BRB No. 10-0542 BLA

ROGER T. COLEMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 05/24/2011
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Roger T. Coleman, Throop, Pennsylvania, *pro se.*

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2009-BLA-05645) of Administrative Law Judge Adele Higgins Odegard rendered on a claim filed on September 2, 2008, pursuant to 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). In her Decision and Order dated June 3, 2010, the administrative law judge found that claimant established 4.63 years of coal mine employment, from 1955 to 1961, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge initially determined that, because claimant established less than fifteen years of

coal mine employment, claimant was not entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis, pursuant to Section 411(c)(4) of the Act.[1] The administrative law judge further determined that the evidence was insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the denial of his claim. Claimant asserts that the administrative law judge erred in failing to credit him with nine years of coal mine employment, from 1952 to 1961. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial of benefits.

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 Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence and in accordance with applicable law.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. LENGTH OF COAL MINE EMPLOYMENT

We first address claimant's assertion that the administrative law judge erred in determining the length of his coal mine employment. On his application for benefits, claimant alleged "8 or 9" years of coal mine work. Director's Exhibit 2. In subsequent letters, claimant indicated that he started work in the coal mines in 1952, at the age of

[1] Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

[2] The record indicates that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

fifteen years, and worked until the spring of 1961. Director's Exhibits 11, 13. According to an Itemized Statement of Earnings from the Social Security Administration (SSA), claimant worked for Turnpike Coal Company from 1955 to 1956, C & D Coal Company in 1956, Fino Brothers in 1957, and Hudson Coal Company from 1957 to 1960. Director's Exhibit 12.

The administrative law judge calculated claimant's yearly income, based on the average yearly income for miners, as reported by the Bureau of Labor Statistics, pursuant to 20 C.F.R §725.101(a)(32)(iii), and found that claimant established 4.63 years of coal mine employment between 1955 and 1961. Decision and Order at 4-5. The administrative law judge found that while claimant alleged coal mine employment with Turnpike Coal Company, from 1952 to 1955, because there was no evidence in the record of the amount of wages claimant earned during those years, she was unable to credit claimant with any coal mine work prior to 1955. *Id*. at 5.

Claimant asserts in this appeal:

> I can see why there is no record of me working from 1952 to 1955. I was no[t] credited with those [years] because I was under age. I can see that Turnpike Coal Co. lumped my wages from 1952 to 1955. The fact[s] are [that] when I worked for Turnpike Coal Co.[,] I was only making $9 a day. That is why the amount for [1955] is so large. They lumped those [years] together. I honestly work[ed] in the mine from 1952 to 1961.

See Claimant's Appeal Letter.

Claimant bears the burden of proof to establish the number of years actually worked in coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). Since the Act fails to provide any specific guidelines for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's determination if it is based on a reasonable method and supported by substantial evidence in the record considered as a whole. *See Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Smith v. National Mines Corp.*, 7 BLR 1-803 (1985); *Miller v. Director, OWCP*, 7 BLR 1-693 (1983); *Maggard v. Director, OWCP*, 6 BLR 1-285 (1983). We conclude that the administrative law judge properly calculated claimant's coal mine employment from 1955 to 1961, based on her review of the earnings reported in the SSA records, and the formula set forth at 20 C.F.R 725.101(a)(32)(iii).[3] *See Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, 1-60 (1988);

[3] The regulation at 20 C.F.R. §725.101(32)(iii), states that "[i]f the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine

Brumley v Clay Coal Corp., 6 BLR 1-956, 1-959 (1984). The administrative law judge also reasonably found that claimant was unable to establish coal mine work prior to 1955 because "there is no evidence of record of the amount of wages, if any, the [c]laimant earned in those years, and so it would be impossible to determine the amount, if any, of coal mine employment to credit the [c]laimant." Decision and Order at 5 n. 5; *see Dawson*, 11 BLR at 1-60; *Brumley*, 6 BLR at 1-959. Accordingly, we affirm the administrative law judge's finding that claimant worked 4.63 years in coal mine employment, as it is supported by substantial evidence. Furthermore, because claimant established less than fifteen years of coal mine employment, we affirm the administrative law judge's finding that claimant is not entitled to invocation of the Section 411(c) presumption.

