BRB No. 06-0338 BLA

AVERY R. MORGAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: 11/30/2006
	)	
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 Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

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

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 appeals the Decision and Order Denying Benefits (04-BLA-5787) of Administrative Law Judge Pamela Lakes Wood rendered 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). This case involves a request for modification of the denial of a subsequent claim for benefits filed on October 31, 2003.[1] The prior

[1] Claimant filed his initial claim for benefits on June 18, 1997, which was denied by the district director on September 30, 1997, due to claimant's failure to establish total disability due to pneumoconiosis. Director's Exhibit 1. Claimant filed a second claim

claim was denied because claimant failed to establish total disability due to pneumoconiosis. The administrative law judge concluded that evidence submitted with the new claim established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), and that claimant had, therefore, established a basis for modification. *See* 20 C.F.R. §725.310. Nonetheless, on considering all the evidence of record, the administrative law judge concluded that it failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a necessary element of entitlement under the Act. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis and total disability due to pneumoconiosis established. Employer responds, urging affirmance of the denial of benefits. Employer also renews its previous argument that the administrative law judge erred by naming employer as the operator potentially responsible for payment of benefits herein. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in 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 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 pursuant to 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. *See* 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*).

Claimant first contends that in finding that the existence of pneumoconiosis was not established, the administrative law judge erred in considering the evidence separately under each subsection of Section 718.202(a) instead of weighing the evidence together pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir.

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for benefits on August 18, 1999, and a third claim on January 31, 2001, which were denied by the district director on January 31, 2000, and May 1, 2003, on the same grounds as the first denial. Director's Exhibits 2, 4, 34. Claimant filed a petition for modification on October 31, 2003, which was also denied on the same grounds by the district director on December 23, 2003. Director's Exhibit 40. Thereafter, claimant requested a formal hearing. Director's Exhibit 42.

2000).[2] Although claimant recognizes that the administrative law judge cited to *Compton*, he contends that her evaluation of the evidence shows that she relied primarily on the negative x-ray evidence to find that claimant failed to establish the existence of pneumoconiosis. Likewise, claimant contends that the administrative law judge erred in crediting the opinion of Dr. Zaldivar, who relied primarily on negative x-ray and CT scan evidence, to find that claimant did not have pneumoconiosis. Claimant contends that the administrative law judge should have accorded greater weight to the opinions of Drs. Ranavaya and Rasmussen, who, in addition to reviewing claimant's negative x-rays, also made a complete review of the record. Thus, claimant contends that the administrative law judge erred in relying on the negative x-rays and CT scans to find that claimant failed to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(b).[3]

At the outset, we reject claimant's argument that the administrative law judge's consideration of the x-ray evidence, relevant to the existence of pneumoconiosis, fails to comply with *Compton*. Although the administrative law judge first considered the x-ray and medical opinion evidence separately under each subsection of Section 718.202(a), she then considered it as a whole, Decision and Order at 17, and concluded that "the evidence preponderates against a finding of pneumoconiosis." Decision and Order at 17. This was permissible. *Compton*, 211 F.3d 203, 22 BLR 2-162. Although the administrative law judge found that a preponderance of claimant's x-ray readings were negative for the existence of pneumoconiosis, claimant does not provide any support for his contention that the administrative law judge erred in relying primarily on negative x-ray evidence to find that the existence of pneumoconiosis was not established. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-5 (2004). In considering the x-ray evidence, the administrative law judge determined that a preponderance of the x-ray evidence was negative for pneumoconiosis since a greater number of dually-qualified readers, *i.e.*, Board-certified, B-readers, read the x-rays of record as negative. This was proper. 20 C.F.R. §718.202(a)(1); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995).

Similarly, we reject claimant's contention that the administrative law judge erred in relying on Dr. Zaldivar's opinion, which was based primarily on negative x-ray and CT scan evidence, instead of the opinions of Drs. Ranavaya and Rasmussen which were supported by a review of the record evidence. Contrary to claimant's contention, the

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[2] Because the miner last worked in West Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 2.

[3] Section 718.202(b) provides that no claim for benefits shall be denied solely on the basis of a negative x-ray reading. 20 C.F.R. §718.202(b).

administrative law judge permissibly accorded less weight to Dr. Rasmussen's opinion as the doctor relied on a positive x-ray reading which contradicted the administrative law judge's finding that the x-ray evidence, as a whole, did not establish the existence of pneumoconiosis. Decision and Order Denying Benefits at 15-17; Director's Exhibit 40; *see Compton*, 211 F.3d 203, 22 BLR 2-162; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985).

Regarding Dr. Ranavaya's opinion, the administrative law judge rationally accorded it little weight because Dr. Ranavaya did not have the benefit of reviewing the negative CT scans, and gave little rationale for his opinion other than claimant's positive x-ray readings and history of coal dust exposure. In addition, the administrative law judge found that the doctor relied on a positive x-ray which contradicted the weight of the x-rays as a whole. Decision and Order Denying Benefits at 15-17; Director's Exhibits 1, 2, 11; *Clark*, 12 BLR 1-149; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1985); *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984).

Finally, the administrative law judge permissibly credited Dr. Zaldivar's opinion finding no evidence of pneumoconiosis, which was based on a review of claimant's medical records, claimant's examinations and objective test results, in addition to the negative x-ray readings and CT scans. Decision and Order Denying Benefits at 15-17; Employer's Exhibits 8, 11; *Ellison v. Ranger Fuel Corp.*, 73 F.3d 357, 20 BLR 2-125 (4th Cir. 1995); *Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73 (1986); *Stanford v. Valley Camp Coal Co.*, 7 BLR 1-906 (1985). Thus, contrary to employer's argument, the administrative law judge rationally found that Dr. Zaldivar's opinion was not based primarily on negative x-ray and CT scan evidence. *Anderson*, 12 BLR 1-111. We, therefore, affirm the administrative law judge's finding that claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

As we have affirmed the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), an essential element of entitlement, *see Compton*, 211 F.3d 203, 22 BLR 2-162, we must also, therefore, affirm the denial of benefits. *See Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1. We need not, therefore, address claimant's argument concerning disability causation or employer's argument regarding its designation as the responsible operator herein. *See Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

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