BRB No. 99-0851 BLA

GEORGE B. NIDAY, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED:
	)	
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 Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

George B. Niday, Jr., Barrett, West Virginia, *pro se*.

Paul E. Frampton (Bowles, Rice, McDavid, Graff & Love, P.L.L.C.), Fairmont, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (98-BLA-0262) of Administrative Law Judge Gerald M. Tierney 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). The administrative law judge accepted the parties' stipulation to forty-four years of coal mine employment and found that the medical evidence of record did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, he denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the

Director), has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers 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 supported by substantial evidence, is rational, and is in accordance with law. 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).

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 Section 718.202(a)(1), the administrative law judge considered all of the x-ray readings based upon the readers' radiological qualifications and found that claimant "[did] not establish the existence of pneumoconiosis by the preponderance of the chest x-ray evidence." Decision and Order at 4; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990). Substantial evidence supports the administrative law judge's finding. The record contains twenty-three readings of four x-rays. Six readings were positive for the existence of pneumoconiosis and seventeen readings were negative. Of the six positive readings, four were rendered by physicians qualified as both Board-certified radiologists and B-readers, one was by a B-reader, and one was by a Board-certified radiologist. Of the negative readings, nine were rendered by Board-certified radiologists and B-readers and eight were by B-readers. Under these circumstances, the administrative law judge acted within his discretion when he found that the positive readings "[did] not represent the preponderance of the chest x-ray evidence," because "[o]ther equally qualified [B]oard-certified radiologists and/or B-readers found no evidence of the disease." Decision and Order at 4; *see Adkins, supra*. Because the administrative law judge properly weighed the x-ray readings and substantial evidence supports his finding, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1).

The administrative law judge did not specifically address the applicability of either Section 718.202(a)(2) or (a)(3). Review of the record reveals no biopsy evidence and indicates that the presumptions at Sections 718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of

complicated pneumoconiosis. *See* 20 C.F.R. §718.304, 718.305, 718.306. Therefore, Sections 718.202(a)(2) and (a)(3) are inapplicable.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the conflicting opinions of Drs. Ranavaya, Rasmussen, Zaldivar, and Renn.[1] Drs. Ranavaya and Rasmussen examined and tested claimant and diagnosed pneumoconiosis. Director's Exhibit 11; Claimant's Exhibit 1. Dr. Zaldivar examined and tested claimant and reviewed various items of medical evidence, including Dr. Ranavaya's examination report and data. Employer's Exhibits 1, 7. Dr. Zaldivar concluded that claimant does not have pneumoconiosis but suffers from asthma which is unrelated to his coal mine employment. *Id*. Dr. Renn reviewed most of the medical evidence of record and reached the same conclusion. Employer's Exhibits 4, 6.

[1] The administrative law judge also discussed the findings of the West Virginia Occupational Pneumoconiosis Board in claimant's state claim for benefits, and the two notations of pneumoconiosis in claimant's hospital treatment records. Director's Exhibit 3; Employer's Exhibit 2. Substantial evidence supports the administrative law judge's discretionary determination that these records did not contain documented and reasoned diagnoses of pneumoconiosis as defined under the Act. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 , 1-155 (1989)(*en banc*).

The administrative law judge found within his discretion that Drs. Zaldivar and Renn provided better reasoned opinions because they "specifically explained what factors led them to rule out coal mine dust exposure" as a cause of claimant's obstructive ventilatory impairment. Decision and Order at 5; *see* 20 C.F.R. §718.201; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). As highlighted by the administrative law judge, Drs. Zaldivar and Renn explained in detail that the pattern of claimant's ventilatory impairment is one of significantly reversible obstruction with air trapping and wheezing, yet normal blood gas studies and diffusing capacity. In deferring to Dr. Zaldivar's and Dr. Renn's opinions that this pattern is consistent with asthma and inconsistent with pneumoconiosis, the administrative law judge permissibly took into account their superior credentials in Pulmonary Disease.[2] *See Hicks, supra*; *Akers, supra*; *Clark*, 12 BLR at 1-154. Additionally, the administrative law judge rationally considered that Drs. Zaldivar and Renn "had the opportunity to review the evidence developed over time and provide their opinions based on a more complete picture of the miner's health," *see Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986), whereas Drs. Ranavaya and Rasmussen "only considered the results of their respective, one-time evaluations." Decision and Order at 5. The administrative law judge exercises broad discretion in assessing the quality of the medical opinions, *see Trumbo*

[2] Review of the record indicates that Dr. Rasmussen is Board-certified in Internal Medicine, but not in Pulmonary Disease. Claimant's Exhibit 1. The administrative law judge additionally considered Dr. Rasmussen's experience and research publications, but permissibly found that Dr. Rasmussen did not explain his opinion in this case as well as did Drs. Zaldivar and Renn. *See Hicks, supra*; *Akers, supra*. The record does not contain Dr. Ranavaya's qualifications.

v. Reading Anthracite Co., 17 BLR 1-85, 1-88-89 and n.4 (1993), and substantial evidence supports his finding in this case. Therefore, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(4).

Because claimant has 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.[3] *See Trent*, *supra*; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

[3] Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that the administrative law judge must weigh all of the categories of evidence together to determine whether the existence of pneumoconiosis is established pursuant to Section 718.202(a). *Island Creek Coal Co. v. Compton*, F.3d , 2000 WL 524798 (4th Cir. 2000). In this case, however, the administrative law judge found that no individual category of evidence supported a finding of pneumoconiosis under any subsection of Section 718.202(a). Therefore, there is no contrary evidence for the administrative law judge to weigh pursuant to Section 718.202(a) under *Compton*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge