BRB No. 05-0786 BLA

JAMES R. HAMMOND	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JIM WALTERS RESOURCES, INCORPORATED	)	
	)	DATE ISSUED: 03/21/2006
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Patrick K. Nakamura (Nakamura, Quinn & Walls, LLP), Birmingham, Alabama, for claimant.

Thomas J. Skinner, IV (Lloyd, Gray & Whitehead, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (04-BLA-5101) of Administrative Law Judge Gerald M. Tierney awarding benefits 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). Claimant filed his application for benefits on March 21, 2002. Director's Exhibit 2. The administrative law judge credited claimant with twenty-three

years and five months of coal mine employment,[1] found that employer is the responsible operator, and noted that employer did not contest that claimant is totally disabled. Decision and Order at 2, 5; Hearing Transcript at 7, 12; Director's Exhibits 7, 19, 28. The administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment and that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204(c). Decision and Order at 2-6. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis and total disability due to pneumoconiosis established. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a substantive response in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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 in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of 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 precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered six readings of two x-rays in light of the readers' radiological credentials. The administrative law judge chose to give greater weight to the interpretations by the physicians possessing the dual qualifications of Board-certified radiologist and B reader, and on this basis, found that claimant established the existence of pneumoconiosis by a preponderance of

[1] The record indicates that claimant's coal mine employment occurred in Alabama. Director's Exhibits 3, 5, 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[2] The administrative law judge's length of coal mine employment and responsible operator determinations, and his findings pursuant to 20 C.F.R. §§718.203(b) and 718.204(b), are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

the x-ray evidence. This was a proper analysis of the x-ray evidence. *See Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (*en banc*). Employer concedes that the administrative law judge's "analysis is permissible," but argues that the administrative law judge erred by failing to first weigh together the x-ray and medical opinion evidence to determine whether the existence of pneumoconiosis was established, pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000) and *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Employer's Brief at 8, 12. We disagree. This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, n.1, *supra*, which has not adopted the reasoning of *Compton* or *Williams*. *U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 991, 23 BLR 2-213, 2-237 (11th Cir. 2004). We therefore affirm the administrative law judge's finding that the existence of pneumoconiosis was established by the x-ray evidence pursuant to Section 718.202(a)(1).

Moreover, any argument that the administrative law judge did not weigh the evidence together is moot because he found the existence of pneumoconiosis established by both the x-ray and medical opinion evidence. Decision and Order at 4-5. Pursuant to Section 718.202(a)(4), the administrative law judge considered Dr. Hawkins's diagnosis of both pneumoconiosis based on x-ray, and chronic bronchitis due to coal dust exposure, and the opinions of Drs. Goldstein and Hasson that claimant does not have pneumoconiosis. Director's Exhibits 12, 14; Employer's Exhibit 2. The administrative law judge permissibly credited Dr. Hawkins's opinion because he found it better supported by the x-ray evidence, because exertional dyspnea supported his diagnosis of legal as well as clinical pneumoconiosis, and because he gave "less weight" to the opinions of Drs. Goldstein and Hasson due to flaws in their reasoning and documentation. Decision and Order at 4-5; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Although employer argues that the opinions of Drs. Goldstein and Hasson were reasoned, and that "the whole picture" proves that claimant's impairments stem from a back injury and obesity, Employer's Brief at 11, the Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Contrary to employer's contention that the administrative law judge ignored evidence of claimant's back problems and obesity, he considered that claimant suffers from these conditions and he found that Dr. Hawkins was aware of them. Decision and Order at 5, 6. Substantial evidence supports the administrative law judge's finding pursuant to Section 718.202(a)(4). It is therefore affirmed.

Pursuant to Section 718.204(c), employer contends that the administrative law judge erred in finding that claimant is totally disabled due to pneumoconiosis. The administrative law judge applied the proper standard, which is whether pneumoconiosis is a "substantially contributing cause" of claimant's total disability. 20 C.F.R. §718.204(c)(1); *Jones*, 386 F.3d at 993, 23 BLR at 2-240. Since Dr. Hawkins opined that pneumoconiosis and chronic bronchitis due to coal dust exposure each contribute twenty

percent to claimant's respiratory impairment, the administrative law judge found that Dr. Hawkins's opinion supported a finding that pneumoconiosis is a substantially contributing cause of claimant's total disability. Substantial evidence supports the administrative law judge's determination. Director's Exhibit 12 at 4. Employer argues that the administrative law judge erred in "disregard[ing]" the contrary opinions of Drs. Goldstein and Hasson because they did not diagnose pneumoconiosis. Employer's Brief at 13. This contention lacks merit. The administrative law judge permissibly gave "little weight" to the opinions of Drs. Goldstein and Hasson attributing claimant's total disability to back problems and obesity, because they were rendered under the mistaken belief that claimant does not have pneumoconiosis, contrary to the administrative law judge's finding. Decision and Order at 5; *see Scott v. Mason Coal Co*., 289 F.3d 263, 269-70, 22 BLR 2-372, 2-382-84 (4th Cir. 2002); *Trujillo v. Kaiser Steel Corp*., 8 BLR 1-472, 1-473 (1986). We therefore reject employer's allegation of error and affirm the administrative law judge finding pursuant to Section 718.204(c)(1).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge