BRB No. 98-0814 BLA

PATSY HOLBROOK (Widow of William N. Holbrook)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED:
EASTERN ASSOCIATED COAL CORPORATION	)	
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 on Remand - Denying Benefits of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Laura Metcoff Klaus (Arter & Hadden, L.L.P.), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (90-BLA-1034) of Administrative Law Judge Mollie W. Neal 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).[1] This case is on appeal to the Board for the fourth time. In the original decision, Administrative Law Judge Charles W. Campbell credited the miner with sixteen and one-quarter years of coal mine employment and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence was sufficient to establish total disability due to pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b) and 718.204(b), (c). Accordingly, benefits were awarded. Employer appealed and in *Holbrook v. Eastern Associated Coal Corp.*, BRB No. 90-1313 BLA (Aug. 19, 1992) (unpub.), the Board affirmed the administrative law judge's finding of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), but vacated the administrative law judge's findings that total disability due to pneumoconiosis was established pursuant to 20 C.F.R. §718.204(b), (c)(1), (4) and remanded the case for further consideration.

On remand, the administrative law judge found that the evidence established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded. Employer appealed and in *Holbrook v. Eastern Associated Coal Corp.*, BRB No. 94-0428 BLA (Aug. 30, 1995) (unpub.), the Board affirmed the administrative law judge's finding that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), but noted that the United States Supreme Court had recently issued *Director, OWCP v. Greenwich Collieries* [Ondecko],114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), which held that the "true doubt rule" violated Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Inasmuch as the administrative law judge had found the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1) relying upon the true doubt rule, the Board vacated his finding and remanded the case for further consideration thereunder. The Board also vacated the administrative law judge's findings at 20 C.F.R. §718.204(b), holding that he had applied an incorrect legal standard in weighing the evidence thereunder.

On remand, the case was reassigned to Administrative Law Judge Neal who found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and total disability due to pneumoconiosis

[1]Claimant is the widow of the miner, William N. Holbrook, who died on April 15, 1992. This case involves the continued pursuit of benefits in the miner's claim.

pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were awarded. Employer appealed and in *Holbrook v. Eastern Associated Coal Corp.*, BRB No. 96-1320 BLA (July 22, 1997) (unpub.), the Board vacated the administrative law judge's finding of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and remanded the case for the administrative law judge to reconsider all of the relevant x-ray evidence and to provide a more detailed finding on this issue. The Board also instructed the administrative law judge to consider whether the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(2)-(4) on remand, if necessary. In addition, the Board rejected employer's arguments with respect to the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b).

On remand, the administrative law judge found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and thus found no entitlement under the Act. In the instant appeal, claimant contends that the administrative law judge erred in finding that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated 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 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 establish 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 of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

[2]The administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) are unchallenged on appeal and are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983), Decision and Order on Remand at 4.

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. In her consideration of the x-ray evidence, the administrative law judge noted that although the majority of x-ray readings were negative, physicians who were both B-readers and board-certified radiologists read the most recent x-rays as both positive and negative. Decision and Order on Remand at 2-4. The administrative law judge thus found that the x-ray evidence was in equipoise and that claimant failed to meet her burden of proof in establishing the existence of pneumoconiosis by a preponderance of the x-ray evidence pursuant to Section 718.202(a)(1). *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Decision and Order on Remand at 3-4; Director's Exhibits 13-14, 32-33; Employer's Exhibits 1-6. We therefore affirm the administrative law judge's finding that the x-ray evidence was in equipoise and thus insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) as it is supported by substantial evidence. *Ondecko*, *supra*.

In weighing the medical opinions of record, the administrative law judge also rationally concluded that this evidence failed to establish the existence of pneumoconiosis by a preponderance of the evidence pursuant to Section 718.202(a)(4). *Perry*, *supra*. In so finding, the administrative law judge acted within her discretion as fact-finder in concluding that of the opinions by Drs. Acosta, Honrado and Zaldivar, the most credible opinion was by Dr. Zaldivar, who found that claimant's condition was unrelated to coal mine employment. Decision and Order on Remand at 4-7; Director's Exhibits 18, 32; Claimant's Exhibit 1. In so finding, the administrative law judge rationally accorded greater weight to Dr. Zaldivar's opinion, that the miner did not have coal workers' pneumoconiosis and that he suffered from asthma unrelated to his coal mine employment, based on the physician's superior qualifications. *Clark*, *supra*; *Perry*, *supra*; *Winters v. Director, OWCP*, 6 BLR 1-877 (1984); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983); Decision and Order on Remand at 7. The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Inasmuch as the administrative law judge properly weighed all of the medical opinions of record and rationally concluded that the preponderance of the evidence did not establish the existence of pneumoconiosis, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(4). *Clark*, *supra*; *Perry*, *supra*. Consequently, claimant's failure to establish the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement

under 20 C.F.R. Part 718, precludes an award of benefits thereunder. *Anderson*, *supra*; *Trent*, *supra*.

Accordingly, the Decision and Order on Remand of the administrative law judge
denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge