BRB No. 05-0259 BLA

JEFFREY A. SEAMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CANNELTON INDUSTRIES, INCORPORATED	)	
	)	
	)	DATE ISSUED: 10/27/2005
Employer	)	
	)	
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 Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-5790) of Administrative Law Judge Stephen L. Purcell (the administrative law judge) 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). In a Decision and Order – Denying Benefits issued on November 29, 2004, the administrative law judge credited claimant with nineteen years of coal mine employment,[1] and found that the medical evidence did

[1] The record indicates that claimant's coal mine employment occurred in West Virginia. Director's Exhibit 4. Accordingly, 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, 1-202 (1989)(*en banc*).

not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge further found that while the medical evidence did establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv), claimant failed to establish that his disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4), and relevant to the issue of total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). In addition, claimant asserts that in weighing all of the relevant evidence together pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000), the administrative law judge erred in according determinative weight to the negative x-ray and computerized tomography (CT) evidence of record. Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.[2]

The Board's scope of review is defined by statute. 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. 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant initially challenges the administrative law judge's evaluation of the x-ray evidence on the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), specifically asserting that the administrative law judge "simply accepted" the opinions of

[2] The administrative law judge's evidentiary rulings pursuant to 20 C.F.R. §725.414, his findings that the evidence establishes a nineteen year coal mine employment history and a one hundred pack-year smoking history, and his findings at 20 C.F.R. §718.202(a)(2)-(3) and 20 C.F.R. §718.204(b)(2)(i)-(iv), are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

employer's physicians that the x-ray evidence was negative for pneumoconiosis. Claimant's Brief at 4, 6.

Contrary to claimant's arguments, the administrative law judge properly noted that of the eleven interpretations of the seven x-rays of record, only two, both by Dr. Patel, a dually-qualified B reader and Board-certified radiologist, are positive for the existence of pneumoconiosis. Director's Exhibits 1, 16, 17, 20, 37, 39; Employer's Exhibits 8, 9; Decision and Order at 5. The administrative law judge further noted that while Dr. Patel is a highly qualified reader, of the nine negative readings, seven, including two interpretations of the most recent x-rays of record, were by equally highly qualified readers and two were by B readers. Director's Exhibits 1, 16, 17, 20, 37, 39; Employer's Exhibits 8, 9; Decision and Order at 5. The administrative law judge then permissibly concluded that based on the clear majority of the negative x-ray readings of record, including those by the most highly qualified readers and those of the most recent x-ray of record, the x-ray evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order at 5. Because the administrative law judge properly conducted a both a qualitative and quantitative review of the x-ray evidence by considering both the number of positive and negative x-ray readings, the radiological expertise of the readers, and the relative recency of the x-ray films, we affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1). *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988).

Claimant further asserts that in evaluating the medical opinion evidence on the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge erred in according less weight to the opinion of Dr. Rasmussen than to the contrary opinions of Drs. Zaldivar, Crisalli, Naeye and Oesterling. We disagree.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge initially considered the CT scan evidence of record and properly found that all ten interpretations of the four CT scans of record were negative for the existence of pneumoconiosis. Director's Exhibits 20-22; Employer's Exhibits 3, 4, 11; Decision and Order at 8. Reviewing the medical opinion evidence, the administrative law judge further properly found that Dr. Rasmussen, a Board-certified internist, diagnosed the existence of both clinical and legal pneumoconiosis,[3] while Drs. Zaldivar and Branscomb, both Board-

[3] The administrative law judge further properly found that while the record contained evidence that claimant had received state awards of occupational pneumoconiosis benefits, these awards did not constitute binding evidence. *Miles v. Central Appalachian Coal Co.*, 7 BLR 1-744 (1985); Director's Exhibit 7; Employer's Exhibit 10; Decision and Order at 14. In addition, the administrative law judge properly noted that while the record contained treatment notes which referred to a history of coal

certified internists and pulmonologists who examined claimant, performed objective tests and reviewed the medical records, and Drs. Naeye and Oesterling, both Board-certified pathologists who reviewed the biopsy evidence of record, found no evidence of either clinical or legal pneumoconiosis. Director's Exhibits 1, 12, 19-22, 38, 40, 41; Employer's Exhibits 3, 4, 11, 12, 16, 19, 20; Decision and Order at 8-13. The administrative law judge properly acknowledged, but did not rely on, the fact that Dr. Rasmussen based his opinion on positive x-ray readings which were contrary to the administrative law judge's own findings, *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997), and permissibly accorded less weight to Dr. Rasmussen's opinion in part because he relied on an understated smoking history and acknowledged that, if claimant had a one hundred pack-year smoking history, as found by the administrative law judge, it was possible that all of claimant's lung disease was caused by smoking. Director's Exhibits 1, 12, 40, 41; Decision and Order at 4, 14. By contrast, the administrative law judge permissibly found the opinions of Drs. Zaldivar and Crisalli, that claimant does not have pneumoconiosis, to be of greater probative value because they possess higher qualifications than Dr. Rasmussen, their conclusions are more consistent with the objective evidence of record, including the preponderance of the negative x-ray readings and negative CT scans, and their opinions are further buttressed by the negative biopsy analyses of Drs. Naeye and Oesterling, both Board-certified pathologists. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-332, 2-335 (4th Cir. 1998); *Akers*, 131 F.3d at 441, 21 BLR at 2-275-6; *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Moreover, contrary to claimant's arguments, the opinions of Drs. Zaldivar and Crisalli were not based solely on negative x-rays, but were based on the results of their physical examinations, objective testing, and their review of the relevant medical evidence of record, including the negative CT scan and biopsy evidence. Further, while Drs. Zaldivar, Crisalli, and Naeye each acknowledged the existence of pulmonary fibrosis and did not offer an opinion as to its cause, they each explicitly and unequivocally stated that claimant does not have pneumoconiosis and explained why they were certain coal dust played no role in his fibrosis.[4] Director's Exhibits 19, 20, 38; Employer's Exhibits 12, 16, 19, 20. The evaluation of the physicians' opinions is within the province of the administrative law judge. *Compton*, 211 F.3d at 211, 22 BLR at 2-174. As the administrative law judge properly considered all of the relevant medical evidence, and as

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worker's pneumoconiosis, these reports did not contain actual diagnoses of pneumoconiosis and thus do not constitute probative medical evidence. *See Williams v. Black Diamond Coal Mining Co.*, 6 BLR 1-282 (1983); Director's Exhibit 22; Decision and Order at 14.

[4] Dr. Oesterling did not diagnose fibrosis, but did state that the biopsy evidence was insufficient to establish the existence of pneumoconiosis. Director's Exhibit 38.

his analysis of that evidence is supported by the record, we affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(4). *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n. 10, 21 BLR 2-587, 2-603 n. 10 (4th Cir 1999).

Finally, we reject claimant's assertion that the administrative law judge erred in his consideration of all of the evidence relevant to the existence pneumoconiosis pursuant to *Compton*, 211 F.3d at 211, 22 BLR at 2-174. In concluding that claimant failed to establish the existence of pneumoconiosis, the administrative law judge explicitly stated that he based his determination on the fact that the preponderance of the x-rays are negative, the biopsy evidence is either negative or inconclusive for the existence of pneumoconiosis, the CT scan evidence is entirely negative, and the preponderance of the medical opinion evidence is also negative for the existence of pneumoconiosis. Decision and Order at 14. The administrative law judge has exclusive power to make credibility determinations and resolve inconsistencies in the evidence, *Grizzle v. Pickands Mather & Co./Chisolm Mines*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993), and the Board will not substitute its inferences for those of the administrative law judge, *Mays*, 176 F.3d at 753, 21 BLR at 2-587. As the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a) is supported by substantial evidence, it is hereby affirmed.

Because we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a), we need not address claimant's contention that the administrative law judge erred in failing to attribute claimant's pulmonary impairment to his coal mine employment pursuant to 20

C.F.R. §718.204(c). A finding of entitlement to benefits is precluded in this case. *See Trent*, 11 BLR at 1-27.

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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JUDITH S. BOGGS
Administrative Appeals Judge