BRB No. 01-0194 BLA

ROMAN DANIELS Claimant-Petitioner v. EASTERN ASSOCIATED COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION AND ORDER

Appeal of the Decision and Order-Denying Benefits of Robert J. Lesnick, 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: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (00-BLA-0145) of Administrative Law Judge Robert J. Lesnick 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 administrative law judge accepted the parties' stipulation to twenty-one and one-quarter years of coal mine employment and determined that the application for benefits filed on March 30, 1999, is a duplicate claim inasmuch as claimant previously filed an application for benefits on December 20, 1994, which was finally denied on May 23, 1995. Director's Exhibits 1, 26. The administrative law judge determined that the newly submitted evidence was sufficient to establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(c) (2000) and, therefore, that claimant demonstrated a material change in conditions under 20 C.F.R. §725.309(d) (2000).

Upon considering the merits of claimant's 1999 claim, the administrative law judge determined that the evidence of record, as a whole, was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). Accordingly, benefits were denied. Claimant argues on appeal that the administrative law judge did not properly weigh the x-ray and medical opinion evidence relevant to the existence of pneumoconiosis. Employer responds and takes issue with the administrative law judge's determination that the newly submitted evidence establishes that claimant is totally

---

[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 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). As a result, the Board issued an order dated August 10, 2001, in which it rescinded its request for supplemental briefing. *Daniels v. Eastern Associated Coal Co.*, BRB No. 01-0194 BLA (Aug. 10, 2001)(unpub. Order).

disabled, but nevertheless, urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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, claimant must prove that he suffers from 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. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

With respect to Section 718.202(a)(1) (2000), claimant argues that the administrative law judge improperly based his finding that the x-ray evidence did not establish the existence of pneumoconiosis upon the number of negative x-ray readings generated by employer. This contention is without merit. The administrative law judge considered both the number of x-ray readings and the qualifications of the respective readers and rationally determined that the preponderance of interpretations by physicians who are B readers or B readers and Board-certified radiologists is negative for pneumoconiosis. Decision and Order at 12, 14. The administrative law judge acted within his discretion, therefore, in finding that the x-ray evidence of record does not support a finding of pneumoconiosis. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *see also Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

Regarding the administrative law judge's findings under Section 718.202(a)(4) (2000), claimant asserts that the administrative law judge erred in according greatest weight to the reports of Drs. Fino and Zaldivar and in discrediting the opinion of Dr. Rasmussen. Dr. Fino reviewed the evidence of record and concluded that claimant is

---

[2]The administrative law judge's findings with respect to the length of coal mine employment and pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(c)(1)-(3) (2000) are affirmed, as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in West Virginia. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

suffering from a totally disabling obstructive impairment, but that the impairment is unrelated to his coal mine employment. Dr. Fino indicated that he based his conclusion upon the fact that the obstruction in claimant's lungs is largely reversible, the fixed portion of the impairment is too large to be consistent with coal dust related lung disease, neither claimant's pO2 value nor his lung volume is reduced, and claimant's impairment appears to stem primarily from dysfunction in the small airways, a finding that is not consistent with the diagnosis of a coal dust induced condition. Employer's Exhibit 7 at 7-14. Dr. Zaldivar examined claimant and reviewed his medical records. Dr. Zaldivar diagnosed chronic bronchitis and asthma and indicated that with "intensive bronchodilator therapy," claimant would be capable of performing his usual coal mine employment. Employer's Exhibit 1. Dr. Zaldivar further indicated that claimant's conditions were not related to coal dust exposure, as the obstructive impairment is reversible and his diffusion capacity is normal as were his exercise blood gas studies. Employer's Exhibit 5 at 12-13, 23, 32, 34.

Dr. Rasmussen, as claimant's treating physician, has examined him on a number of occasions and has reviewed the medical evidence of record. Based upon claimant's employment history and the changes observed on claimant's chest x-rays, Dr. Rasmussen diagnosed pneumoconiosis caused by coal dust exposure. Director's Exhibits 8, 26; Claimant's Exhibit 4; Employer's Exhibits 6, 9. Dr. Rasmussen also determined that claimant has chronic obstructive lung disease related to coal dust exposure and cigarette smoking. *Id.*

The administrative law judge determined that:

> Dr. Rasmussen, while the claimant's treating physician, has failed to explain the reversibility of the claimant's condition that is found with the bronchodilation treatments. Therefore, I find that the opinions of Drs. Zaldivar and Fino [are] better supported by the objective medical data, and [are] well-reasoned and well-documented considering the evidence contained in the record and therefore entitled to greater weight.

Decision and Order at 12. Claimant maintains that inasmuch as Drs. Fino and Zaldivar based their opinions solely upon the negative x-ray evidence, the administrative law judge should have discredited their conclusions. Claimant also argues that the administrative law judge should have accorded little weight to Dr. Fino's opinion, as he relied upon the assumption that pneumoconiosis cannot cause a totally disabling obstructive impairment. These contentions are without merit.

Contrary to claimant's allegation, both Dr. Fino and Dr. Zaldivar discussed whether the objective medical data supported a diagnosis of "legal" pneumoconiosis, as defined in 20 C.F.R. §718.201, in addition to whether the x-ray evidence of record established the presence of clinical pneumoconiosis. Employer's Exhibits 1, 5, 7.

Moreover, Dr. Fino did not express an opinion that conflicts with the United States Court of Appeals for the Fourth Circuit's holding in *Warth v. Southern Ohio Coal Co.,* 60 F.3d 173, 19 BLR 2-265 (4th Cir.1995). In *Warth,* the court held that an opinion in which a physician asserts that pneumoconiosis or coal dust exposure does not cause an obstructive impairment is not entitled to any probative weight. In contrast to claimant's assertion, the Fourth Circuit's holding did not touch upon the issue of the extent to which the obstructive impairment is disabling nor is that issue relevant to the inquiry under Section 718.202(a)(4). In the present case, Dr. Fino acknowledged that pneumoconiosis can cause an obstructive impairment and explained why, based upon the data before him, claimant's obstructive lung disease is not related to coal dust exposure. Employer's Exhibit 7 at 7-14; *see Stiltner v. Island Creek Coal Co.*, 86 F.3d 377, 20 BLR 2-246 (4th Cir. 1996). Accordingly, the administrative law judge acted within his discretion in finding that the opinions of Drs. Fino and Zaldivar are well documented and well reasoned and entitled to great weight.

Moreover, the administrative law judge rationally determined that Dr. Rasmussen did not explicitly address the significance of the reversibility of claimant's obstructive impairment. Although Dr. Rasmussen indicated that he disagreed with Dr. Zaldivar's determination that claimant's totally disabling respiratory impairment could be eliminated by bronchodilator therapy, he did not respond to Dr. Fino's and Dr. Zaldivar's assertion that claimant's positive response to bronchodilator medication ran counter to a finding of coal dust related disease. Claimant's Exhibit 4. Thus, the administrative law judge acted within his discretion in concluding that the reports of Drs. Fino and Zaldivar were entitled to more weight than the opinion of Dr. Rasmussen, as their reports are better reasoned and better supported by the objective evidence of record. Decision and Order at 12, 14; *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *U.S. Steel Mining Co., Inc. v. Director, OWCP* [Jarrell], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999). We affirm, therefore, the administrative law judge's finding that the existence of pneumoconiosis was not established under Section 718.202(a)(4) (2000).

Inasmuch as we have affirmed the administrative law judge's determination that the evidence of record did not support a finding of pneumoconiosis pursuant to Section 718.202(a)(1)-(4) (2000), an essential element of entitlement, we also affirm the denial of benefits. *See Trent*, *supra*; *Gee*, *supra*; *Perry*, *supra*. In addition, because the administrative law judge rationally found that the existence of pneumoconiosis was not established under any of the subsections set forth in Section 718.202(a) (2000), we need not remand this case to the administrative law judge for the application of the Fourth Circuit's holding in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000), that in order to determine whether the existence of pneumoconiosis is established, all evidence relevant to Section 718.202(a)(1)-(4) must be weighed together. Finally, we

decline to address employer's arguments concerning the administrative law judge's findings under Sections 718.204(c) and 725.309(d) (2000), as error, if any, in these findings is harmless in light of our affirmance of the denial of benefits on the merits. *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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge