BRB No. 05-0948 BLA

HEZEKIAH S. THOMPSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 06/26/2006
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Hezekiah S. Thompson, Columbus, Ohio, *pro se*.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order – Denial of Benefits (04-BLA-5112) of Administrative Law Judge Joseph E. Kane 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] In a Decision and

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[1] The instant claim was filed on August 14, 2002. Director's Exhibit 2. The administrative law judge initially found that there is some evidence that claimant filed a prior claim on August 29, 1975, which was denied on July 3, 1980. Director's Exhibits 2, 18; Decision and Order at 4. The administrative law judge acted within his discretion, however, in finding that because neither the district director, nor claimant, was able to locate the prior claim file or any documentation associated with it, the instant claim would be treated as an original claim. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-

Order dated July 26, 2005, the administrative law judge credited the miner with four years of coal mine employment,[2] as established by social security records, and found that the evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), and failed to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b), (c). Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits.[3] The Director, Office of Workers' Compensation Programs, responds urging affirmance of the denial of benefits.

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 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board 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. 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). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

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*

149, 1-153 (1989)(*en banc*); Director's Exhibit 18, Hearing Transcript at p 13; Decision and Order at 4.

[2] The record indicates that claimant's coal mine employment occurred in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] Claimant's daughter, writing on claimant's behalf, contends that both the administrative law judge and Dr. Kaufman relied on an inaccurate smoking history of fifty pack-years, rendering their conclusions invalid. A review of the record reveals, however, that neither the administrative law judge nor Dr. Kaufman relied on a fifty pack-year smoking history, but, rather, both characterized claimant's smoking history as "unclear." Decision and Order at 3; Director's Exhibit 5.

v. Valley Camp of Utah, Inc., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

In finding the x-ray evidence insufficient to establish the existence of pneumoconiosis, the administrative law judge properly found that there are no positive x-ray readings of record. Decision and Order at 5. An October 24, 2002 x-ray was read once as showing obstructive airways disease by Dr. Cole, a physician with no specialized qualifications for the reading of x-rays, and once as negative by Dr. Cox, a Board-certified radiologist.[4] Director's Exhibits 9, 10. The administrative law judge properly found this x-ray to be negative based on the absence of positive readings. Decision and Order at 5. The only other x-ray reading of record is of a July 10, 2003 x-ray, which was interpreted by Dr. Lanese, whose qualifications are unknown, as showing a normal chest. Claimant's Exhibit 1; Decision and Order at 3. As the administrative law judge permissibly concluded, based on absence of positive x-ray readings, that claimant failed to meet his burden of proof to establish the existence of pneumoconiosis by x-ray evidence, *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); Decision and Order at 5, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1). *See* 20 C.F.R. §718.102(b).

The administrative law judge also found, correctly, that a bronchoscopy and lung biopsy performed on March 9, 2005 revealed only mild bronchitis, bilateral, and anthracotic pigments in the submucosa. Claimant's Exhibit 2; Decision and Order at 3. A finding of anthracotic pigment alone is insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(2). Thus, the administrative law judge properly concluded that the record contains no biopsy evidence supportive of a finding of pneumoconiosis at 20 C.F.R. §718.202(a)(2). Decision and Order at 3, 5. In addition, the administrative law judge properly found that the presumptions set forth at 20 C.F.R. §§718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306; Decision and Order at 5.

Finally, relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical report of Dr. Kaufman and the progress notes of Dr. Shareef, including the results of several computerized tomography (CT) scans ordered by Dr. Shareef. The administrative law judge found that Dr. Kaufman, an osteopath, conducted a physical examination and objective testing and in a report dated December 24, 2002, diagnosed severe chronic obstructive lung disease and dyspnea. Director's Exhibit 5. In addition, Dr. Kaufman noted that the x-ray was grossly

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[4] The October 24, 2002 x-ray was also read for quality only (Quality 1) by Dr. Gaziano, a B reader. Director's Exhibit 11.

abnormal and stated that: "It is impossible to totally rule out the radiographic changes as being related to coal exposure. It was impossible to get a good history from this patient as to what his exposure was and for the most part his pattern is more consistent with airway obstruction perhaps from cigarette smoking."[5] Director's Exhibit 5; Decision and Order at 6. The administrative law judge permissibly found that as Dr. Kaufman's opinion as to the existence of either radiographic pneumoconiosis or coal dust related obstructive lung disease is equivocal and uncertain, it did not constitute a well-reasoned medical opinion and, therefore, is insufficient to support a finding of pneumoconiosis pursuant to Section 718.202(a)(4). *Consolidation Coal Co. v. Held*, 314 F.3d 184, 187 n.2, 22 BLR 2-564, 2-571 n.2 (4th Cir. 2002)(Gregory, J., dissenting); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); *United States Steel Mining Co., Inc. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 791 n.1 (4th Cir. 1990); *Clark*, 12 BLR 1-149; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Director's Exhibit 5; Decision and Order at 6.

With respect to the progress notes from Dr. Shareef, and the CT scans ordered by him, the administrative law judge accurately summarized the diagnoses contained therein, which do not include any diagnoses of coal worker's pneumoconiosis. Claimant's Exhibits 1-3; Decision and Order at 3. In addition, while the CT results do list chronic obstructive pulmonary disease as an impression, there is no indication that it was due in part to claimant's coal dust exposure. *See Held*, 314 F.3d at 187 n.2, 22 BLR at 2-571 n.2; *Hobbs*, 917 F.2d at 791 n.1; Claimant's Exhibits 1-3; Decision and Order at 3.

The administrative law judge has the power to make credibility determinations and resolve inconsistencies in the evidence, *Grizzle v. Pickands Mather & Co./Chisolm Mines*, 994 F.2d 1093, 1096 (4th Cir. 1993), and the Board will not substitute its inferences for those of the administrative law judge, *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). As the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a) is supported by substantial evidence, it is hereby affirmed.

Because we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a), we need not address the administrative law judge's findings in determining that the evidence fails to establish the existence of a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(iv). A finding of entitlement to benefits is precluded in this case. *See Trent*, 11 BLR at 1-27.

[5] At the time of Dr. Kaufman's examination, claimant was suffering from Alzheimer's disease. Director's Exhibit 5; Hearing Transcript at 16-18, 19.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge