BRB No. 05-0914 BLA

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| JAMES L. HARRIS<br><br>Claimant-Petitioner<br>v.<br><br>CONSOLIDATION COAL COMPANY<br><br>Employer-Respondent<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | <br><br><br><br><br>DATE ISSUED: 03/22/2006<br><br><br><br><br><br><br><br>DECISION and ORDER |

Appeal of the Decision and Order – Denying Benefits of Daniel J. Leland, Administrative Law Judge, United States Department of Labor.

C. Patrick Carrick (Carrick Law, PLLC), Morgantown, West Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order- Denying Benefits (2004-BLA-115) of Administrative Law Judge Daniel L. Leland (the administrative law judge) on a duplicate 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's first claim for benefits, filed on May 21, 1973, was denied because claimant failed to establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Claimant filed the present duplicate claim on August 15, 2000, which was denied by Administrative Law Judge Michael P. Lesniak because claimant, by not establishing the existence of pneumoconiosis or a totally disabling respiratory impairment, failed to establish a material change in conditions. Director's Exhibit 36. Claimant appealed to the Board, which affirmed the finding that the newly submitted x-ray and biopsy evidence did not establish the existence of pneumoconiosis, 20 C.F.R. §718.202(a)(1), (2), and that claimant was not entitled to the

presumptions contained at 20 C.F.R. §718.202(a)(3), but remanded the case for the administrative law judge to consider whether the existence of pneumoconiosis was established at 20 C.F.R. §718.202(a)(4) by the July 10, 2001 CT scan and the June 16, 2000 PET scan. Regarding total disability, the Board affirmed the findings that total disability was not established at 20 C.F.R. §718.204(b)(2)(i), (ii) by pulmonary function studies and blood gas studies and that there was no evidence of cor pulmonale at 20 C.F.R. §718.204(b)(2)(iii), but, remanded the case for a determination of whether the opinions of Drs. Jaworski, Naeye, and Renn established total disability at 20 C.F.R. §718.204(b)(2)(iv), although the Board affirmed the finding that the opinion of Dr. Kanj was entitled to less weight and the opinions of Drs. Branscomb and Bush did not support a finding of total respiratory disability. Director's Exhibit 46. On remand, after allowing the record to be reopened for the submission of additional evidence, the administrative law judge found that the newly submitted evidence established a material change in conditions by establishing total respiratory disability, but, on considering the claim on the merits, found that the old and new evidence, when weighed together, failed to establish the existence of pneumoconiosis. Accordingly, the administrative law judge denied benefits on this duplicate claim.

On appeal, claimant contends that the CT scan and PET scan present more objective proof of clinical pneumoconiosis than x-ray evidence. Further, claimant contends that records relating to his treatment from February 7, 2003 through May 30, 2003, contains a January 14, 2002 CT scan of the chest which shows changes consistent with complicated pneumoconiosis and evidence excluding the presence of cancer. Claimant also contends that there are several reports from Dr. Ghamande, claimant's attending physician, which would support a finding of pneumoconiosis. In addition, claimant cites several x-ray interpretations stating "compatible with pneumoconiosis," to suggest error in the administrative law judge's prior determination that the x-ray evidence failed to establish the existence of pneumoconiosis. Claimant's Brief at 5 (unpaginated). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law 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 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 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, and that the pneumoconiosis is totally disabling. *See* 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*).

Considering together all of the evidence relevant to the existence of pneumoconiosis pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the administrative law judge properly found that the sparse positive x-ray interpretations, *see* Claimant's Brief at 5, from the prior claim were insufficient to outweigh the x-ray interpretations, biopsy results, CT scans and medical opinions from the present claim which showed that the miner did not have pneumoconiosis. Decision and Order at 7. Addressing the July 10, 2001 CT scan, the administrative law judge properly found that Dr. Gabriele's finding that the nodular densities seen were a "likely" consequence of silicosis was too equivocal to establish the existence of pneumoconiosis, *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988), and that Dr. Renn, a pulmonary specialist, found that this CT scan did not show the existence of pneumoconiosis. Considering the PET scan of June 16, 2000 the administrative law judge properly found that Dr. Gupta's statement that it was "suggestive" of a process "such as pneumoconiosis," was too indefinite to establish the existence of pneumoconiosis. *Justice*, 11 BLR 1-91. Likewise, the administrative law judge found that the January 14, 2002 CT scan which was interpreted as consistent with complicated pneumoconiosis failed to establish pneumoconiosis because no such diagnosis was made by Dr. Brown after reviewing the February 7, 2003 CT scan, and Dr. Renn, a pulmonary specialist, who reviewed both CT scans concluded that they did not show pneumoconiosis. *See Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). Likewise, the administrative law judge properly found that Dr. Gupta's interpretation of the February 19, 2003 PET scan as representing granulomatous disease did not establish the existence of pneumoconiosis as the doctor did not mention pneumoconiosis. *See* 20 C.F.R. §§718.201. Further, the administrative law judge noted that although Dr. Ghamande made numerous diagnoses of coal workers' pneumoconiosis, his opinion was unreasoned because he did not provide a basis for his diagnoses and Dr. Renn provided a well-reasoned and documented opinion concluding that claimant did not have pneumoconiosis or any other coal dust related pulmonary condition. 20 C.F.R. §§718.201, 718.202(a)(4); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88, 89 n.4 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLLR 1-149, 1-155 (1989)(*en banc*). Likewise, the administrative law judge found that the July 9, 2004 x-ray initially read positive for pneumoconiosis, was subsequently read negative by dually qualified Board-certified radiologists and B-readers and that the findings on claimant's lung biopsy of February 10, 2003 were insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §§718.201, 718.202(a)(2).

The administrative law judge properly rejected all of the evidence upon which claimant relies to support a finding of pneumoconiosis. We affirm, therefore, the administrative law judge's finding that the evidence fails to establish the existence of

pneumoconiosis pursuant to Section 718.202(a), and, thereby, affirm the administrative law judge's denial of benefits, as the evidence is insufficient to establish the existence of pneumoconiosis, a necessary element of entitlement. *See Trent*, 11 BLR at 1-28 ; *Perry*, 9 BLR at 1-3.

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge