BRB No. 08-0693 BLA

T.J.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: 06/30/2009
	)	
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 – Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

T.J., Alkol, West Virginia, *pro se.*

Paul E. Frampton (Bowles Rice McDavid Graff & Love, LLP), Charleston, West Virginia, for employer.

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

Claimant appeals, without the assistance of counsel, the Decision and Order – Denying Benefits (2005-BLA-6049) of Administrative Law Judge Richard A. Morgan issued on a subsequent claim filed on October 13, 2004, 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] The administrative law judge credited claimant with at least

[1] Claimant first filed a claim on March 1, 2000, which was denied by the district director on August 9, 2000, because claimant did not establish any of the elements of entitlement. Director's Exhibit 1. Claimant filed a second claim on October 5, 2001. Director's Exhibit 2. The district director found that claimant failed to establish total disability and denied benefits on March 7, 2003. *Id.* Claimant took no action with regard

thirty-three years of coal mine employment and found that the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge, however, found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the denial of his claim. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response unless specifically requested to do so by the Board.[2]

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 applicable law.[3] 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any

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to the denial of his claim until he filed the current subsequent claim on October 13, 2004. Director's Exhibit 4.

[2] The administrative law judge's findings that claimant has at least thirty-three years of coal mine employment and that the newly submitted evidence established total disability and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b), 725.309 are affirmed, as they are unchallenged on appeal and favorable to claimant. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] Because claimant's coal mine employment was in West Virginia, 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 (1989) (*en banc*); Director's Exhibits 5, 9.

one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

After consideration of the Decision and Order and the evidence of record, we conclude that the administrative law judge's denial of benefits is supported by substantial evidence and in accordance with law. Specifically, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis.

The regulation at Section 718.202(a) provides four methods by which a claimant may establish the existence of pneumoconiosis: 1) chest x-ray evidence; 2) biopsy or autopsy evidence; 3) application of the presumptions contained in 20 C.F.R. §§718.304, 718.305 or 718.306; and 4) medical opinion evidence. 20 C.F.R. §718.202(a)(1)-(4). The United States Court of Appeals for the Fourth Circuit has further held that all relevant evidence is to be considered together, rather than merely within discrete subsections of Section 718.202(a)(1)-(4), in determining whether a claimant has met his or her burden of establishing the existence of pneumoconiosis by a preponderance of the evidence. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000).

Pursuant to Section 718.202(a)(1), the administrative law judge first considered whether claimant established the existence of pneumoconiosis based on the x-ray evidence. The administrative law judge weighed eight readings of four films dated December 13, 2004, December 14, 2005, May 15, 2007 and July 11, 2007.[4] Decision and Order at 5; Director's Exhibits 12, 13; Claimant's Exhibits 1, 2; Employer's Exhibits 1 - 3, 17. The administrative law judge properly considered the radiological qualifications of the physicians and found that "a majority of the recent x-ray interpretations are negative for pneumoconiosis, including those by four dually qualified B-readers and Board-certified radiologists." Decision and Order at 5. In contrast, the administrative law judge found that there are three positive readings for pneumoconiosis, including one by a dually qualified radiologist and two by B readers. *Id*. Because the administrative law judge

[4] The December 13, 2004 x-ray was read by Dr. Ranavaya, a B reader, as positive for pneumoconiosis and by Dr. Wheeler, a Board-certified radiologist and B reader, as negative. Director's Exhibit 13. The December 14, 2005 x-ray has one reading by Dr. Wheeler, which is negative. Employer's Exhibit 1. The May 15, 2007 x-ray was read by Dr. Smith, a Board-certified radiologist and B reader, as positive, and by Dr. Rasmussen, a B reader, as positive, and by Drs. Scott and Wheeler, dually qualified Board-certified radiologists and B readers, as negative. Claimant's Exhibits 1, 2; Employer's Exhibits, 3, 17. The July 11, 2007 x-ray has one reading by Dr. Scatarige, a Board-certified radiologist and B reader, which is negative. Employer's Exhibit 2.

properly performed a quantitative and qualitative analysis of the x-ray evidence in determining that a preponderance of the x-rays are negative, we affirm his finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see also Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

Since there is no biopsy evidence of record, the administrative law judge properly found that claimant is unable to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2). Decision and Order at 13. Additionally, the administrative law judge correctly found that since claimant is not eligible for any of the presumptions set forth at Sections 718.304, 718.305 or 718.306, claimant is unable to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(3). *Id*.

With regard to Section 718.202(a)(4), the administrative law judge considered claimant's hospitalization and treatment records,[5] and CT scans, along with the opinions of Drs. Ranavaya, Rasmussen, Zaldivar and Tuteur. The administrative law judge correctly concluded that none of the hospitalization or treatment records makes reference to any clinical diagnosis of pneumoconiosis or to any pulmonary impairment that arose out of coal mine employment. Decision and Order at 14. The administrative law judge also noted that Drs. Wheeler, Scott, and Scatarige, who are all dually qualified radiologists, read three different CT scans as negative for pneumoconiosis, and that there was no positive CT scan evidence. *Id*. at 14; Director's Exhibit 13; Employer's Exhibits 10, 11.

Turning to the four medical opinions of record, the administrative law judge noted that Dr. Ranavaya examined claimant on December 13, 2004, and diagnosed pneumoconiosis. Director's Exhibit 12. In support of this diagnosis, Dr. Ranavaya cited a thirty-seven year history of occupational exposure to dust in coal mining and his own positive x-ray reading of the December 13, 2004 x-ray. *Id*.

Dr. Rasmussen examined claimant on May 15, 2007, and diagnosed coal workers' pneumoconiosis based on "a significant history of exposure to coal mine dust" and "x-ray changes consistent with pneumoconiosis." Claimant's Exhibit 2. Dr. Rasmussen noted that there were "multiple possible risk factors" for claimant's respiratory condition, including smoking, coal dust exposure, medications, and a possible pulmonary embolism.

[5] The treatment records include Boone Memorial Hospital, from July 27, 1994 to December 4, 2001 and then from October 29, 2004 to March 10, 2006; Madison Medical Group from May 13, 1982 to April 29, 2002; and Charleston Sleep Solutions from January 31, 2002 to March 27, 2002. Employer's Exhibits 12-15.

Id. He opined that although claimant's other risk factors may have contributed to claimant's impairment, coal dust exposure "remains a potent cause and the primary cause" of claimant's respiratory condition. *Id*.

Dr. Zaldivar examined claimant on July 11, 2007, and was deposed on November 12, 2007. Employer's Exhibits 9, 16. Dr. Zaldivar opined that there was no evidence to justify a diagnosis of coal workers' pneumoconiosis from a medical or legal standpoint. *Id*. Dr. Tuteur examined claimant on December 17, 2007, and was deposed on December 18, 2007. Employer's Exhibits 8, 18. Dr. Tuteur opined that claimant does not have coal workers' pneumoconiosis or any other coal mine dust related disease.

In weighing these conflicting medical opinions, the administrative law judge accorded greater weight to the opinions of Drs. Zaldivar and Tuteur over those of Drs. Ranavaya and Rasmussen. First, the administrative law judge considered the relative qualifications of the physicians, noting that Drs. Zaldivar and Tuteur are Board-certified pulmonary specialists, while Drs. Ranavaya and Rasmussen are not. Decision and Order at 14. Second, the administrative law judge observed that "Drs. Ranavaya and Rasmussen relied almost entirely upon their own evaluation of [c]laimant, whereas Drs. Zaldivar and Tuteur also considered other medical evidence." *Id*. Third, the administrative law judge found that the opinions of Drs. Ranavaya and Rasmussen, diagnosing pneumoconiosis, were not as reasoned[6] as the contrary opinions of Drs. Zaldivar and Tuteur, that claimant does not have the disease. Decision and Order at 15.

We conclude that the administrative law judge permissibly assigned less weight to the opinions of Drs. Ranavaya and Rasmussen, in comparison to Drs. Zaldivar and Tuteur, because the latter are not Board-certified pulmonologists. *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). The administrative law judge acted within his discretion in finding the diagnoses of clinical pneumoconiosis[7] by Drs. Ranavaya and

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[6] A "reasoned" opinion is one in which the underlying documentation is adequate to support the physician's conclusions. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

[7]Pursuant to 20 C.F.R. §718.201:

> Clinical pneumoconiosis consists of those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis,

Rasmussen less persuasive, since he found that those diagnoses were based primarily on claimant's history of coal dust exposure and a positive x-ray, which was read by a more qualified radiologist as negative for pneumoconiosis. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); Decision and Order at 15, 16.

The administrative law judge also properly explained that he found Dr. Ranavaya's diagnosis of legal pneumoconiosis[8] to be less persuasive since the doctor did not specifically explain why he attributed claimant's pulmonary condition to coal dust exposure and "did not analyze possible alternative causes or factors of [c]laimant's impairment." Decision and Order at 15. The administrative law judge similarly found that "except for a cursory reference to [a] 'pattern of impairment,'" Dr. Rasmussen did not explain the basis for his diagnosis of legal pneumoconiosis.[9] *Id*. In contrast to the opinions of Drs. Ranavaya and Rasmussen, however, the administrative law judge concluded that Drs. Zaldivar and Tuteur provided detailed reports and deposition testimony in which they reviewed and analyzed the available medical evidence and provided opinions "regarding the absence of pneumoconiosis [which] are more consistent with the credible objective medical evidence." Decision and Order at 15; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

The administrative law judge has discretion to make credibility determinations and to resolve inconsistencies or conflicts in the medical evidence. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Lane v. Union Carbide Corp.*,

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> anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

[8] Under the terms of 20 C.F.R. §718.201(a)(2), legal pneumoconiosis is defined as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[9] Dr. Rasmussen stated that "the pattern of impairment exhibited is that commonly accounted [sic] in impaired miners." Claimant's Exhibit 2.

105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). Thus, we affirm, as supported by substantial evidence, the administrative law judge's finding that the medical opinions fail to establish that claimant has pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 15. We further affirm the administrative law judge's finding that the evidence, overall, is insufficient to establish the existence of pneumoconiosis. *See Compton*, 211 F.3d at 211, 22 BLR at 2-174; Decision and Order at 15.

Additionally, we note that, insofar as the administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, claimant was entitled to have the administrative law judge weigh all of the record evidence in considering his claim on the merits.[10] The administrative law judge indicated that he had considered the prior claim evidence and found that it did not alter his findings that claimant did not have pneumoconiosis. Decision and Order at 15 n. 11. Thus, we affirm the administrative law judge's finding that the evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a), and the denial of benefits.

[10] If a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that the newly submitted evidence demonstrates that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). If a claimant satisfies his burden to demonstrate a change in an applicable condition of entitlement, then he is entitled to have his claim considered on the merits. *White*, 23 BLR at 1-3.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge