading was flawed. On these facts, we find no error in the administrative law judge's analysis of the x-ray evidence, and we conclude that substantial evidence supports the administrative law judge's finding pursuant to Section 718.202(a)(1). *See Adkins, supra*. Therefore, we affirm the administrative law judge's finding that the x-ray evidence is in equipoise and thus that claimant has not established the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), the administrative law judge found that the well reasoned, conflicting opinions of qualified physicians did not support a finding of the existence of pneumoconiosis. The administrative law judge concluded that when the medical opinions were

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[2] The physicians who classified the x-rays as negative for pneumoconiosis indicated that the x-rays revealed bullous emphysema. Additionally, a B-reader noted that in two x-rays, large bullae (enlarged air sacs), in the upper lung zones compressed the lung tissue below, creating the impression of linear opacities in the lower lung zones. Director's Exhibit 34; Employer's Exhibit 5.

considered in light of the x-ray readings which did not establish the existence of pneumoconiosis, *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000), and together with the non-qualifying pulmonary function and blood gas studies, the medical opinions did not support a finding of the existence of pneumoconiosis as defined in the Act. *See* 20 C.F.R. §718.201; *Barber v. Director, OWCP*, 43 F.3d 899, 900, 19 BLR 2-61, 2-67 (4th Cir.1995). Claimant's sole contention is that the administrative law judge erred in finding the opinions of employer's physicians to be well reasoned when, claimant alleges, those physicians did not explain their opinion that claimant's obstructive impairment is unrelated to coal mine employment. Claimant's Brief at 7.

Contrary to claimant's contention, the administrative law judge acted within his discretion in finding the opinions of Drs. Zaldivar, Fino, and Renn to be well reasoned. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). As highlighted by the administrative law judge, these physicians concluded that claimant does not have a coal-dust-related impairment based on chest x-rays negative for pneumoconiosis but positive for the presence of bullous emphysema, a pattern of pulmonary function and blood gas impairment consistent with bullous emphysema, a long history of smoking, and no known association between bullous emphysema and the inhalation of coal mine dust. Director's Exhibit 34; Employer's Exhibits 3-5; *see Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 341, 20 BLR 2-246, 2-254-55 (4th Cir. 1996). As substantial evidence supports the administrative law judge's permissible credibility determination, *see Hicks, supra*; *Akers, supra*; *Trumbo, supra*, we reject claimant's contention and affirm the administrative law judge's finding pursuant to Section 718.202(a)(4).

Because claimant has failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a necessary element of entitlement under Part 718, we

affirm the denial of benefits. *See Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[3] Because claimant's failure to establish the existence of pneumoconiosis precluded an award of benefits, there is no merit in claimant's contention that the administrative law judge erred in not addressing the remaining elements of entitlement. Claimant's Brief at 8-10.