

BRB No. 03-0249 BLA

SHERIDAN MARCUM)
)
 Claimant-Petitioner)
)
 v.)
)
 ROBERT COAL COMPANY) DATE ISSUED: 11/25/2003
)
 and)
)
 OLD REPUBLIC INSURANCE COMPANY)
)
 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 of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Sheridan Marcum, Williamson, West Virginia, *pro se*.

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

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (01-BLA-1181) of Administrative Law Judge Gerald M. Tierney denying benefits 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).¹ After crediting claimant with six years of coal mine employment, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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. 33 U.S.C. §921(b)(3), as 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 under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of 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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

The record contains interpretations of three x-rays taken on May 24, 2000, February 12, 2001 and March 21, 2001. The administrative law judge accurately noted that "equally-qualified" experts disagreed as to whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis. Decision and Order at 4. Because the record contains both positive and negative interpretations of claimant's May 24, 2000,

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.

February 12, 2001 and March 21, 2001 x-rays by the best qualified physicians of record,² *see Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984), we affirm the administrative law judge's implicit finding that the weight of the x-ray evidence is equally probative and, therefore, insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Because there is no biopsy evidence of record, claimant cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Furthermore, claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3).³

We now turn our attention to the administrative law judge's consideration of whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis. While Dr. Baker opined that claimant suffered from coal workers' pneumoconiosis, Director's Exhibit 24, Drs. Fino and Castle opined that claimant did not suffer from coal workers' pneumoconiosis or any other disease arising out of coal mine employment.⁴ Director's Exhibit 25; Employer's Exhibits 3, 5, 7. The administrative

² While five physicians dually qualified as B readers and Board-certified radiologists interpreted claimant's May 24, 2000 x-ray as positive for pneumoconiosis, Director's Exhibit 10; Claimant's Exhibits 7-10, three equally qualified physicians interpreted the x-ray as negative for pneumoconiosis. Director's Exhibits 22, 27. While four dually qualified physicians interpreted claimant's February 12, 2001 x-ray as positive for pneumoconiosis, Claimant's Exhibits 18, 20-22, three equally qualified physicians interpreted the x-ray as negative for pneumoconiosis. Director's Exhibit 27; Employer's Exhibit 1. Finally, although five dually qualified physicians interpreted claimant's March 21, 2001 x-ray as positive for pneumoconiosis, Claimant's Exhibits 1-5, five equally qualified physicians interpreted the x-ray as negative for pneumoconiosis. Employer's Exhibit 8.

³ Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, inasmuch as the instant claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

⁴ The record additionally contains medical reports from Drs. Younes and Ranavaya. Although Dr. Younes indicated that claimant did not suffer from an occupational lung disease caused by his coal mine employment, he noted that coal workers' pneumoconiosis should be ruled out as a cause of claimant's restrictive lung disease. Director's Exhibit 7. Given Dr. Younes' contradictory statements, the

law judge properly credited the opinions of Drs. Fino and Castle that claimant did not suffer from pneumoconiosis over Dr. Baker's contrary opinion based upon their superior qualifications.⁵ *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 6. The administrative law judge also properly credited the opinions of Drs. Fino and Castle that claimant did not suffer from pneumoconiosis because they each had an opportunity to review the evidence in the record.⁶ *See generally Sabett v. Director*,

administrative law judge permissibly discredited his opinion as equivocal. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order at 6.

Dr. Ranavaya opined that claimant did not suffer from coal workers' pneumoconiosis. Director's Exhibit 25. The administrative law judge found that Dr. Ranavaya's opinion that claimant's restrictive lung disease was "most likely" due to an elevated left hemidiaphragm was equivocal. Decision and Order at 6. The administrative law judge also questioned the definitiveness of Dr. Ranavaya's diagnosis given the doctor's acknowledgement that additional testing would be useful in further defining the nature of claimant's disease. *Id.* Because Dr. Ranavaya's opinion does not support a finding of pneumoconiosis, we need not address the administrative law judge's consideration of Dr. Ranavaya's opinion. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

⁵ The administrative law judge properly noted that Drs. Fino and Castle are Board-certified pulmonary specialists. Decision and Order at 6; Employer's Exhibits 4, 6. The administrative law judge noted that Dr. Baker's qualifications are not found in the record. Decision and Order at 6.

⁶ Dr. Baker's diagnosis of coal workers' pneumoconiosis was based upon his positive interpretation of claimant's March 21, 2001 x-ray. Director's Exhibit 21. The administrative law judge, however, noted that none of the other examining or consulting physicians found chest x-ray evidence of the disease. Decision and Order at 6. The administrative law judge also found that the x-ray evidence, as a whole, was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Although Dr. Baker also diagnosed legal pneumoconiosis, opining that claimant's chronic bronchitis and moderate restrictive defect were attributable to coal dust exposure, the administrative law judge found that Dr. Baker's diagnosis of chronic bronchitis arising out of coal dust exposure does not have support elsewhere in the record. *Id.* The administrative law judge also found that Dr. Baker was the only physician not to consider whether claimant's elevated left hemidiaphragm was the cause of his restrictive ventilatory defect. *Id.*

OWCP, 7 BLR 1-299 (1984); Decision and Order at 6. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718.⁷ *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

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

PETER A. GABAUER, JR.
Administrative Appeals Judge

⁷ Claimant has submitted to the Board copies of check stubs from Westmoreland Coal Company. Because this evidence is not part of the record, the Board is precluded from considering it on appeal. See 20 C.F.R. §802.301(b); *Berka v. North American Coal Corp.*, 8 BLR 1-183 (1985).