BRB Nos. 02-0614 BLA
and 02-0614 BLA-A

JARRELL DEAN COCHRAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-In-Interest	)	DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

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

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Jennifer U. Toth (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order-

Denying Benefits (2001-BLA-0035) of Administrative Law Judge Gerald M. Tierney rendered 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). Claimant filed his application for benefits on February 23, 1995. Director's Exhibit 1. The district director denied benefits and claimant requested a hearing, which was held on September 19, 2001.

Director's Exhibits 110, 111.

In the ensuing Decision and Order-Denying Benefits, the administrative law judge credited claimant with sixteen years of coal mine employment, found that employer is the responsible operator, and concluded that the medical evidence 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 x-ray and medical opinion evidence when he found that the existence of pneumoconiosis was not established. Employer responds, urging affirmance of the denial of benefits, and has filed a cross-appeal challenging the administrative law judge's finding that employer is the responsible operator. The Director, Office of Workers' Compensation Programs (the Director), responds to both appeals, urging affirmance of the denial of benefits and of the finding that employer is the responsible operator.

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

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The September 19, 2001 hearing was the second hearing on this claim. The first hearing, held on October 9, 1996, resulted ultimately in a remand by the Board to the district director for further investigation of the responsible operator issue. Director's Exhibits 69, 71, 73, 81, 84; *Cochran v. Westmoreland Coal Co.*, BRB No. 98-0309 BLA (Jan. 7, 1999)(unpub.).

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).

The administrative law judge first considered the x-ray evidence, which consisted of seventy readings of nine x-rays. Three readings of only one x-ray were positive for pneumoconiosis. Sixty-seven readings were negative. The administrative law judge found that the weight of the x-ray readings by the most highly qualified readers did not support a finding of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order-Denying Benefits at 7.

There being no biopsy evidence and no applicable presumptions pursuant to 20 C.F.R. §718.202(a)(2),(a)(3), the administrative law judge next considered the medical opinions of eight physicians pursuant to 20 C.F.R. §718.202(a)(4). Dr. Walker, whose credentials are not of record, examined and tested claimant and diagnosed bronchitis and bronchial asthma due to occupational dust exposure and smoking. Director's Exhibit 95. Dr. Rasmussen, whose credentials are also not of record, reviewed the medical evidence and diagnosed asthma caused or aggravated by coal mine dust exposure and cigarette smoke. Director's Exhibit 62. By contrast, Dr. Zaldivar, who is Board-certified in Internal Medicine and Pulmonary Disease, and Dr. Daniel, who is Board-certified in Family Practice, examined and tested claimant and diagnosed a severe obstructive pulmonary impairment due to bronchial asthma unrelated to coal mine employment, and to smoking. Director's Exhibits 23, 47, 61, 68, 113; Employer's Exhibits 5, 16. Consulting physicians Drs. Castle, Fino, Jarboe, and Spagnolo, all of whom are Board-certified in Internal Medicine and Pulmonary Disease, reviewed claimant's medical records and reached the same conclusion. Director's Exhibits 63, 64, 68; Employer's Exhibits 6-8, 10, 15.

The administrative law judge found that the opinions of Drs. Walker and Rasmussen were less persuasive than those of Drs. Daniel, Zaldivar, Castle, Fino, Jarboe, and Spagnolo because they were not as well explained. Decision and Order-Denying Benefits at 9. The administrative law judge considered further that Drs. Zaldivar, Castle, Fino, Jarboe, and Spagnolo "are each board-certified in the subspecialty of pulmonary medicine," while "[t]he record does not contain the curriculum vitae of either Dr. Rasmussen or Dr. Walker." *Id*. Consequently, the administrative law judge found that a preponderance of the medical opinion evidence did not support a finding of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Finding that "[c]laimant d[id] not establish the existence of pneumoconiosis by either of the means available" in this case, the administrative law

[3] Claimant does not challenge the administrative law judge determination to accord less weight to a 1987 report by the West Virginia Occupational Pneumoconiosis Board. Decision and Order-Denying Benefits at 9; Director's Exhibit 6.

judge denied benefits. Decision and Order-Denying Benefits at 10.

Pursuant to Section 718.202(a)(1), claimant contends that the administrative law judge gave undue weight to "the large number of negative chest x-ray reports the employer was able to develop." Claimant's Brief at 8. Contrary to claimant's contention, review of the administrative law judge's Decision and Order reflects that he properly weighed the x-ray readings in light of the physicians' radiological credentials. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). The administrative law judge permissibly found that the three positive readings by Drs. Pathak, Cappiello, and Ahmed of claimant's June 14, 1996 x-ray, Director's Exhibit 57, were countered by those of "equally and superiorly qualified readers and [by] the readings of subsequent chest x-rays." Decision and Order-Denying Benefits at 7; *see Adkins, supra*. Substantial evidence supports the administrative law judge's finding pursuant to Section 718.202(a)(1), which we therefore affirm.

Pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge erred in crediting the opinions of employer's medical experts because their opinions that claimant does not have pneumoconiosis are based solely on negative x-ray readings. Claimant's Brief at 8. Claimant's contention lacks merit. The record reflects that Drs. Daniel, Zaldivar, Castle, Fino, Jarboe, and Spagnolo based their opinions not only on x-ray readings but also on medical, coal mine employment, and smoking histories, physical examination findings, pulmonary function studies, blood gas studies, and diffusion capacity tests. Director's Exhibits 23, 47, 61, 63, 64, 68, 113; Employer's Exhibits 5-8, 10, 15, 16. In weighing the medical opinions, the administrative law judge permissibly analyzed the physicians' reasoning and explanation, and reasonably considered the physicians' credentials. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-88-89 and n.4 (1993). Because the administrative law judge properly weighed the medical opinions and substantial evidence supports his finding, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(4).

Claimant contends further that the administrative law judge erred in finding that the existence of pneumoconiosis was not established because he failed to weigh the x-ray and medical opinion evidence together. Claimant's Brief at 8-9. We reject claimant's contention. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that the different

[4] Consequently, we also reject as meritless claimant's contention that his claim was denied solely on the basis of a negative x-ray reading, in violation of 20 C.F.R. §718.202(b).

categories of medical evidence must be weighed together to determine whether a preponderance of the evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-11, 22 BLR 2-162, 2-169-74 (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 was no contrary evidence for the administrative law judge to weigh pursuant to Section 718.202(a) under *Compton*.

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. *See Anderson, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*). Therefore, we need not address employer's cross-appeal.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, JR.
Administrative Appeals Judge