BRB No. 12-0529 BLA

DONNIE DEEL Claimant-Petitioner v. BIG TRACK COAL COMPANY, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/21/2013 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.

Donnie Deel, Vansant, Virginia, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order – Denial of Benefits (2010-BLA-5675) of Administrative Law Judge Richard T. Stansell-Gamm, with respect to a claim filed on August 10, 2009, pursuant to the provisions of the

Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[1] After determining that claimant established fourteen years and three months of underground coal mine employment, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that, although claimant established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2), claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

Claimant generally appeals the administrative law judge's decision denying benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. In the alternative, employer contends that the administrative law judge erred in finding that the opinions of Drs. Fino and Rosenberg were poorly reasoned when considering the issue of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.[2] 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 pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

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[1] Seth O'Quinn, a lay representative with Stone Mountain Health Services of Oakwood, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but he is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] The record reflects that claimant's coal mine employment was in 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 (1989) (*en banc*).

I. Length of Coal Mine Employment

The administrative law judge found that although claimant testified at the hearing that he had fifteen years of coal mine employment, the record established only fourteen years and three months from "about December 1974 through March 1989." Decision and Order at 3-4. As noted by the administrative law judge, "[i]n his application for black lung disability benefits, [claimant] indicated that he started mining coal in September 1974 and stopped in March 1989, which yields a length of only [fourteen and one-half] years of coal mine employment." *Id.* at 3. The administrative law judge also noted that while claimant stated at the hearing that he was "not exactly sure" of the beginning date of his coal mine employment, claimant credibly testified that he first worked as a coal miner in 1974 for about a month, or two pay periods, for Bear Branch and, just before the end of 1974, began working as a coal miner for Clinchfield Coal Company (Clinchfield) through March 1979. *Id.* at 3-4, *quoting* Hearing Transcript at 28. The administrative law judge determined that, except for the short period of employment in 1974, claimant's Social Security Administration (SSA) Statement of Earnings confirms that he was employed by Clinchfield from January 1975 to March 1979 and that claimant worked for employer from March 1979 to March 1989. Decision and Order at 4. The administrative law judge also noted claimant's testimony that he was out on strike for at least a month between 1975 and 1989, which the administrative law judge found is "offset[]" by claimant's month of coal mine employment with Bear Branch in 1974. *Id.*

The administrative law judge rationally determined that claimant's SSA Statement of Earnings and testimony established that he was employed by Clinchfield from January 1975 to March 1979 and by employer from March 1979 through March 1989. *See Clark v. Barnwell Coal Co.*, 22 BLR 1-275 (2003); Director's Exhibit 7; Hearing Transcript at 16, 23, 30. In addition, the administrative law judge acted within his discretion in determining, based on claimant's testimony, that claimant had about a month of coal mine employment at the end of 1974. *See Clark*, 22 BLR at 1-280-81; Hearing Transcript at 16, 23, 28-29. Therefore, we affirm the administrative law judge's determination that claimant established fourteen years and three months of coal mine employment, as it supported by substantial evidence.[3]

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[3] The administrative law judge indicated that claimant's one month of coal mine employment in 1974 was offset by the cumulative month that he was out on strike between 1975 and 1989. Decision and Order at 4. However, claimant testified that the strike occurred in 1989 and that he did not go back to work after the strike because his employer at that time "quit" but that the strike was only for a "very short period of time … maybe a month or so." Hearing Transcript at 17, 31. Even including this additional month, claimant would not have established fifteen years of coal mine employment. Therefore, error, if any, is harmless, and the administrative law judge accurately found that claimant was not eligible to invoke the presumption of total disability due to

II. 20 C.F.R. §718.202(a)

In considering whether claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), the administrative law judge considered six interpretations of three x-rays, dated June 22, 2009, August 27, 2009, and January 21, 2011. Decision and Order at 5. The June 22, 2009 x-ray was interpreted as positive for pneumoconiosis by Dr. Alexander, who is dually qualified as a Board-certified radiologist and B reader, and as negative by Dr. Wheeler, who is also dually qualified. Director's Exhibits 14-15. Because the administrative law judge rationally considered Drs. Alexander and Wheeler to be similarly qualified, we affirm his determination that the June 22, 2009 x-ray is inconclusive. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); Decision and Order at 5.

Concerning the August 27, 2009 x-ray, Dr. Forehand, a B reader, interpreted it as positive for pneumoconiosis, and Dr. Scott, who is a dually qualified radiologist, interpreted it as negative. Decision and Order at 6; Director's Exhibits 11, 16. Because the administrative law judge rationally considered Dr. Scott to be better qualified, we affirm his decision to accord more weight to Dr. Scott's reading, and affirm his finding that the August 27, 2009 x-ray is negative for pneumoconiosis. *See Adkins*, 958 F.2d at 52, 16 BLR at 2-66; Decision and Order at 6. Dr. Alexander interpreted the January 21, 2011 x-ray as positive for pneumoconiosis and Dr. Poulos, who is also a dually qualified radiologist, interpreted it as negative. Claimant's Exhibit 1; Employer's Exhibit 1. Because the administrative law judge rationally considered Drs. Alexander and Poulos to be similarly qualified, we affirm the administrative law judge's finding that the January 21, 2011 x-ray is inconclusive for the presence or absence of pneumoconiosis. *See Adkins*, 958 F.2d at 52, 16 BLR at 2-66; Decision and Order at 6. Consequently, as the administrative law judge found that two of the three x-rays are inconclusive and the remaining x-ray is negative, we affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *Id*.

In considering whether claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge weighed two interpretations of a digital x-ray dated October 22, 2009 and the medical opinion evidence. Decision and Order at 6-14. Dr. Fino, a B reader, interpreted the digital x-ray as negative for pneumoconiosis, and Dr. Alexander, who is dually qualified, interpreted it as positive for pneumoconiosis. Decision and Order at 7; Director's Exhibits 12, 17.

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pneumoconiosis at amended Section 411(c)(4), 30 U.S.C. §921(c)(4). *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order at 4.

Based on Dr. Alexander's superior credentials, the administrative law judge rationally determined that the October 22, 2009 digital x-ray is positive for pneumoconiosis. *See Adkins*, 958 F.2d at 52, 16 BLR at 2-66; Decision and Order at 7. However, weighing the positive digital x-ray against the analog x-ray evidence, which the administrative law judge determined was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), the administrative law judge also permissibly concluded that "the preponderance of all the probative chest x-ray evidence is actually inconclusive for the presence of pneumoconiosis."[4] Decision and Order at 7; *see Adkins*, 958 F.2d at 52, 16 BLR at 2-66.

With respect to the medical opinion evidence on the issue of clinical pneumoconiosis,[5] the administrative law judge noted correctly that Dr. Forehand, relying on his positive interpretation of the August 27, 2009 analog chest x-ray, opined that claimant has clinical pneumoconiosis and that Drs. Fino and Rosenberg, relying on their negative analog x-ray interpretations, opined that claimant does not have clinical pneumoconiosis. Decision and Order at 12; *see* Director's Exhibits 11-12; Employer's Exhibits 1-3. We affirm the administrative law judge's determination to assign less weight to the physicians' opinions as they are based solely on the radiological evidence and are contrary to the administrative law judge's determination that the x-ray evidence as a whole is inconclusive for pneumoconiosis. *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

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[4] As the administrative law judge noted, none of the physicians addressed the acceptability of the digital x-ray. Decision and Order on Remand at 7 n.14. However, the administrative law judge found that because Drs. Fino and Alexander did not have "any reservation in interpreting the study for the presence of pneumoconiosis . . . the digital chest x-ray is medically acceptable and admissible as 20 C.F.R. §718.107 evidence." *Id*.

[5] Pursuant to 20 C.F.R. §718.201(a)(1):

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

20 C.F.R. §718.201(a)(1).

Concerning the existence of legal pneumoconiosis,[6] the administrative law judge noted that Dr. Forehand opined that claimant's obstructive impairment is due to coal dust exposure, while Drs. Fino and Rosenberg opined that coal dust did not contribute to claimant's impairment. Decision and Order at 13-14; *see* Director's Exhibits 11-12; Employer's Exhibits 1-3. The administrative law judge permissibly gave less weight to Dr. Forehand's opinion, as he determined that Dr. Forehand did not explain how the objective medical evidence supported his conclusion that thirty percent of claimant's impairment was due to coal dust exposure.[7] *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993). Because Dr. Forehand's opinion is the only one supportive of claimant's burden of proof, we affirm the administrative law judge's determination that claimant did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).[8] We further affirm the administrative law judge's overall determination that claimant failed to prove that he has pneumoconiosis under 20 C.F.R. §718.202(a). As claimant did not establish an essential element of entitlement, we affirm the denial of benefits. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

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[6] "Legal pneumoconiosis" is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition also includes "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id.*

[7] Dr. Forehand stated that the "[p]attern of disability indicates that cigarette smoking is the principal cause of claimant's respiratory impairment but that at least 30% of claimant's symptoms of shortness of breath are due to the effects of breathing coal mine dust almost daily for 15 years." Director's Exhibit 11.

[8] Because we affirm the denial of benefits, it is not necessary that we address employer's arguments with respect to the weight accorded the opinions of Drs. Fino and Rosenberg at 20 C.F.R. §718.202(a)(4).

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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JUDITH S. BOGGS
Administrative Appeals Judge