BRB No. 08-0668 BLA

W.D. o/b/o J.W.D. (deceased)	)	
Claimant-Petitioner	)	
v.	)	
UNION CARBIDE CORPORATION	)	DATE ISSUED: 06/30/2009
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 – Denial of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Sandra Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Ann B. Rembrandt (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order – Denial of Benefits (2005-BLA-05695)

[1] Claimant is the widow of the miner, J.W.D., who died on April 7, 2004. Director's Exhibit 45. Claimant filed a separate survivor's claim on May 10, 2004. Director's Exhibit 50. However, by letter dated February 18, 2005, claimant requested that her survivor's claim be withdrawn. *Id.* Therefore, the miner's subsequent claim is the only claim at issue.

of Administrative Law Judge Richard T. Stansell-Gamm rendered on a miner's 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). The administrative law judge found the instant case to be a subsequent claim filed on April 12, 2001.[2] Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited the miner with thirty-six years of coal mine employment based on the parties' stipulation in the prior claim, and considered whether the evidence submitted since the prior denial was sufficient to establish the applicable condition of entitlement previously adjudicated against claimant pursuant to 20 C.F.R. §725.309(d). The administrative law judge found the newly submitted medical evidence sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2) and, thus, sufficient to establish a change in an applicable condition of entitlement pursuant to Section 725.309. The administrative law judge then considered all of the evidence of record, old and new, and found the evidence insufficient to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the x-ray and medical opinion evidence insufficient to establish pneumoconiosis pursuant to Section 718.202(a)(1) and (4). In response, employer urges affirmance of the administrative law judge's Decision and Order, as it is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a substantive brief unless requested to do so by the Board.[3]

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,

[2] The miner filed his initial claim on November 23, 1987, which was ultimately denied by Administrative Law Judge Melvin Warshaw in a Decision and Order issued on October 23, 1989. Director's Exhibit 1. While finding the medical opinion evidence sufficient to establish pneumoconiosis, Judge Warshaw found the evidence insufficient to establish total respiratory disability and, therefore, denied benefits. *Id*. The miner took no further action until filing the current claim on April 12, 2001. Director's Exhibit 3.

[3] The parties do not challenge the administrative law judge's finding that the newly submitted evidence is sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2) and, thus, sufficient to establish a change in an applicable condition entitlement pursuant to 20 C.F.R. §725.309, or his finding that the medical evidence does not establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (3). These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and in accordance with applicable law.[4] 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish 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; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to Section 718.202(a)(1), the administrative law judge considered all of the x-ray evidence of record, including the x-ray readings from the prior claim and the current claim, and also the x-ray readings included in the miner's treatment records. Decision and Order at 10-13. Considering the radiological qualifications of the physicians who read the x-ray films and the number of positive and negative readings of each film, the administrative law judge found that of the twenty-four x-ray films dated between December 22, 1972 and March 25, 2004, nine x-rays were inconclusive for the presence or absence of pneumoconiosis;[5] three films, dated December 22, 1972, December 16, 1988 and January 3, 2002, were read as positive for pneumoconiosis, and twelve films, dated August 29, 1980, August 19, 1988, October 14, 1988, December 15, 1988, April 20, 1989, May 31, 1989, April 25, 1996, November 2, 2000, November 24, 2002, November 11, 2003, November 13, 2003 and March 25, 2004, were read as negative for pneumoconiosis. Decision and Order at 13-14; Director's Exhibits 1, 11, 13; Claimant's Exhibits 3, 4; Employer's Exhibits 1, 2, 8. Consequently, the administrative

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mining employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 4.

[5] The administrative law judge found that the December 9, 1987 and April 17, 2002 x-rays were inconclusive for the presence or absence of pneumoconiosis as these films were read as positive and negative by equally qualified physicians. Decision and Order at 13; Director's Exhibit 1; Claimant's Exhibit 3. In addition, the administrative law judge found that the April 23, 1996, April 27, 1996, November 18, 2002, November 19, 2002, November 20, 2002, November 21, 2002 and March 22, 2004 x-rays, which were contained in the miner's treatment records, were inconclusive for the presence or absence of pneumoconiosis because the physicians who interpreted these films did not specify the source of the pulmonary fibrosis or pulmonary effusion noted in the interpretations. Decision and Order at 13-14; Director's Exhibit 1; Employer's Exhibit 1.

law judge found that claimant is unable to establish pneumoconiosis pursuant to Section 718.202(a)(1) based on the preponderance of the negative x-ray evidence.

In challenging the administrative law judge's weighing of the x-ray evidence of record, claimant contends that the administrative law judge erred in considering the x-ray readings from the miner's treatment records under Section 718.202(a)(1) because they are not in substantial compliance with the quality standards set forth at 20 C.F.R. §718.102 and, therefore, may not be considered under Section 718.202(a)(1). Instead, claimant contends that the administrative law judge should have considered these readings with the treatment records under Section 718.202(a)(4). Claimant's Brief at 5. In addition, claimant contends that the administrative law judge impermissibly substituted his opinion for that of the physicians when he found some of the x-ray readings in the treatment records were negative for pneumoconiosis, when, in fact, none of the x-rays in the treatment records specifically diagnosed the presence or absence of pneumoconiosis. Claimant's Brief at 5-6. Further, claimant contends that the administrative law judge erred in failing to consider the subsequent negative x-ray evidence in light of the first x-ray film, dated December 22, 1972, that was positive for pneumoconiosis. These contentions lack merit.

Contrary to claimant's contention, the administrative law judge acted reasonably in considering x-ray readings that were in the miner's treatment records at Section 718.202(a)(1), even though they were not properly classified under Section 718.102. Specifically, pursuant to 20 C.F.R. §718.101(b), the quality standards contained in 20 C.F.R. Part 718 apply only to "evidence developed by any party . . . in connection with a claim" and, therefore, the x-ray readings contained in the treatment records did not have to be classified under the ILO system, as they were obtained in connection with the miner's treatment, rather than in connection with his claim. 20 C.F.R. §718.101(b); *see also* 64 Fed. Reg. 54966, 54975 (Oct. 8, 1999); 65 Fed. Reg. 79,929 (Dec. 20, 2000). In addition, the Board has held that, in the absence of applicable quality standards, the significance of x-ray readings that contain no mention of pneumoconiosis is a question committed to the discretion of the administrative law judge in his role as fact-finder. *See Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996), *modified on recon.*, 21 BLR 1-52 (1997); *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984). Consequently, the administrative law judge acted within his discretion in considering the x-ray interpretations contained in the miner's treatment records under Section 718.202(a)(1).

Moreover, contrary to claimant's contention, the administrative law judge did not substitute his own interpretation of the x-ray evidence for that of the physicians, who provided the readings contained in the treatment records. Rather, the administrative law judge reasonably exercised his discretion in finding that where the physicians did not mention pneumoconiosis, it was not present. *Marra*, 7 BLR at 1-218-219 (a physician

who interprets an x-ray can be expected to accurately report the presence of any abnormalities that he or she observes). The administrative law judge, therefore, properly found that the x-rays that did not contain a diagnosis of pneumoconiosis were negative.

In addition, claimant contends that the administrative law judge erred in failing to consider the fact that the December 22, 1972 x-ray was positive, in weighing the subsequent x-rays that were read as negative, as pneumoconiosis is a progressive disease. We disagree. Contrary to claimant's contention, the administrative law judge reasonably weighed the December 22, 1972 x-ray with the subsequent x-rays in determining whether claimant established pneumoconiosis under Section 718.202(a)(1) by a preponderance of the evidence. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). In considering the x-ray evidence, the administrative law judge considered both the quality of the x-ray evidence, in according greater weight to the x-ray readings by physicians who possess superior radiological qualifications, and the quantity of the x-ray readings, in determining that a preponderance of the x-ray evidence was negative for pneumoconiosis. Decision and Order at 13-14. Because the administrative law judge considered both the quality and the quantity of the evidence in determining that a preponderance of the x-ray evidence did not establish pneumoconiosis pursuant to Section 718.202(a)(1), we affirm the administrative law judge's finding that claimant failed to establish pneumoconiosis thereunder. *Ondecko*, 512 U.S. at 276, 18 BLR at 2A-9; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

Claimant further contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish clinical pneumoconiosis pursuant to Section 718.204(a)(4). Specifically, claimant contends that because the administrative law judge provided invalid bases for finding the x-ray evidence insufficient to establish pneumoconiosis, the administrative law judge erred in weighing the medical opinions on the issue of clinical pneumoconiosis. We disagree.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Shepherd, Crisalli, Pfister, Fino, Hippensteel and Gaziano, submitted in conjunction with the miner's 1987 claim, and the medical opinions of Drs. Rasmussen, Houser, Cohen, Zaldivar and Rosenberg, submitted in conjunction with the miner's current claim. Initially, the administrative law judge found that the opinions of Drs. Shepherd, Crisalli, Pfister, Fino, Hippensteel and Gaziano, were of little probative value because they were based on medical data developed prior to 1989. Decision and Order at 26. Rather, the administrative law judge found the medical opinions of Drs. Rasmussen, Houser, Cohen, Zaldivar and Rosenberg, to be more probative, as they are based on the more recent medical evidence of record. Decision and Order at 26.

Considering the more recent opinions on the issue of clinical pneumoconiosis, the administrative law judge accorded little probative weight to the opinions of Drs. Rasmussen and Houser because their opinions finding clinical pneumoconiosis are based on positive x-ray readings, contrary to the administrative law judge's finding at Section 718.202(a)(1) that the x-ray evidence does not establish pneumoconiosis. Decision and Order at 26-27. The administrative law judge found the opinions of Drs. Zaldivar and Rosenberg, that clinical pneumoconiosis is not present, to be the most probative because their opinions are reasoned, documented and in keeping with his finding at Section 718.202(a)(1). *Id*. The administrative law judge further found the opinion of Dr. Cohen inconclusive on the issue, concluding that Dr. Cohen did not specifically address the issue of clinical pneumoconiosis. *Id*. Consequently, the administrative law judge found that the medical opinion evidence is insufficient to establish the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(4).

Claimant contends that the administrative law judge erred in crediting the opinions of Drs. Zaldivar and Rosenberg over the opinions of Drs. Rasmussen and Houser to find that clinical pneumoconiosis was not established at Section 718.202(a)(4). Contrary to claimant's contention, in assessing the weight to accord the conflicting medical opinion evidence on clinical pneumoconiosis, the administrative law judge reasonably accorded less weight to the opinions of Drs. Rasmussen and Houser because they based their opinions of clinical pneumoconiosis on their positive x-ray readings, contrary to the administrative law judge's finding that the weight of the x-ray evidence was negative for pneumoconiosis. *See Taylor v. Brown Badgett, Inc*., 8 BLR 1-405 (1985); Decision and Order at 26-27; Director's Exhibit 11; Claimant's Exhibits 1, 5. The administrative law judge reasonably found the opinions of Drs. Zaldivar and Rosenberg, that claimant did not have clinical pneumoconiosis, more persuasive as they were supported by the weight of the negative x-ray evidence. *See Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 27; Director's Exhibits 12, 42; Employer's Exhibits 9, 12. Moreover, contrary to claimant's contention, the administrative law judge reasonably exercised his discretion in finding that Dr. Cohen's opinion on the issue was inconclusive, as he rationally found that Dr. Cohen, while noting the conflicting radiological evidence, did not render a specific finding regarding the presence of clinical pneumoconiosis. *See Clark*, 12 BLR at 1-155; Decision and Order at 27; Claimant's Exhibit 2. Consequently, the administrative law judge rationally found that the medical opinion evidence did not establish clinical pneumoconiosis at Section 718.202(a)(4).

With regard to the issue of legal pneumoconiosis at Section 718.202(a)(4),[6] the administrative law judge accorded little weight to any of the medical opinions because

[6] Legal pneumoconiosis is defined to include any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

none of them is well-reasoned. In particular, the administrative law judge determined that the opinion of Dr. Rasmussen is entitled to little weight because Dr. Rasmussen failed to specifically identify the objective medical evidence he relied on in determining that the miner's coal dust exposure was a significant factor in his respiratory impairment. Decision and Order at 27. In addition, the administrative law judge found that Dr. Rasmussen effectively shifted the burden of proof in this case when he stated that he was unable to exclude coal dust exposure as a causative factor in the miner's impairment because coal dust exposure and cigarette smoking cause similar lung damage. *Id*. Similarly, the administrative law judge accorded little weight to Dr. Houser's opinion, diagnosing legal pneumoconiosis, because the physician did not explain his conclusions and did not explain what evidence, other than positive x-ray evidence, supported his conclusions. Decision and Order at 28. The administrative law judge found that Dr. Cohen's opinion is entitled to little weight because the physician is unable to affirmatively state that the miner's chronic obstructive pulmonary disease is due to both coal dust exposure and cigarette smoking, instead of stating only that it "may" be due to both conditions. Decision and Order at 29. The administrative law judge also found that Dr. Cohen's diagnosis of legal pneumoconiosis is entitled to little weight as his opinion is contrary to the Act and the Administrative Procedure Act. Specifically, the administrative law judge found that Dr. Cohen impermissibly applied a presumption of causation because he was unable to differentiate between the possible causative effects of claimant's respiratory impairment.[7] *Id*.

Claimant contends that the administrative law judge erred in according little weight to the opinions of Drs. Cohen, Rasmussen and Houser, arguing that the administrative law judge misinterpreted their medical opinions and provided irrational reasons for according their opinions little weight. Specifically, claimant contends that the administrative law judge erred in finding that Dr. Rasmussen's opinion is poorly reasoned, arguing that Dr. Rasmussen's opinion does identify the objective evidence that supports his opinion, that the physician's conclusions are consistent with the medical opinions of Drs. Cohen and Houser, and that Dr. Rasmussen did not reverse the burden of proof in stating that cigarette smoking and coal dust exposure can produce the same type and degree of respiratory impairment. Claimant also contends that the administrative law judge erred in not crediting Dr. Houser's opinion, arguing that because Dr. Houser based his opinion on his review of the medical evidence of record and provided a sufficient explanation of his opinion, his opinion is both reasoned and documented. Additionally, claimant contends that the administrative law judge erred in finding that the opinion of

[7] The administrative law judge also found the contrary opinions of Drs. Zaldivar and Rosenberg, that the miner's respiratory impairment was not due to coal dust exposure, entitled to little weight because the physicians did not adequately explain their opinions.

Dr. Cohen is not well-reasoned, arguing that the administrative law judge misunderstands and mischaracterizes Dr. Cohen's opinion. We disagree.

In weighing the conflicting medical opinions of record, the administrative law judge provided multiple reasons for determining that they are not well-reasoned and, thus, that claimant failed to establish legal pneumoconiosis pursuant to Section 718.202(a)(4). However, the underlying basis for his credibility determinations is that the physicians did not adequately identify the evidence they relied on in formulating their conclusions that the miner's respiratory condition was due, at least in part, to the miner's coal dust exposure.

Contrary to claimant's contention, the administrative law judge reasonably exercised his discretion in finding that Dr. Rasmussen did not adequately identify the specific medical evidence he relied on in finding legal pneumoconiosis, when the doctor merely stated that because it is impossible to differentiate between the causes of the miner's impairment, the miner's obstructive impairment was due to both coal dust exposure and cigarette smoking. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *Clark*, 12 BLR at 1-155; Decision and Order at 27; Director's Exhibit 11.

Similarly, the administrative law judge permissibly accorded little weight to Dr. Houser's opinion, that the miner's emphysema and chronic bronchitis are attributable to his coal dust exposure, because he found that Dr. Houser did not adequately discuss the bases for his diagnoses; particularly, his finding that claimant's bronchitis was related to his coal mine employment. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Underwood*, 105 F.3d at 951, 21 BLR at 2-31-32; *Clark*, 12 BLR at 1-155; Decision and Order at 28; Claimant's Exhibits 1, 5. Moreover, the administrative law judge rationally found that while Dr. Houser discussed the medical studies that showed the connection between long term coal dust exposure and the development of an obstructive impairment, he did not adequately identify the "specific aspects of the objective medical evidence that enabled him to conclude that coal mine dust-emphysema connection actually occurred in [claimant's] case." Decision and Order at 23; *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Knizer v. Bethlehem Mines Corp*., 8 BLR 1-5 (1985).

Likewise, contrary to claimant's contention, the administrative law judge did not mischaracterize Dr. Cohen's medical opinion, but accurately set forth the physician's discussion of the relevant medical evidence and medical studies. Decision and Order at 24-25; Claimant's Exhibits 2, 5. Weighing this evidence, the administrative law judge reasonably found that while discussing the generalities contained in the medical studies, Dr. Cohen did not adequately explain how chronic obstructive pulmonary disease was

due to both coal dust exposure and cigarette smoking in this particular case. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Knizer*, 8 BLR at 1-7; Decision and Order at 29.

As the trier-of-fact, the administrative law judge has broad discretion to assess the evidence of record and determine whether a party has met its burden of proof. *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Claimant has the general burden of establishing each of the elements of entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element of entitlement. *See Ondecko*, 512 U.S. at 276, 18 BLR at 2A-9; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Herein, because the administrative law judge considered all of the relevant medical opinion evidence and provided a rational basis for according little weight to the medical opinions supportive of claimant's burden, we affirm his determination that claimant has failed to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Moreover, because substantial evidence supports the administrative law judge's finding that the preponderance of the x-ray evidence and probative medical opinion evidence was insufficient to establish the existence of either clinical or legal pneumoconiosis, claimant did not establish the presence of either pursuant to Section 718.202(a). 20 C.F.R. §718.202(a); *Compton*, 211 F.3d at 207, 22 BLR at 2-167-168.

Since claimant has not established the existence of pneumoconiosis pursuant to Section 718.202(a), a requisite element of entitlement under Part 718, an award of benefits is precluded. *Akers*, 131 F.3d at 441, 21 BLR at 2-275; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, the administrative law judge's Decision and Order – Denial of 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