II. MERITS OF ENTITLEMENT

In order to establish entitlement to benefits 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 total 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*).

The regulation at 20 C.F.R. §718.202(a) provides four methods by which a claimant may establish the existence of pneumoconiosis: 1) x-ray evidence; 2) biopsy or autopsy evidence; 3) application of the presumptions contained in 20 C.F.R. §§718.304, 718.305 or 718.306; and 4) medical opinion evidence. 20 C.F.R. §718.202(a)(1)-(4).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge weighed three readings of two x-rays dated October 20, 2008 and November 3, 2009. Decision and Order at 7-8. The October 20, 2008 x-ray was read by Dr. Navani, a Board-certified radiologist and B reader,[4] as negative for pneumoconiosis. Director's Exhibit 8. The

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employment . . . the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS)." 20 C.F.R. §725.101(32)(iii). The administrative law judge properly attached to her Decision and Order, a copy of the BLS table she used to calculate the length of claimant's coal mine employment. *Id.*

[4] A Board-certified radiologist is one who is certified as a radiologist or diagnostic roentgenologist by the American Board of Radiology, Incorporated, or the American Osteopathic Association. 20 C.F.R. §718.202(a)(ii)(C). To qualify as a B reader, a

November 3, 2009 film was read by Dr. Barrett, a Board-certified radiologist and B reader, as negative for pneumoconiosis, and by Dr. Gaia, a Board-certified radiologist only, as positive for pneumoconiosis. Director's Exhibits 18, 21.

In weighing the conflicting readings of the October 20, 2008 x-ray, the administrative law judge permissibly credited the negative reading by Dr. Barrett, based on his dual qualifications as a Board-certified radiologist and B reader. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (*en banc*); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999) (*en banc on recon.*). The administrative law judge also rationally concluded, based on her review of both x-rays, that "because two interpretations by dually qualified physicians are negative for pneumoconiosis, . . . the overall weight of the [x]-ray evidence is negative for pneumoconiosis." Decision and Order at 8; *see Cranor*, 22 BLR at 1-107. We, therefore, affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Cranor*, 22 BLR at 1-7.

Since there is no biopsy evidence of record, we affirm the administrative law judge's finding that claimant is unable to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2). Decision and Order at 8. Additionally, the administrative law judge correctly found that claimant is unable to establish the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(3), as claimant is not eligible for any of the presumptions set forth at that subsection.[5] *Id*.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered three medical opinions as to the existence of pneumoconiosis. Dr. Levinson examined

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physician must demonstrate designated levels of proficiency in classifying x-rays according to the ILO-U/C standards by the successful completion of an examination established by the National Institute of Occupational Safety and Health. *See* 42 C.F.R. §37.51.

[5] The administrative law judge properly determined that claimant is not entitled to the irrebuttable presumption of total disability due to pneumoconiosis, set forth at 20 C.F.R. §718.304, as there is no evidence that claimant has complicated pneumoconiosis. *See* 20 C.F.R. §718.304; Decision and Order at 8. The regulation at 20 C.F.R. §718.306 does not apply because this is not a survivor's claim. *See* 20 C.F.R. §718.306; Decision and Order at 8.

claimant on October 20, 2008, and reported that claimant had a negative x-ray for pneumoconiosis. Director's Exhibit 8. Although Dr. Levinson opined that claimant had a mild respiratory impairment, he attributed that condition to obesity and not coal dust exposure. *Id*.

Dr. Talati examined claimant on December 15, 2009, and diagnosed simple coal workers' pneumoconiosis, based on claimant's history of coal mine employment and a positive x-ray. Director's Exhibit 17. He opined that claimant suffered from a mild respiratory impairment due to coal workers' pneumoconiosis, and that claimant is totally disabled from performing his usual coal mine work. *Id*. However, on January 22, 2010, Dr. Talati prepared a supplemental report, addressed to the Department of Labor (DOL), which stated, in pertinent part:

> According to your letter, [claimant] ha[s] worked a total of four years in coal mine employment and chest X-ray dated November 3, 2009 did not reveal pneumoconiotic changes as per "B" reader radiologist. Based on new information available, [claimant] has no pneumoconiosis (CWP) and is not totally disabled from coal workers' pneumoconiosis.

Director's Exhibit 20.

Lastly, Dr. Ramakrishna examined claimant on October 9, 2009, and reported that an x-ray showed no acute lung disease, while a pulmonary function test showed moderate restrictive lung disease. Claimant's Exhibit 1. According to Dr. Ramakrishna, claimant has an "insignificant smoking history and worked in coal mine employment for ten years." *Id*. He opined that claimant's restrictive lung disease "may" be related to his coal mine employment. *Id*.

In weighing the medical opinion evidence, the administrative law judge properly determined that "Dr. Levinson diagnosed claimant with several conditions, but not pneumoconiosis or any lung disease." Decision and Order at 11; Director's Exhibit 8. She also reasonably "infer[red], from Dr. Talati's most recent opinion [,] that Dr. Talati has concluded that the [c]laimant has neither clinical nor legal pneumoconiosis."[6]

[6] Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1).

Decision and Order at 11; *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); Director's Exhibit 20. Thus, the administrative law judge properly concluded that "the sole physician opinion that could be construed to posit a relationship between [claimant's] respiratory condition and his coal mine employment" is by Dr. Ramakrishna. Decision and Order at 12; *see* Claimant's Exhibit 1.

We affirm the administrative law judge's decision to accord less weight to Dr. Ramakrishna's opinion, since she permissibly found that Dr. Ramakrishna's statement, that claimant's lung condition "may" be due to coal dust exposure, is equivocal. Claimant's Exhibit 1; *see Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97, 22 BLR 2-386, 2-396 (3d Cir. 2002); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); Decision and Order at 11. The administrative law judge also rationally discredited Dr. Ramakrishna's diagnosis of legal pneumoconiosis, finding that he "overstates" claimant's history of coal dust exposure. Decision and Order at 11-12; *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). Dr. Ramakrishna reported a coal mine employment history of ten years, whereas the administrative law judge found that claimant worked 4.63 years in coal mine employment. *Id*.; Claimant's Exhibit 1. Because the administrative law judge has discretion to determine the credibility of the medical experts, we affirm her finding that claimant failed to establish the existence of pneumoconiosis based on the medical opinion evidence at 20 C.F.R. §718.202(a)(4). *See Balsavage*, 295 F.3d at 396-97, 22 BLR at 2-396; *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Worhach*, 17 BLR at 1-110; *Clark*, 12 BLR at 1-155.

We also affirm the administrative law judge's overall finding, that claimant did not satisfy his burden to establish the existence of pneumoconiosis by a preponderance of the record evidence. Decision and Order at 12. Since claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement, benefits are precluded.[7] *Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Legal pneumoconiosis is defined in 20 C.F.R. §718.201(a)(2) as "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).

[7] The administrative law judge found that Dr. Levinson, who performed the Department of Labor (DOL)-sponsored pulmonary evaluation, did not provide a reasoned opinion on the issue of total disability, noting that "it is unclear whether Dr. Levinson knew or considered the exertional requirements of the [c]laimant's coal mine job." Decision and Order at 15. The Director, Office of Workers' Compensation Programs

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

(the Director) concedes that the Department of Labor did not satisfy its statutory obligation to provide claimant with a complete pulmonary evaluation. Director's Letter Brief at 3; *see* 30 U.S.C. §923(b), *implemented by* 20 C.F.R. §§718.101(a), 725.406; *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994). We agree with the Director, however, that is unnecessary to remand this case for a supplemental opinion from Dr. Levinson on the issue of total disability, as benefits would still be precluded, based on claimant's failure to establish the existence of pneumoconiosis.