BRB No. 97-1626 BLA

JOHNNIE BAILEY Claimant-Petitioner v. ROBERT COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION AND ORDER

Appeal of the Decision and Order Denying Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Johnnie Bailey, Lenore, West Virginia, *pro se.*

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appears without the assistance of counsel[1] and appeals the Decision and Order Denying Benefits (96-BLA-1463) of Administrative Law Judge Pamela Lakes Wood with respect to 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). The administrative law judge noted that the parties stipulated to at least eight years of coal mine employment and considered the claim, filed on April 18, 1995, pursuant to the regulations set forth in 20 C.F.R. Part 718. The administrative law judge determined that claimant did not prove the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4). Accordingly, benefits were denied. Employer has responded to claimant's appeal and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[2]

In an appeal by a claimant filed without the assistance of counsel, the Board will consider 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). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 under 20 C.F.R. Part 718, claimant must prove that he suffers from 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. Failure to establish any one of these elements

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[1]Claimant was represented by counsel at the hearing. Hearing Transcript at 3.

[2]We affirm the administrative law judge's determination that employer is the properly designated responsible operator, as this finding has not been challenged on appeal. Decision and Order at 6; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

We affirm the administrative law judge's findings under Section 718.202(a)(1)-(4), as they are rational and supported by substantial evidence. With respect to Section 718.202(a)(1), the administrative law judge rationally determined that claimant did not prove the existence of pneumoconiosis by a preponderance of the x-ray evidence, inasmuch as the record contained both negative and positive interpretations by physicians who are equally qualified as Board-certified radiologists and B readers. Decision and Order at 10; *Director, OWCP v. Greenwich Collieries [Ondecko],* 512 U.S. 267, 18 BLR 2A-1 (1994); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993);[3] *Trent*, *supra*; *Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-68 (1985). The administrative law judge's finding is supported by substantial evidence in light of the fact that eleven physicians with dual qualifications rendered negative interpretations, while four physicians with the same qualifications rendered positive interpretations. Director's Exhibits 20, 35-38, 40; Employer's Exhibit 3.

In addition, the administrative law judge's determination that the existence of pneumoconiosis was not established under Section 718.202(a)(2) is appropriate, as the record does not contain any biopsy evidence. Decision and Order at 10; 20 C.F.R. §718.202(a)(2). The administrative law judge also properly found that claimant could not prove the existence of pneumoconiosis pursuant to Section 718.202(a)(3), as the presumption set forth in 20 C.F.R. §718.304 is not available in this case based upon the absence of any evidence suggesting that claimant is suffering from complicated pneumoconiosis. Decision and Order at 10; 20 C.F.R. §§718.202(a)(3), 718.304. The presumptions set forth in 20 C.F.R. §§718.305 and 718.306, and referenced in 20 C.F.R. §718.202(a)(3), are also not available in this case filed by a living miner after January 1, 1982. 20 C.F.R. §§718.202(a)(3), 718.305(e), 718.306.

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's last full year of coal mine employment with employer occurred in Kentucky. Hearing Transcript at 15; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Under Section 718.202(a)(4), the administrative law judge considered the reports of Drs. Dahhan, Carrillo, and Baker, who based their diagnoses on an examination of claimant, and the reports of Drs. Fino and Broudy, who reviewed the medical evidence of record. Decision and Order at 10-11; Director's Exhibits 11, 19, 26; Employer's Exhibits 1, 3. The administrative law judge rationally determined that the opinion in which Dr. Dahhan stated that claimant does not have pneumoconiosis was entitled to greater weight than the contrary opinions of Drs. Carrillo and Baker, on the ground that Dr. Dahhan provided a more thorough explanation of his conclusions. Decision and Order at 11; Director's Exhibits 11, 19, 26; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*)*; King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge also acted within her discretion in according more weight to Dr. Dahhan's opinion on the ground that Dr. Dahhan's findings are corroborated by the reports of Drs. Fino and Broudy, who reviewed all of the medical evidence of record and who are both Board-certified in Pulmonary Disease.[4] Decision and Order at 11; Employer's Exhibits 1, 3; *see Clark*, *supra*. The administrative law judge rationally determined, therefore, that the preponderance of the medical opinion evidence does not support a finding of pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order at 11; *see generally Perry*, *supra*. The administrative law judge's findings under Section 718.202(a)(1)-(4) are, therefore, affirmed, as they are rational and supported by substantial evidence.

Inasmuch as we have affirmed the administrative law judge determination that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), an essential element of entitlement, we must also affirm the denial of benefits under Part 718. *See Trent*, *supra*.

[4]The administrative law judge noted that Drs. Baker and Dahhan are also Board-certified in Pulmonary Disease. Decision and Order at 11.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge