BRB No. 02-0634 BLA

DADLE DARRELL ELLIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHANNON-POCAHONTAS MINING COMPANY[1]	)	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 Denying Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

Karin L. Weingart (Spilman, Thomas & Battle), Charleston, West Virginia, for employer.

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

PER CURIAM:

[1] The administrative law judge dismissed Allied Signal, Incorporated as the responsible operator and found that Shannon-Pocahontas Mining Company was the most recent coal mine operator which meets the requirements under 20 C.F.R. §§725.491-493.

Claimant appeals the Decision and Order Denying Benefits (00-BLA-0215) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) on a duplicate 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).[2] After accepting the parties stipulation to twenty-five years of coal mine employment, and considering all of the evidence of record, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).[3] The administrative law judge also found that the evidence fails to establish that claimant is totally disabled due to a respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2) and a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000).[4] Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that claimant failed to establish: a material change in conditions, the existence of pneumoconiosis and total disability due to pneumoconiosis. In response, employer urges the Board to affirm the administrative law judge's denial of benefits as it is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has submitted a letter indicating that he will not file a brief on the merits of this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

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[2] 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.

[3] The administrative law judge also noted that the parties stipulated that the claim was timely filed, that claimant falls within the statutory definition of "miner" pursuant to 20 C.F.R. §725.202, and that Lou Ellen Kidd is the dependent spouse of claimant. Decision and Order Denying Benefits at 5.

[4] The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c). The amendments to the regulations at 20 C.F.R. §725.309 (2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. 20 C.F.R. §725.2.

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order Denying Benefits, the arguments on appeal, and the evidence of record, we affirm the administrative law judge's denial of benefits on the merits of the claim as substantial evidence supports his finding that the evidence of record as a whole fails to establish the existence of pneumoconiosis. Claimant alleges that the medical opinion of Dr. Rasmussen and the physicians of the West Virginia Occupational Pneumoconiosis Board (WVOPB) "showed that claimant suffered from pneumoconiosis." Claimant's Brief at 8. We reject claimant's arguments. The administrative law judge reasonably gave less weight to the 1983 and 1987 medical reports submitted by the WVOPB finding them less relevant than the evidence developed after 1998 which discredits the WVOPB's opinion diagnosing pneumoconiosis. *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718, 18 BLR 2-16, 2-23 (4th Cir. 1993).

The administrative law judge correctly found that of the fourteen medical opinions by seven different physicians dating from 1994 through 2001, only Dr. Rasmussen diagnosed claimant as having pneumoconiosis. The administrative law judge acknowledged that Dr. Rasmussen submitted two well-documented reports dated March 8, 1999 and September 20, 2000, but the administrative law judge discounted them due to inconsistencies between these opinions and Dr. Rasmussen's deposition taken on June 20, 2000. Decision and Order Denying Benefits at 23; Director's Exhibit 11; Claimant's Exhibit 4; Employer's Exhibit 11. The administrative law judge found that in his September 20, 2000 medical report, Dr. Rasmussen relied on epidemiologic studies to conclude that claimant's chronic pulmonary lung disease is a consequence of claimant's cigarette smoking and exposure to coal mine dust. Decision and Order Denying Benefits at 23; Claimant's Exhibit 4. The administrative law judge found that Dr. Rasmussen stated that the epidemiologic studies indicated that impairment of lung function may progress even following termination of exposure, Claimant's Exhibit 4, and that, in the absence of x-ray evidence of pneumoconiosis, the progression of impairment on pulmonary function "would be a linear loss of function--something that one would expect to progress steadily over time." Decision and Order Denying Benefits at 23; Employer's Exhibit 11 at 19-22. The administrative law judge correctly noted however, that Dr. Rasmussen in his deposition testimony concluded that the

claimant's progression of impairment was not consistent with the types of changes described in the epidemiological studies that the doctor relied on to opine that claimant's coal workers' pneumoconiosis is due to both, cigarette smoking and coal mine exposure. *See* Rasmussen Deposition at Employer's Exhibits 11 at 32, 36. Employer's counsel, Mr. William T. Brotherton, III, questioned Dr. Rasmussen on this subject:

> Mr. Brotherton: Would you agree then that the course of this gentleman's progression of impairment is not consistent with the types of changes that are described in the epidemiologic studies you relied upon earlier?
>
> Dr. Rasmussen: Yes, they are not-they are also not consistent with the epidemiologic studies of cigarette smoke induced lung disease either.
> Mr. Brotherton: My point or direction I was trying to head with this question that I am going to ask now. The significant progression of impairment following removal from exposure in this case and the absence of a linear progression are both factors that are inconsistent with the epidemiological studies that you are citing, correct?
>
> Dr. Rasmussen: Well, so far as I know about the point-by-point values in the epidemiologic studies, that is correct.

Decision and Order Denying Benefits at 25; Employer's Exhibit 11 at 32, 36. Based on the above testimony, the administrative law judge rationally gave less weight to Dr. Rasmussen's reports finding his September 20, 2000 medical report undermined by his deposition that concludes that claimant's progression of impairment is not consistent with the types of changes described in the epidemiological studies upon which he had relied in his medical report. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.,* 10 BLR 1-19 (1987); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order Denying Benefits at 26.

Moreover, the administrative law judge reasonably gave more weight to Dr. Iosif's contrary opinion as the physician is Board-certified in internal medicine and pulmonary diseases and his opinion is reasoned and well-documented.[5] *Id.; see Clark*, *supra*; *Fields*, *supra*; *Peskie*, *supra*; *Lucostic, supra*; Employer's Exhibit 3. Consequently, we affirm the administrative law judge's finding that claimant, who bears the burden of proving that his obstructive lung disease did in fact arise out of

[5] The administrative law judge found that Dr. Rasmussen is Board-certified in internal medicine. Decision and Order Denying Benefits at 12.

coal mine employment, failed to establish the existence of pneumoconiosis under Section 718.202(a)(4).

Further, we affirm as unchallenged on appeal the administrative law judge's reasonable finding that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a)(1)-(3) as the x-ray evidence failed to establish the existence of pneumoconiosis, the record is devoid of autopsy or biopsy evidence and the presumptions under Section 718.202(a)(3) are not available or applicable to claimant. *Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983). Because the administrative law judge properly found that the evidence of record is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(4), we reject claimant's assertion that the administrative law judge erred in failing to weigh together the evidence at Section 718.202(a)(1)-(4) in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

In light of our affirmance of the administrative law judge's determination that the evidence of record, as a whole, is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), we need not address the administrative law judge's finding that claimant did not establish a material change in conditions under Section 725.309(d)(2000) or total disability under Section 718.204(b)(2), as any error in these findings would be harmless. *See Johnson v. Jeddo-Highland Coal Co.,* 12 BLR 1-53 (1988); *Trent*, *supra*; *Perry*, *supra*; *Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984).

Accordingly, we affirm the administrative law judge's Decision and Order Denying Benefits.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge