BRB No. 08-0519 BLA

R.W. (Deceased)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: 03/16/2009
	)	
Employer-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 Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

R.W., Madison, West Virginia, *pro se*.

Paul E. Frampton (Bowles, Rice, McDavid, Graff & Love), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel, the Decision and Order (06-BLA-6048) of Administrative Law Judge Janice K. Bullard 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). Claimant filed his

[1] Claimant died on June 2, 2008, while his appeal was pending before the Board. Claimant's widow is pursuing the appeal on his behalf.

third and instant claim on April 27, 2005.[2] Director's Exhibit 4. The administrative law judge credited claimant with forty-five years of coal mine employment.[3] The administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d) by establishing total disability based on new evidence pursuant to 20 C.F.R. §718.204(b)(2). Considering the claim on its merits, the administrative law judge found that although all of the evidence established that claimant is totally disabled, claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief to claimant's appeal.[4]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

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[2] Claimant's first claim, filed on July 25, 1991, was denied on September 17, 1993. Director's Exhibit 1. Claimant requested modification on September 12, 1994, and the district director denied modification on November 9, 1994. *Id.* Claimant filed his second claim on September 20, 2000, and it was denied on June 4, 2002, because claimant did not establish any element of entitlement. Director's Exhibit 2.

[3] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 6. 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*).

[4] We affirm the administrative law judge's finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d) and that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2) on the merits, as unchallenged on appeal by employer, and not adverse to claimant. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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, 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).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge weighed the new and old x-ray evidence together, and found that it did not establish the existence of pneumoconiosis. In so doing, the administrative law judge performed a proper quantitative and qualitative analysis of the x-ray evidence. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-4 (2004).

Specifically, the administrative law judge considered that a June 20, 2005 x-ray was read by Dr. Ranavaya, a B reader, as positive for pneumoconiosis, but was reread as negative for pneumoconiosis by Dr. Wheeler, a Board-certified radiologist and B reader. Director's Exhibits 12, 14. The administrative law judge reasonably found that the June 20, 2005 x-ray was negative for pneumoconiosis because Dr. Wheeler was "dually qualified" as both a Board-certified radiologist and B reader. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003); Decision and Order at 13. Moreover, the administrative law judge properly found that the September 7, 2005 and March 13, 2006 x-rays were negative for pneumoconiosis, as both Drs. Scott and Wheeler, Board-certified radiologists and B readers, interpreted these x-rays as negative. Director's Exhibit 14; Employer's Exhibit 1. Further, because Drs. Ahmed and Scatarige, both of whom are Board-certified radiologists and B readers, read the July 24, 2007 x-ray as positive and negative, respectively, the administrative law judge reasonably found that x-ray to be "in equipoise." *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994); *Adkins*, 958 F.2d at 52-53, 16 BLR at 2-66; *Chaffin*, 22 BLR at 1-300; Decision and Order at 13; Claimant's Exhibit 1; Employer's Exhibit 6.

The administrative law judge then discussed the eighteen readings of five x-rays dated July 8, 1999, October 24, 2000, November 17 and 22, 2000, and February 7, 2001, that were submitted in claimant's second claim, filed in 2000. The administrative law judge correctly noted that the only positive readings were those of Drs. Navani and Ranavaya of the October 24, 2000 x-ray.[5] Decision and Order at 18-19. The

[5] The record reflects that Dr. Navani was a Board-certified radiologist and B reader. Director's Exhibit 2. The record further reflects that Drs. Wheeler, Scott, and Gayler, Board-certified radiologists and B readers, read the October 24, 2000 x-ray as negative for pneumoconiosis. *Id*.

administrative law judge correctly noted that all other readings of those x-rays were negative readings by dually qualified physicians, except for the negative reading of the November 22, 2000 x-ray by Dr. Zaldivar, a B reader. The administrative law judge concluded that the existence of pneumoconiosis was not established based on a weighing of the old and new x-ray evidence. Upon review, we conclude that substantial evidence supports the administrative law judge's finding.[6] As the administrative law judge performed a proper quantitative and qualitative analysis of the x-ray evidence, we affirm her finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Adkins*, 958 F.2d at 52-53; *Chaffin*, 22 BLR at 1-300.

Because there is no biopsy or autopsy evidence of record, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 13. Furthermore, the administrative law judge properly found that claimant is not entitled to any of the statutory presumptions set forth at 20 C.F.R. §718.202(a)(3).[7] *Id.*

Pursuant to Section 718.202(a)(4), the administrative law judge discussed the medical opinions of Drs. Ranavaya, Rasmussen, Tuteur, and Zaldivar. Dr. Ranavaya, whose qualifications are not of record except for his status as a B reader, diagnosed claimant with pneumoconiosis based on a positive x-ray and a history of forty-five years of coal mine dust exposure. Director's Exhibit 12 at 4. Dr. Rasmussen, who is Board-certified in Internal Medicine, opined that claimant suffered from chronic obstructive pulmonary disease (COPD) due to both smoking and coal mine dust exposure. Claimant's Exhibit 3. Drs. Tuteur and Zaldivar, both of whom are Board-certified in Internal Medicine and Pulmonary Disease, concluded that claimant did not have

[6] The administrative law judge did not discuss an additional eleven readings of five earlier x-rays that were taken between February 1991 and August 1994, and submitted in claimant's first claim, filed in 1991. Director's Exhibit 1. Of those readings, one was positive for pneumoconiosis, by Dr. Gaziano, a B reader, of an August 30, 1994 x-ray. Any error in the administrative law judge's failure to discuss these earlier readings was harmless, since the record reflects that Dr. Gaziano is a B reader only, whereas the administrative law judge chose to accord greater weight to the readings by dually qualified readers in her analysis of the x-ray evidence. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[7] Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed this claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, because this claim is not a survivor's claim, the Section 718.306 presumption is inapplicable. *See* 20 C.F.R. §718.306.

pneumoconiosis, but suffered from COPD and emphysema due to smoking. Director's Exhibit 14; Employer's Exhibits 5, 7, 8.

A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The administrative law judge rationally discounted Dr. Ranavaya's diagnosis of clinical pneumoconiosis because the diagnosis was based on Dr. Ranavaya's positive reading of the June 20, 2005 x-ray, which the administrative law judge found was reread as negative by a "dually qualified" physician, and because the administrative law judge found that the preponderance of the x-ray evidence was negative for pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-12, 22 BLR 2-162, 2-175 (4th Cir. 2000); Decision and Order at 15; Director's Exhibit 12. Further, the administrative law judge acted within her discretion when she found Dr. Rasmussen's opinion, that claimant had COPD due to both smoking and coal dust exposure, not to be well-reasoned, because Dr. Rasmussen stated in a conclusory manner that smoking and coal dust cause the same types of emphysema, and because Dr. Rasmussen did not adequately explain how the medical literature upon which he relied correlated to claimant's specific case. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 15; Claimant's Exhibit 3. Additionally, the administrative law judge permissibly found that Dr. Rasmussen's opinion was "not fully supported by the objective evidence" in claimant's pulmonary function study results. *See Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985); Decision and Order at 15; Claimant's Exhibit 3.

The administrative law judge permissibly found that, by contrast, the opinions of Drs. Tuteur and Zaldivar, that claimant did not have clinical pneumoconiosis, were supported by claimant's x-rays, CT scans, and pulmonary function studies. *See Wetzel*, 8 BLR at 1-141; Decision and Order at 14-15; Director's Exhibit 14; Employer's Exhibits 5; 7 at 11-12; 8 at 26, 43-44. With respect to legal pneumoconiosis, the administrative law judge acted within her discretion to find that Drs. Zaldivar and Tuteur presented well-reasoned and documented opinions explaining that claimant's impairment resulted from smoking-related emphysema. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-33, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Decision and Order at 14-15; Employer's Exhibits 5 at 3; 7 at 14-15; 38-44; 8 at 13. Additionally, the administrative law judge reasonably accorded additional weight to the opinions of Drs. Tuteur and Zaldivar based on the doctors' qualifications in Internal Medicine and Pulmonary Disease. *See Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Substantial evidence supports

the administrative law judge's finding. Consequently, we affirm the finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).[8]

Because we have affirmed the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a), a requisite element of entitlement, the administrative law judge's denial of benefits is affirmed. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

[8] The administrative law judge did not discuss the earlier medical opinions that were submitted in claimant's 1991 and 2000 claims. We conclude that this oversight constituted harmless error in the circumstances of this case, as the earlier diagnoses of pneumoconiosis could not assist claimant in carrying his burden of proof. *See Larioni*, 6 BLR at 1-1278. As discussed above, the administrative law judge chose to accord greater weight to the medical opinions of the doctors with superior credentials in Internal Medicine and Pulmonary Disease. However, the record does not contain the pulmonary credentials, if any, of Drs. Walker, Agus, Ranavaya, or the physicians with the West Virginia Occupational Pneumoconiosis Board, who rendered diagnoses of pneumoconiosis in claimant's earlier claims. Director's Exhibits 1, 2. Additionally, the record reflects that Dr. Ranavaya's October 24, 2000 diagnosis of pneumoconiosis was based on his own reading of a positive x-ray, when the administrative law judge specifically found that the old and new x-rays weighed together were negative for pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-12, 22 BLR 2-162, 2-175 (4th Cir. 2000); Director's Exhibit 2.

Accordingly, the administrative law judge's Decision and Order denying 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