BRB No. 07-0836 BLA

D.F.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 06/24/2008
	)	
SLAB FORK COAL COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND/ BRICKSTREET ADMINISTRATIVE SERVICES	)	
	)	
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 Larry W. Price, Administrative Law Judge, United States Department of Labor.

Derrick W. Lefler (Gibson Lefler & Associates), Princeton, West Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (06-BLA-5836) of Administrative Law Judge Larry W. Price 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 claim was filed on May 12, 2005. Director's Exhibit 2. After crediting claimant with eleven years and two months of coal mine employment,[1] the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings pursuant to Section 718.202(a)(1), (4).[2] Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief.

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, 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).

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 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), claimant contends that the administrative law judge erred in finding that the June 7, 2005 x-ray was in equipoise for the existence of pneumoconiosis, because the quantitative weight of this x-ray is, in claimant's view, positive for pneumoconiosis. Claimant also contends that the administrative law judge erred in considering that Dr. Rasmussen's 1/0 reading was minimally positive for

[1] The record indicates that claimant's coal mine employment occurred in West Virginia. Decision and Order at 12; Director's Exhibit 5. 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*).

[2] We affirm the administrative law judge's findings that the existence of pneumoconiosis was not established at 20 C.F.R. §718.202(a)(2), (3), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 13-14.

pneumoconiosis, and in finding that the 1/0 reading meant that Dr. Rasmussen seriously considered that the June 7, 2005 x-ray was negative for pneumoconiosis. Claimant's contentions lack merit.

In weighing the readings of the June 7, 2005 x-ray, the administrative law judge considered that Drs. Abramowitz and Wheeler, both Board-certified radiologists and B readers, interpreted the x-ray as positive and negative for pneumoconiosis, respectively, and that Dr. Rasmussen, a B reader, interpreted the x-ray as 1/0, which is also a positive interpretation. Decision and Order at 13; Director's Exhibits 11, 12; Employer's Exhibit 1. The administrative law judge stated:

> Three physicians provided interpretations of the June 7, 2005 x-ray. One dually qualified physician interpreted the x-ray as positive for pneumoconiosis with a profusion of 1/2. Another dually qualified specialist read the x-ray to be completely negative. The third physician is a B-reader and read the x-ray to be positive with a profusion of 1/0, which indicates that although he classified this x-ray as positive, he seriously considered the possibility that the x-ray was negative for pneumoconiosis. Also, 1/0 is the lowest qualifying profusion classification. Two dually qualified specialists disagree about whether this x-ray shows the presence of pneumoconiosis. A lesser qualified physician read the x-ray to be positive, but seriously considered the x-ray to be negative. Therefore, I find this x-ray to be in equipoise.

Decision and Order at 13.

The administrative law judge acted within his discretion in finding that the June 7, 2005 x-ray was in equipoise, because two dually qualified readers rendered conflicting interpretations, and the lesser qualified reader interpreted the x-ray as 1/0, a reading that the administrative law judge found insufficiently persuasive to resolve the conflict in the interpretations of the dually qualified readers. *See* 20 C.F.R. §718.202(a)(1); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003); Decision and Order at 13; Director's Exhibits 11, 12; Employer's Exhibit 1. Additionally, the administrative law judge's consideration that Dr. Rasmussen's 1/0 reading was the lowest qualifying profusion classification for pneumoconiosis accords with law, since "1/0" is the lowest positive reading for pneumoconiosis provided at Section 718.202(a)(1). *See* 20 C.F.R. §718.102(b). Moreover, the administrative law judge's finding that Dr. Rasmussen's 1/0 reading was positive, but also indicated that Dr. Rasmussen had considered the possibility of a negative reading, is supported by substantial evidence. Specifically, Dr. Castle, who is a B reader, testified by deposition on November 15, 2006, that a 1/0 reading:

> means that he [Dr. Rasmussen] thought that the abnormalities that were present, and I would indicate that he found irregular type opacities classified as t and s in the mid and lower lung zones, which is again not typical of coal workers' pneumoconiosis, but the 1/0 means that although he felt that it was positive, he also considered that the film may be entirely negative.

Employer's Exhibit 5 at 15-16; *see also* Decision and Order at 9 n.22. Consequently, we affirm the administrative law judge's finding that the June 7, 2005 x-ray was in equipoise for the existence of pneumoconiosis, as it is rational, supported by substantial evidence, and in accordance with law. As claimant raises no other arguments at Section 718.202(a)(1), we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis by x-ray.[3]

Pursuant to Section 718.202(a)(4), claimant argues that, because the administrative law judge erred in his analysis of the June 7, 2005 x-ray, he also erred in finding that Dr. Mullins' medical opinion diagnosing clinical pneumoconiosis was entitled to diminished weight, because it was based on Dr. Rasmussen's 1/0 reading. Claimant's contention lacks merit.

Based on our affirmance at Section 718.202(a)(1), we hold that the administrative law judge properly gave diminished weight to the opinion of Dr. Mullins, that claimant has clinical pneumoconiosis, because it was based on Dr. Rasmussen's positive x-ray reading, which was contrary to the administrative law judge's finding that the existence of pneumoconiosis was not established by x-ray. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-212, 22 BLR 2-162, 2-175 (4th Cir. 2000); Decision and Order at 14; Director's Exhibit 11. As claimant raises no other arguments at Section 718.202(a)(4), we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis by the medical opinion evidence pursuant to Section 718.202(a)(4).[4]

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[3] The administrative law judge found that the remaining x-rays of record dated November 27, 1984, December 5, 1999, February 28, 2002, March 23, 2002, August 22, 2003, September 28, 2004, April 24, 2005, February 27, 2005, July 28, 2005, December 7, 2005, February 14, 2006, and March 7, 2006, were either negative for pneumoconiosis or did not specifically diagnose pneumoconiosis. *See* Decision and Order at 13; Director's Exhibit 13; Employer's Exhibits 2, 3.

[4] The administrative law judge relied on the opinions of Drs. Castle and Hippensteel, that claimant has neither clinical nor legal pneumoconiosis, to support his finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R.

In light of our affirmance of the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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§718.202(a)(4). *See* Decision and Order at 14-15; Director's Exhibit 13; Employer's Exhibits 2, 4-6.