BRB No. 04-0897 BLA

JAMES W. MAHAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	
	)	DATE ISSUED: 06/09/2005
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

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

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2003-BLA-6322) of Administrative Law Judge Daniel L. Leland 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). Initially, the administrative law judge found that this case

involves the filing of a subsequent claim on March 7, 2002, pursuant to 20 C.F.R. §725.309.[1] Decision and Order at 2, 5. The administrative law judge then credited claimant with twenty-two years of coal mine employment, finding that claimant's employment records verified his length of coal mine employment, and he adjudicated the claim under 20 C.F.R. Part 718. Decision and Order at 2. The administrative law judge found that the newly admitted evidence was insufficient to establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a)(1)-(4), 718.204(b)(2)(i)-(iv). Decision and Order at 5-6. Consequently, he found that the newly admitted evidence does not establish any of the elements of entitlement previously decided against claimant as required under Section 725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in finding the medical evidence of record insufficient to establish entitlement to benefits. In addition, claimant contends that the administrative law judge erred in excluding, at the hearing, the two positive readings submitted as rebuttal evidence to the x-ray evidence submitted by employer. In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), responds to claimant's appeal urging the Board to reject claimant's contention as the plain language of 20 C.F.R. §725.414(a)(2)(ii) requires that claimant's rebuttal evidence must be readings of the films submitted by the party opposing entitlement.[2]

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,

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[1] Claimant filed his initial application for benefits with the Social Security Administration (SSA) on June 28, 1973. Director's Exhibit 1. Following denial of the application, claimant submitted an "Election Card" seeking review by SSA, which again denied the claim on April 19, 1979. *Id.* The claim was forwarded to the Department of Labor (DOL), which reviewed the record and denied the claim, finding that no elements of entitlement had been established. *Id.*

Claimant filed three subsequent claims with DOL which were denied based on the determination that claimant failed to establish any of the elements of entitlement under Part 718. Director's Exhibits 2-4.

[2] The parties do not challenge the administrative law judge's decision to credit claimant with twenty-two years of coal mine employment, or his findings under 20 C.F.R. §§718.202(a)(2), (3) and 718.204(b)(2)(i)-(iii). These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.[3] The administrative law judge rationally found that the newly admitted evidence of record was insufficient to establish either the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Initially, we reject claimant's contention that the administrative law judge erred in not admitting the positive x-ray readings by Drs. Aycoth and Cappiello of the March 26, 2004 film as claimant's rebuttal evidence. Claimant's Brief at 3-4 (unpaginated). In particular, claimant contends that the administrative law judge "erred in his interpretation of the regulations" in finding that the only evidence that claimant could submit in rebuttal of employer's x-ray evidence was re-readings of the same x-ray films. Claimant's Brief at 3 (unpaginated). Contrary to claimant's contention, Section 725.414(a)(2)(ii) states, in pertinent part:

> [T]he claimant shall be entitled to submit, in rebuttal of the case presented by the party opposing entitlement, no more than one physician's interpretation of each chest x-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by the designated responsible operator or the fund, as appropriate, under paragraph (a)(3)(i) or (a)(3)(iii) of this section and by the Director pursuant to §725.406.

20 C.F.R. §725.414(a)(2)(ii). Consequently, the plain language of the regulation restricts

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was last employed in the coal mine industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 2, 3, 8.

the type of evidence that claimant can submit in rebuttal to an interpretation of evidence submitted by the party opposing entitlement in its affirmative case. *Id.* Therefore, we affirm the administrative law judge's decision declining to admit into the formal record the x-ray interpretations by Drs. Aycoth and Cappiello of the March 26, 2004 x-ray film as they do not directly analyze any x-ray evidence submitted by employer in its case-in-chief. Hearing Transcript at 6-10; 20 C.F.R. §725.414(a)(2)(ii).

With regard to the administrative law judge's consideration of the newly admitted evidence, we affirm the administrative law judge's finding that it is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). In challenging the administrative law judge's finding, claimant generally contends that the administrative law judge erred in placing "primary reliance on the negative x-rays generated by employer" in his weighing of the evidence under *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Claimant also generally contends that Dr. Mullins was the only physician to base her diagnosis on all of the evidence available to her. Claimant's Brief at 5 (unpaginated). These contentions lack merit.

Contrary to claimant's contention, the administrative law judge did not unduly rely on the negative x-ray evidence. Rather, he considered all of the newly admitted evidence and determined that it was insufficient to establish the existence of pneumoconiosis. Decision and Order at 5. Specifically, the administrative law judge reasonably exercised his discretion, as trier-of-fact, in finding the newly admitted x-ray evidence was in equipoise, as the record contained two positive readings by Drs. Aycoth and Ahmed and negative readings by Drs. Wiot and Patel. Decision and Order at 5. As the administrative law judge rationally found the newly admitted x-ray evidence was in equipoise, claimant has not satisfied his burden of establishing the existence of pneumoconiosis by a preponderance of the evidence. Decision and Order at 6; *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).

Furthermore, we affirm the administrative law judge's finding that the newly admitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Specifically, we reject claimant's general contention that Dr. Mullins, who diagnosed the existence of pneumoconiosis, was the only physician to base her diagnosis on the entire record available to her. Claimant's Brief at 5 (unpaginated). Contrary to claimant's contention, the administrative law judge found that the opinions of Drs. Zaldivar and Crisalli, that claimant is not suffering from pneumoconiosis, were well reasoned and documented and were based on their examinations of claimant, objective testing and also a review of the medical evidence of record. Decision and Order at 4, 5; Employer's Exhibits 2, 5, 12, 13; *Hicks*, 138 F.3d

524, 21 BLR 2-323; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Moreover, the administrative law judge reasonably found that Dr. Mullins's opinion was entitled to little weight because it was contradictory and does not definitively diagnose pneumoconiosis, as the physician does not state with reasonable medical certainty that claimant suffers from pneumoconiosis. Decision and Order at 5; Director's Exhibit 15; *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *see also U.S. Steel Mining Co., Inc. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999). In addition, the administrative law judge reasonably found that Dr. Mullins does not adequately explain the rationale supporting her conclusions. Decision and Order at 4, 5; Director's Exhibit 15; *Clark*, 12 BLR 1-149. As the administrative law judge considered all of the newly admitted medical opinion evidence evidence, we affirm his finding that it is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Moreover, we affirm the administrative law judge's finding that the newly admitted medical evidence as a whole is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *Compton*, 211 F.3d 203, 22 BLR 2-162.

In challenging the administrative law judge's finding that the medical evidence is insufficient to establish a totally disabling respiratory impairment, claimant generally contends that the record establishes that claimant suffers from a severe pulmonary impairment and that Dr. Mullins's report properly concluded that it prevented him from performing his usual coal mine employment. Claimant's Brief at 4 (unpaginated). Claimant further contends that the opinions of Drs. Zaldivar and Crisalli should be accorded little weight because they were unable to diagnose the existence of pneumoconiosis. *Id*. There is no merit to these contentions.

Contrary to claimant's contentions, the administrative law judge properly weighed the newly admitted evidence and reasonably found the opinions of Drs. Zaldivar and Crisalli, that claimant is capable from a respiratory standpoint of performing his usual coal mine employment, entitled to greater weight than the opinion of Dr. Mullins, based on their superior qualifications.[4] Decision and Order at 6; *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). Additionally, the administrative law judge reasonably found that the medical opinions of Drs. Zaldivar and Crisalli are better reasoned and documented than the

[4] Drs. Zaldivar and Crisalli are Board-certified in Internal Medicine and Pulmonary Diseases, whereas Dr. Mullins's credentials are not in the record. Employer's Exhibits 2, 5, 12, 13.

opinion of Dr. Mullins, as they had a more complete picture of claimant's pulmonary condition. Decision and Order at 6; *compare* Employer's Exhibits 2, 5, 12, 13 *with* Director's Exhibit 15; *Hicks*, 138 F.3d 524, 21 BLR 2-323 *Akers*, 131 F.3d 438, 21 BLR 2-269; *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). Consequently, as claimant does not otherwise identify any error with specificity, we affirm the administrative law judge's finding that the newly admitted evidence is insufficient to establish total respiratory disability as supported by substantial evidence.

Since the newly admitted evidence does not establish either the existence of pneumoconiosis pursuant to Section 718.202(a) or a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2), claimant cannot establish a change in an applicable condition of entitlement pursuant to Section 725.309(d). Because the evidence does not meet the requirements of Section 725.309(d), we affirm the administrative law judge's denial of this subsequent claim for benefits. 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1 (2004).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge