BRB No. 00-0134 BLA

BILLY FORD SUTPHIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COLONY BAY COAL COMPANY	)	DATE ISSUED:
	)	
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 of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Billy Ford Sutphin, Hilltop, West Virginia, *pro se*.

Paul E. Frampton (Bowles Rice McDavid Graff & Love, PLLC), Fairmont, West Virginia, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (99-BLA-0350) of Administrative Law Judge Daniel F. Sutton 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). The instant case involves a claim filed on December 9, 1997. After crediting claimant with at least thirty-three years and eleven months of coal mine employment, the administrative law judge found the evidence 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*).

Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000); *see also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). However, inasmuch as the administrative law judge, in the instant case, found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), his findings, if affirmable, would conform to the newly adopted Fourth Circuit holding in *Compton*.

In his consideration of whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge properly accorded greater weight to the interpretations rendered by physicians dually qualified as B readers and Board-certified radiologists. See *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 6. Of the eight x-ray interpretations rendered by physicians dually qualified as B readers and Board-certified radiologists, only one is positive for pneumoconiosis.[1] Director's Exhibits 18, 19; Employer's

[1]Dr. Patel, a B reader and Board-certified radiologist, interpreted claimant's

Exhibit 4. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Since the record does not contain any biopsy or autopsy evidence, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 6. Furthermore, claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(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. Consequently, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3). Decision and Order at 6.

February 2, 1998 x-ray as positive for pneumoconiosis. Director's Exhibit 19. However, Dr. McFarland, an equally qualified physician, interpreted this x-ray as negative for pneumoconiosis. Director's Exhibit 18. Dr. Gaziano, a B reader, also interpreted claimant's February 2, 1998 x-ray as negative for pneumoconiosis. Director's Exhibit 17. Drs. Scott and Wheeler, each dually qualified as a B reader and Board-certified radiologist, rendered negative interpretations of claimant's August 5, 1997, April 30, 1998 and January 13, 1999 x-rays. Employer's Exhibit 4.

Dr. Patel's positive interpretation of claimant's February 2, 1998 x-ray was the only positive x-ray interpretation in the record.

In his consideration of whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge properly credited the opinions of Dr. Zaldivar and Fino that claimant did not suffer from pneumoconiosis over the contrary opinions of Drs. Siddiqi, Boustani and Rasmussen based upon their superior qualifications.[2] *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 12; Employer's Exhibits 1, 5. The administrative law judge also found that the opinions of Drs. Zaldivar and Fino were better reasoned than the opinions of Drs. Rasmussen, Siddiqi and Boustani. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 12-13. The administrative law judge also properly accorded greater weight to the opinions of Drs. Zaldivar and Fino that claimant did not suffer from pneumoconiosis because he found that their opinions were better supported by the objective evidence. *See Voytovich v. Consolidation Coal Co.*, 5 BLR 1-141 (1982); Decision and Order at 12-13; Employer's Exhibits 1, 5-7. An April 5, 1988 report and a May 6, 1997 report from the West Virginia Occupational Pneumoconiosis Board indicate that claimant suffers from pneumoconiosis.[3] Director's Exhibit 10. Although the administrative law judge failed to consider these reports, his oversight is harmless inasmuch as the preponderance of the medical opinions of record demonstrates that claimant does not suffer from pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Inasmuch as 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 findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R.

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[2]Drs. Zaldivar and Fino are Board-certified in Internal Medicine and Pulmonary Disease. Employer's Exhibits 1. 5. The administrative law judge noted that Drs. Siddiqi, Boustani and Rasmussen are not Board-certified in Pulmonary Disease. Decision and Order at 12. Although Dr. Siddiqi is Board-certified in Internal Medicine, he is Board-certified in the subspecialty of Gastroenterology, not Pulmonary Disease. Claimant's Exhibit 1. The qualifications of Drs. Rasmussen and Boustani are not found in the record.

[3]The West Virginia Occupational Pneumoconiosis Board findings are arguably insufficient to establish the existence of pneumoconiosis because the record does not indicate the legal or medical criteria upon which the state board relied in reaching its finding of pneumoconiosis. *See Compton v. Itmann Coal Co.*, 7 BLR 1-644 (1985).

§718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent*, *supra*; *Gee, supra*; *Perry, supra*.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge