BRB No. 06-0736 BLA

KENNETH R. DEAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 03/27/2007
FLAT GAP MINING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
LIBERTY MUTUAL FIRE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	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.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (04-BLA- 5656) of Administrative Law Judge Richard T. Stansell-Gamm rendered on a subsequent 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).[1] Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] The administrative law judge found that the medical evidence developed since the most recent denial of benefits established that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore determined that claimant established a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). On the merits of the claim, however, the administrative law judge found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical evidence and in finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4).[3] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to claimant's appeal.

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203,

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[1] Claimant's first claim for benefits, filed on February 28, 1983, was denied on March 18, 1993, because claimant did not establish total disability. Director's Exhibit 1. His second claim, filed on March 10, 1997, was denied on December 4, 1998, because claimant did not establish total disability. *Id.* Claimant filed this claim on March 19, 2001.

[2] The record indicates that claimant's last coal mine employment occurred in Virginia. Director's Exhibit 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, 1-202 (1989) (*en banc*).

[3] Because claimant does not challenge the administrative law judge's findings that the existence of pneumoconiosis was not established at 20 C.F.R. §718.202(a)(2), (3), we affirm them. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant contends that the administrative law judge did not properly consider whether claimant established a change in an applicable condition with respect to the existence of pneumoconiosis, because the administrative law judge weighed all the x-ray evidence of record, old and new, rather than just the x-ray evidence filed with the present claim. This contention lacks merit.

Claimant's most recent claim was denied because he failed to establish total disability pursuant to 20 C.F.R. §718.204(c). Director's Exhibit 1. In this case, the administrative law judge found that the new evidence established total disability, and thus a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *White*, 23 BLR at 1-3. The administrative law judge then properly proceeded to consider all the evidence on the merits. Thus, the administrative law judge properly considered both the old and new x-rays when considering the issue of the existence of pneumoconiosis.

Claimant further contends that pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge "merely counted the number of positive and negative films and concluded that the overwhelming majority of the films were [sic] negative for pneumoconiosis." Claimant's Brief at 4. Contrary to claimant's contentions, a review of the administrative law judge's decision reveals that in evaluating the x-ray evidence, the administrative law judge did not merely count the number of positive and negative films. Rather, the administrative law judge properly considered the readings of each x-ray in conjunction with the radiological qualifications of the x-ray readers, and permissibly found that the preponderance of negative readings by B readers and physicians dually-qualified as Board-certified radiologists and B readers outweighs the positive x-ray readings of record. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc on recon*.); *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); Decision and Order at 14-15; Director's Exhibits 1, 2, 9, 14-17; Employer's Exhibits 3, 11; Claimant's Exhibit 1. Claimant alleges no other error in the administrative law judge's weighing of the x-ray evidence. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Consequently, we affirm the administrative law judge's weighing of the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1) as it is supported by substantial evidence.

Pursuant to 20 C.F.R. §718.202(a)(4), claimant argues that because the administrative law judge did not properly weigh the x-ray evidence at 20 C.F.R. §718.202(a)(1), his analysis at 20 C.F.R. §718.202(a)(4) is tainted. Claimant's Brief at 5.

Because we have affirmed the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1), this argument lacks merit. Further, as claimant raises no other allegations of error, we affirm the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Substantial evidence supports the administrative law judge's additional finding that all of the evidence weighed together did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). It is therefore affirmed.

Because claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a necessary element of entitlement under Part 718, we affirm the denial of benefits. *See Anderson*, 12 BLR at 1-112.

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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BETTY JEAN HALL
Administrative Appeals Judge