BRB No. 05-0789 BLA

JACKIE L. TEASLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WOLVERINE COAL COMPANY	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 03/10/2006
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Jackie L. Teasley, St. Paul, Virginia, *pro se*.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order (04-BLA-5623) of Administrative Law Judge Richard T. Stansell-Gamm denying 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). Pursuant to the parties' stipulations, the administrative law judge credited claimant with at least thirty-two years of coal mine employment[2] and found that employer is the responsible operator. Decision and Order at 3; Hearing Transcript at 8-9. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[3] Decision and Order at 4-14. The administrative law judge found that the evidence of record did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 5-14. Accordingly, he denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial 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.

In an appeal filed by a claimant 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 Co.*, 12 BLR 1-176, 1-177 (1989). 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, and in accordance with applicable law. 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 the existence of pneumoconiosis, that the

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[1] Kris Hartley, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Hartley is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] The record indicates that claimant's last coal mine employment occurred in Virginia. Director's Exhibits 3, 5. 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*).

[3] Claimant filed his claim for benefits on February 22, 2001. Director's Exhibit 2.

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 Section 718.202(a)(1), the administrative law judge considered fourteen readings of nine x-rays in light of the readers' radiological qualifications. The first four x-rays, dating from August of 1979 to March of 1997, were all read as negative for pneumoconiosis. Director's Exhibit 41; Employer's Exhibit 3. However, considering the age of these four negative x-rays, the administrative law judge rationally found that they had "little probative value" on whether claimant now suffers from pneumoconiosis. Decision and Order at 6; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

The administrative law judge next considered that the five more recent x-rays all received conflicting readings by physicians with radiological credentials. He reasonably found that the x-rays taken on April 25, 2001, February 19, 2004, and April 5, 2004, were inconclusive for the existence of pneumoconiosis, because they were read as both positive and negative by equally qualified physicians. *See Adkins*, 958 F.2d at 52, 16 BLR at 2-65-66; Director's Exhibit 14, Claimant's Exhibits 2, 3; Employer's Exhibits 7, 9. The administrative law judge permissibly found the August 29, 2002 x-ray positive for pneumoconiosis because the positive reading by Dr. Alexander, a Board-certified radiologist and B-reader, outweighed the negative reading by Dr. Halbert, who, he found, qualified only as a B-reader.[4] *Adkins*, 958 F.2d at 52, 16 BLR at 2-65-66. Similarly, the administrative law judge permissibly found the September 11, 2003 x-ray negative for pneumoconiosis, because the negative reading by Dr. Scott, a Board-certified radiologist and B-reader, outweighed the positive reading by B-reader Dr. Aycoth. *Adkins*, 958 F.2d at 52, 16 BLR at 2-65-66. Having thus determined that one recent x-ray was positive, one was negative, and three were inconclusive, the administrative law judge concluded that the more recent x-ray evidence "stands in equipoise" and therefore "does not support a finding of pneumoconiosis" pursuant to Section 718.202(a)(1). Decision and Order at 7. The administrative law judge properly analyzed the quantity and quality of the x-ray evidence, and substantial evidence supports his finding that the x-ray evidence was inconclusive for the existence of pneumoconiosis pursuant to Section 718.202(a)(1). The finding is therefore affirmed.

[4] Employer contends that Dr. Halbert is dually qualified, as a Board-certified radiologist and a B-reader. However, any error in this regard is harmless. Employer's Response to Claimant's Petition for Review, 3.

Pursuant to Section 718.202(a)(2),(a)(3), the administrative law judge correctly found that the record contains no biopsy or autopsy evidence and that the presumptions by which the existence of pneumoconiosis may be established were not applicable to this claim.[5] *See* 20 C.F.R. §§718.202(a)(2)-(3); Decision and Order at 5.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Rasmussen, Rosenberg, and Hippensteel. Dr. Rasmussen diagnosed claimant with pneumoconiosis, while Drs. Rosenberg and Hippensteel opined that he does not have pneumoconiosis. Because Dr. Rosenberg referred to a negative reading of the August 29, 2002 x-ray that was not admissible when opining that claimant does not have pneumoconiosis, the administrative law judge initially considered whether he had to exclude Dr. Rosenberg's report.[6] Decision and Order at 2-3. The administrative law judge noted that although Dr. Rosenberg's own negative reading of the August 29, 2002 x-ray was inadmissible, Dr. Rosenberg also based his opinion on a review of Dr. Halbert's admissible, negative reading of the same x-ray. Under these circumstances, the administrative law judge properly exercised his discretion in finding that Dr. Rosenberg's opinion was not invalidated by a reference to an inadmissible x-ray reading. *See Harris v. Old Ben Coal Co.*, --- BLR ---, BRB No. 04-0812 BLA (Jan. 27, 2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting).

The administrative law judge considered that Dr. Rasmussen diagnosed both clinical pneumoconiosis, based on a positive x-ray reading and claimant's coal mine employment history, and legal pneumoconiosis, in the form of chronic bronchitis due to both smoking and coal mine dust exposure. Director's Exhibit 9. The administrative law judge was within his discretion to find "diminished probative value" in Dr. Rasmussen's diagnosis of clinical pneumoconiosis, because Dr. Rasmussen relied on a positive reading

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[5] The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 because this claim was filed after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 2. Lastly, this claim is not a survivor's claim filed prior to June 30, 1982; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

[6] Revised Section 725.414(a)(3)(i) provides, in relevant part, that "[a]ny chest X-ray interpretations . . . that appear in a medical report must each be admissible under" the evidentiary limits of Section 725.414(a) or under the provision for admitting hospitalization or treatment records for a respiratory or pulmonary disease. 20 C.F.R. §725.414(a)(3)(i). In this case, employer chose not to submit Dr. Rosenberg's negative reading of the August 29, 2002 x-ray as one of employer's two affirmative case readings, opting instead to submit a reading of that x-ray by Dr. Halbert, a B-reader.

of the April 25, 2001 x-ray, an x-ray which the administrative law judge found inconclusive, and because the x-ray evidence overall was insufficient to support a finding of the existence of pneumoconiosis. Decision and Order at 12; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

Additionally, the administrative law judge permissibly gave less weight to Dr. Rasmussen's diagnosis of legal pneumoconiosis. Although Dr. Rasmussen cited an abnormal exercise blood gas study as evidence that coal dust contributed to claimant's respiratory impairment, the administrative law judge was persuaded by Dr. Hippensteel's "better reasoned" opinion that claimant's blood gas study results show a variability over time "that is inconsistent with the permanent nature of the damage caused by pneumoconiosis," and which stems from an increased carboxyhemoglobin level.[7] Decision and Order at 12, 13; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993); Employer's Exhibit 7. The administrative law judge also permissibly found that Dr. Hippensteel's opinion was more probative than Dr. Rasmussen's because Dr. Hippensteel "is better qualified" to assess the causes of pulmonary impairment, in view of his Board-certification in pulmonary disease. Decision and Order at 13 n.36; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Based on these credibility determinations, the administrative law judge reasonably found that claimant did not establish the existence of pneumoconiosis based on the medical opinion evidence. We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(4).

Weighing the inconclusive x-ray evidence along with "the more probative medical opinion [evidence that] does not support a finding of pneumoconiosis," the administrative law judge found that the record did not establish the existence of pneumoconiosis pursuant to Section 718.202(a). Decision and Order at 14; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Substantial evidence supports the administrative law judge's finding, which is therefore affirmed.

Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a miner's claim under Part 718, we affirm the administrative law judge's denial of benefits. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[7] The administrative law judge found that Dr. Rosenberg's opinion was not as well reasoned and was equivocal. Decision and Order at 13.

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

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge