BRB No. 07-0761 BLA

R.L.G.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 05/29/2008
	)	
PEABODY INVESTMENTS, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

R.L.G., Newcomerstown, Ohio, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order - Denial of Benefits (2006-BLA-5334) of Administrative Law Judge Thomas F. Phalen,

[1] Claimant was also unrepresented by counsel when this case was before the

Jr., 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). Based on the parties' stipulation, the administrative law judge found that claimant established at least nineteen years of coal mine employment, and adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] The administrative law judge further found that the evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1),[3] the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and that the disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). However, the administrative law judge found that employer established rebuttal of the presumption that the miner's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally asserts that he is entitled to benefits. Employer responds, urging that the denial of benefits be affirmed. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.[4] 33 U.S.C. §921(b)(3), as

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administrative law judge. The administrative law judge, however, informed claimant of his right to counsel without cost, *See* Director's Exhibit 1, and gave him the opportunity to present evidence on his own behalf and to rebut evidence proffered by the Director, Office of Workers' Compensation Programs, *see* Hearing Transcript at 10-12, 22. Accordingly, the safeguards enunciated in *Shapell v. Director, OWCP*, 7 BLR 1-304 (1988) for claimants proceeding without counsel were satisfied.

[2] The administrative law judge further noted that employer conceded its status as the responsible operator in this case.

[3] The administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2)-(4).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit as the miner was last employed in the coal mine industry in Indiana. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

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 element of entitlement precludes an award of benefits. *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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Section 718.203(b) provides a rebuttable presumption that claimant's pneumoconiosis arose out of coal mine employment if the presence of pneumoconiosis is established and claimant has at least ten years of coal mine employment. 20 C.F.R. §718.203(b). In order to rebut the presumption, the party opposing entitlement must affirmatively establish, through credible medical evidence, that the source of claimant's pneumoconiosis was not coal mine employment. See 20 C.F.R. §718.203(b).

In the instant case, the administrative law judge found that claimant established the existence of clinical pneumoconiosis at Section 718.202(a)(1), based on the x-ray evidence of record. The administrative law judge found that the record consisted of: the positive interpretations of the March 15, 2005 x-ray by Dr. Muchnok, Director's Exhibit 10, and Dr. Wiot, Director's Exhibit 10;[5] the positive interpretation by Dr. Rosenberg of the June 21, 2005 x-ray, Director's Exhibit 23; and the negative interpretation of that x-ray by Dr. Wiot, Director's Exhibit 24. Based on the weight of these readings, the administrative law judge found clinical pneumoconiosis established at Section 718.202(a)(1). This finding is affirmed.

In considering the source of claimant's pneumoconiosis, *i.e.*, whether claimant's pneumoconiosis arose out of coal mine employment, however, the administrative law judge found that while claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment based on his length of coal mine employment, *see* 20 C.F.R. §718.203(b), employer established rebuttal of the presumption by medical evidence demonstrating that the pneumoconiosis shown by x-ray did not arise out of coal mine employment. Decision and Order at 20. Specifically, the administrative law judge found that while both Dr. Rosenberg and Dr. Wiot read x-rays as positive, 2/3, Dr. Rosenberg explained that his positive reading was unrelated to coal mine employment, but instead demonstrated idiopathic pulmonary fibrosis (IPF), a condition unrelated to

[5] Dr. Gaziano interpreted the March 15, 2005 x-ray for quality only. Director's Exhibit 10.

coal mine dust exposure, while Dr. Wiot indicated his positive reading was not coal workers' pneumoconiosis, but was actually asbestosis, Director's Exhibit 24; Employer's Exhibits 8, 11. Thus, the administrative law judge concluded that, notwithstanding their "technically" positive x-ray interpretations, both Dr. Rosenberg and Dr. Wiot concluded that the pneumoconiosis seen on x-ray did not arise from coal mine employment. Thus, the administrative law judge concluded that Dr. Muchnok's positive x-ray interpretation was "the only x-ray interpretation that conceivably supports a finding of [coal workers' pneumoconiosis] arising from coal mine employment." Decision and Order at 20. Considering this evidence along with the negative x-ray interpretation of Dr. Wiot and the medical report of Dr. Renn, who opined that claimant suffered from no coal mine employment-related disease, Employer's Exhibit 1, and all of the relevant evidence of record,[6] the administrative law judge found that the presumption found at Section 718.203(b), that pneumoconiosis arose out of coal mine employment, was rebutted by employer.

After review of the relevant evidence, we affirm that determination. Notwithstanding the fact that pneumoconiosis is established by the x-ray evidence at Section 718.202(a)(1), a physician's comment on the x-ray interpretation addressing the source of the pneumoconiosis diagnosed by x-ray is relevant evidence to be considered at Section 718.203. *See Cranor v. Peabody Coal Co.* 22 BLR 1-1 (1999) (*recon. en banc*); *see also Kiser v. L&J Equipment Co.*, 23 BLR 1-246 (2006). Here, the administrative law judge considered the entirety of relevant evidence and rationally concluded that the statements of Dr. Rosenberg and Dr. Wiot, that claimant suffered from IPF and asbestosis, diseases unrelated to coal mine dust exposure, along with the medical opinion of Dr. Renn, that claimant suffered from IPF, and that claimant's x-rays were inconsistent with coal workers' pneumoconiosis, were sufficient to rebut the presumption that claimant's pneumoconiosis arose out of coal mine employment. *See Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. 1990).

Hence, as the administrative law judge has properly found that claimant has failed to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to Section 718.203(b), a requisite element of entitlement pursuant to 20 C.F.R.

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[6] The administrative law judge found that Dr. Muchnok provided no discussion as to whether the pneumoconiosis he identified by x-ray arose out of coal mine employment. In addition, the administrative law judge stated that while Drs. Basit and Knight opined that claimant suffered from clinical pneumoconiosis, based primarily on evaluation of the CT scans, the physicians provided no explanation for concluding that bilateral lobe fibrosis and the honeycombing seen on the CT scans demonstrated pneumoconiosis arising out of coal mine employment, and not idiopathic pulmonary fibrosis from an unknown source.

Part 718, entitlement is precluded in this case. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge