BRB No. 09-0628 BLA

HAROLD M. TILLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 05/25/2010
	)	
LEFT FORK COAL COMPANY	)	
	)	
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Harold M. Tiller, Vansant, Virginia, *pro se*.

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

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2007-BLA-5785) of Administrative Law Judge Linda S. Chapman, with respect to a subsequent claim[2] filed on August 17, 2006, pursuant to the provisions

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[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of Oakwood, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but he is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant filed previous claims on March 17, 1998, August 14, 1999, and September 4, 2001, which were all denied by the district director because claimant did

of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[3] After crediting claimant with 10.07 years of coal mine employment, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge concluded that, while claimant established that he was totally disabled at 20 C.F.R. §718.204(b), and therefore established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), he did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

Claimant generally challenges the administrative law judge's decision denying benefits. Employer responds, urging affirmance of the denial of benefits. In the alternative, employer argues that the administrative law judge erred in finding a totally disabling respiratory impairment established at 20 C.F.R. §718.204(b). The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as

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not establish any element of entitlement. Director's Exhibits 1-3. Claimant requested modification of the denial of his September 4, 2001 claim on August 7, 2003, but his request was ultimately denied. Director's Exhibit 3. Claimant did not take any further action until he filed the present claim.

[3] By Order dated March 30, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. *Tiller v. Left Fork Coal Co.*, BRB No. 09-0628 BLA (Mar. 30, 2010)(unpub. Order). The Director, Office of Workers' Compensation Programs, and employer have responded, agreeing that Section 1556 does not apply to the instant claim as claimant has not alleged at least fifteen years of coal mine employment. Based upon the parties' responses, and our review, we hold that the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this case, as there is no evidence of, and no allegation that, claimant has at least fifteen years of coal mine employment.

[4] The record reflects that claimant's coal mine employment was in Virginia. Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United

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 under 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his disability is due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

I. <u>20 C.F.R. §718.202(a)(1)-(3)</u>

In making her findings at 20 C.F.R. §718.202(a)(1), the administrative law judge initially considered the newly submitted evidence, which consisted of thirteen interpretations of five x-rays, dated September 6, 2003, February 2, 2006, October 26, 2006, November 8, 2006, and February 5, 2007. Dr. Alexander interpreted the September 6, 2003 x-ray as positive for coal workers' pneumoconiosis, while Drs. Dahhan and Spitz interpreted it as negative for the disease. Claimant's Exhibit 2; Employer's Exhibits 2, 9. In addition, Dr. Alexander interpreted the February 2, 2006 x-ray as positive for coal workers' pneumoconiosis, while Dr. Wiot interpreted it as negative. Director's Exhibit 16; Employer's Exhibit 1. Both Drs. Fino and Wiot interpreted the October 26, 2006 x-ray as negative for pneumoconiosis. Director's Exhibit 15; Employer's Exhibit 5. Drs. Rasmussen and Miller interpreted the November 8, 2006 x-ray as positive for coal workers' pneumoconiosis, and Dr. Wiot interpreted it as negative.[5] Director's Exhibits 14-15; Claimant's Exhibit 7. Further, Dr. Ahmed interpreted the February 5, 2007 x-ray as positive for coal workers' pneumoconiosis while Dr. Spitz interpreted it as negative for the disease. Claimant's Exhibit 1; Employer's Exhibit 9. Drs. Dahhan, Fino, and Rasmussen are B readers. Director's Exhibits 14-16; Claimant's Exhibits 1-2, 7; Employer's Exhibits 1-2, 5, 9. Drs. Alexander, Spitz, Wiot, Miller, and Ahmed, are dually-qualified as B readers and Board-certified radiologists. Director's Exhibits 15-16; Claimant's Exhibits 1-2, 7; Employer's Exhibits 1, 5, 9.

The administrative law judge gave greater weight to the dually-qualified physicians who interpreted the September 6, 2003 x-ray and, as a result, determined that

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States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[5] Dr. Barrett interpreted the November 8, 2006 for quality only. Director's Exhibit 14.

the x-ray was in equipoise. Decision and Order at 12-13. For the same reason, the administrative law judge determined that the February 2, 2006 x-ray was in equipoise. *Id*. The administrative law judge noted that the only physicians to interpret the October 26, 2006 x-ray found it to be negative. *Id*. at 13. Further, the administrative law judge found that the interpretations by the dually-qualified readers of the November 8, 2006 x-ray were in equipoise and that Dr. Rasmussen's positive reading, as a B reader, was not sufficient "to tip the balance" in favor of a positive finding. *Id*. In addition, the administrative law judge determined that, based on the interpretations of the dually-qualified physicians, the February 5, 2007 x-ray was in equipoise. *Id*.

The administrative law judge stated that in claimant's previous claims there were twelve interpretations of six x-rays, taken between 1998 and 2003. Decision and Order at 13. The administrative law judge indicated that eleven of the interpretations were read as negative for coal workers' pneumoconiosis, with three of them performed by dually-qualified readers, while only Dr. Ahmed interpreted an x-ray as positive for the disease. *Id*. Weighing the x-ray evidence as a whole, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *Id*.

We affirm the administrative law judge's finding at 20 C.F.R. §718.202(a)(1), as it is rational and supported by substantial evidence. The administrative law judge acted within her discretion in giving more weight to the interpretations of the dually-qualified physicians in determining that the x-rays, dated September 6, 2003, February 2, 2006, November 8, 2006, and February 5, 2007, were in equipoise. *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co*., 8 BLR 1-344 (1985). In addition, as the administrative law judge noted, only one of the four interpretations by dually-qualified physicians from claimant's previous claims was positive for pneumoconiosis so the administrative law judge acted within her discretion in finding that the evidence as a whole was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *Adkins*, 958 F.2d at 52, 16 BLR at 2-66; *Trent*, 11 BLR at 1-27-28; *Dixon*, 8 BLR at 1-345.

Further, we affirm the administrative law judge's determination that claimant has not established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), (3), as the record does not contain any biopsy or autopsy evidence and the presumptions set forth in 20 C.F.R. §§718.304, 718.305, and 718.306 are not applicable.[6] Decision and Order at 13.

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[6] The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. With respect to the presumption set forth in 20 C.F.R. §718.305, the statutory provision that it implements was amended, by Section 1556 of Public Law No. 111-148, to delete the requirement that the claim be

II. 20 C.F.R. §718.202(a)(4)

In evaluating whether claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge considered the newly submitted medical opinions of Drs. Narayanan, Patel, Fino, Rasmussen, Roatsey, Dahhan, and Jarboe. The administrative law judge initially noted that none of the physicians diagnosed legal pneumoconiosis,[7] but several diagnosed clinical pneumoconiosis.[8] Decision and Order at 15. The administrative law judge accorded diminished weight to Dr. Narayanan's opinion, that claimant has coal workers' pneumoconiosis and a restrictive lung disease, because it was "apparently" based on x-ray evidence that was positive for coal workers' pneumoconiosis, contrary to the administrative law judge's finding, and a pulmonary function test showing moderate to severe restriction. *Id*. at 14; Claimant's Exhibit 5. The administrative law judge also gave less weight to Dr. Patel's diagnosis of coal workers' pneumoconiosis because, although Dr. Patel included pneumoconiosis in his list of claimant's medical issues, the only x-ray report he reviewed did not contain a finding of pneumoconiosis and Dr. Patel did not identify any evidence supportive of a diagnosis of pneumoconiosis. Decision and Order at 14; Director's Exhibit 16; Claimant's Exhibit 6.

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filed before January 1, 1982. However, as indicated *supra*, this amendment does not apply in the present case, as there is no evidence of, and no allegation that, claimant has at least fifteen years of coal mine employment. Slip op. at 2 n.3. Lastly, as this claim is not a survivor's claim filed before June 30, 1982, the presumption at 20 C.F.R. §718.306 is also inapplicable.

[7] Legal pneumoconiosis is defined as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[8] Although the administrative law judge noted that Dr. Rasmussen's report could be found to suggest a possibility of legal pneumoconiosis, she found that Dr. Rasmussen did not provide any rationale to support his statement that claimant's impairment was caused by his coal dust exposure history. Decision and Order at 15 n.4. We affirm the administrative law judge's credibility determination with respect to Dr. Rasmussen, and the administrative law judge's finding that the evidence was insufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.204(a)(4). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993).

Dr. Fino interpreted an x-ray as negative for pneumoconiosis but stated that the chest x-ray was abnormal due to evidence of a previous open heart surgery and increased interstitial and irregular opacities in the two middle and lower lung zones, which could indicate interstitial pulmonary fibrosis. Director's Exhibit 15. The administrative law judge gave less weight to Dr. Fino's opinion because he did not discuss the etiology of his findings, particularly whether they were due, in part, to claimant's coal dust exposure. Decision and Order at 13.

The administrative law judge discounted Dr. Rasmussen's opinion, that claimant has clinical pneumoconiosis, because it was based on his positive interpretation of the x-ray dated November 8, 2006, which was contrary to the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis, and on claimant's history of coal dust exposure. Decision and Order at 13; Director's Exhibit 14. In addition, the administrative law judge gave diminished weight to Dr. Roatsey's opinion, that claimant has coal workers' pneumoconiosis, because his positive x-ray interpretation was contrary to the administrative law judge's finding at 20 C.F.R. §718.202(a)(1).[9] Decision and Order at 14; Claimant's Exhibit 4. Further, the administrative law judge determined that Dr. Roatsey did not explain the basis for his opinion. *Id.*

Dr. Dahhan stated that there was insufficient evidence to justify a diagnosis of clinical pneumoconiosis, based on the negative x-ray interpretations. Employer's Exhibit 6. Dr. Dahhan also attributed claimant's moderate respiratory impairment, which was primarily restrictive, to claimant's obesity, congestive heart failure, and smoking history, based on the x-ray evidence and the normal diffusion capacity on the pulmonary function study. *Id.*; Employer's Exhibits 11, 13. As a result, the administrative law judge gave significant weight to Dr. Dahhan's opinion because he explained why claimant's restrictive impairment is due to factors other than coal workers' pneumoconiosis, and he supported his explanation with specific clinical and test findings. Decision and Order at 15.

Regarding Dr. Jarboe, the administrative law judge concluded that she did not find Dr. Jarboe's opinion, that no part of claimant's respiratory impairment was due to coal dust exposure, persuasive. Decision and Order at 15. The administrative law judge stated that Dr. Jarboe did not provide a basis for his claim that it is "known" that mild, simple pneumoconiosis "usually" does not cause a significant respiratory impairment. *Id.*; *see* Employer's Exhibits 12, 14. Further, the administrative law judge stated that Dr.

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[9] Dr. Roatsey's interpretation of an x-ray dated March 26, 2007, was not designated by either party under 20 C.F.R. §725.414, was not admitted into the record, and was not considered by the administrative law judge at 20 C.F.R. §718.202(a)(1).

Jarboe did not explain why claimant's restrictive impairment was not due, in part, to his coal dust exposure. Decision and Order at 15.

Further, the administrative law judge stated that even if she discounted Dr. Dahhan's opinion, she still found that the opinions of Drs. Narayanan, Patel, and Roatsey were insufficient to establish the existence of coal workers' pneumoconiosis because their clinical pneumoconiosis findings were based on positive x-ray interpretations. Decision and Order at 15. The administrative law judge noted that, in claimant's previous claims, no physician diagnosed him with clinical or legal pneumoconiosis. *Id.* Accordingly, the administrative law judge concluded that, after considering all of the evidence, claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and, therefore, she denied benefits. *Id.*

The administrative law judge acted within her discretion in discounting Dr. Narayanan's opinion because she was unable to determine the basis of his opinion. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Grizzle v. Pickands Mather & Co*., 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Cosaltar v. Mathies Coal Co.*, 6 BLR 1-1182 (1984). In addition, the administrative law judge acted within her discretion in discounting Dr. Patel's opinion because he did not indicate that there were any findings of pneumoconiosis on claimant's x-ray or provide any support for his assessment that claimant has coal workers' pneumoconiosis.[10] *Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127; *Duke v. Director, OWCP*, 6 BLR 1-673 (1983). The administrative law judge also rationally discounted Dr. Rasmussen's opinion, as his diagnosis of coal workers' pneumoconiosis was based on a positive x-ray interpretation, that conflicted with the administrative law judge's determination that the x-ray evidence was insufficient to establish the existence of pneumoconiosis. *Cornett v. Benham Coal, Inc*., 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Further, the administrative law judge acted within her discretion in finding that Dr. Roatsey's opinion was entitled to less weight because he did not explain how his examination of claimant, or the objective test results, supported his determination that claimant has coal workers' pneumoconiosis. *Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127; *Clark*, 12 BLR at 1-151.

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[10] In light of the administrative law judge's rational determination that Dr. Patel's opinion was not well reasoned, she was not required, pursuant to 20 C.F.R. §718.104(d), to give it more weight based on his status as a treating physician. *Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

The administrative law judge also rationally accorded significant weight to Dr. Dahhan's opinion, that claimant does not suffer from coal workers' pneumoconiosis, because she found that Dr. Dahhan explained why claimant's impairment is due to factors other than pneumoconiosis and cited specific clinical findings and test results to support his opinion. *Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127; *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986). Finally, it is not necessary to address the administrative law judge's discounting of the opinions of Drs. Fino and Jarboe, as they both opined that claimant does not suffer from coal workers' pneumoconiosis. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). We affirm, therefore, the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Based on our affirmance of the administrative law judge's finding at 20 C.F.R. §718.202(a)(4), we also affirm the administrative law judge's determination that the evidence as a whole does not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Because we have affirmed the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement, we also affirm the denial of benefits.[11] *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[11] Because we affirm the administrative law judge's finding at 20 C.F.R. §718.202(a) and her denial of benefits, it is not necessary to address employer's contentions regarding the administrative law judge's findings at 20 C.F.R. §718.204(b). *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge