BRB No. 05-0452 BLA

MAURICE W. LUSK II	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KESSLER COALS, INCORPORATED	)	DATE ISSUED: 10/26/2005
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-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 Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Maurice W. Lusk II, Jacksonville, Florida, *pro se*.

Robert W. Weinberger, (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order-Denying Benefits (2003-BLA-05940) of Administrative Law Judge Richard K. Malamphy 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 found that the record supported employer's concession of at least forty-one years of coal mine employment, Decision and Order at 6, that this claim

constituted a subsequent claim pursuant to 20 C.F.R. §725.309,[1] and that claimant established a change in an applicable condition of entitlement by establishing, through newly submitted evidence, the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), an element of entitlement previously adjudicated against claimant, Decision and Order at 8-10. Turning to the merits of entitlement, the administrative law judge found that the evidence as whole, *i.e.*, that evidence previously submitted along with the evidence submitted with the current claim, failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 11-14. Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer/carrier, in response, urge affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, (the Director) has not filed a brief in this appeal.[2]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

[1] Claimant initially filed a claim for benefits on May 10, 1989, which was denied by the Department of Labor on September 22, 1989 on the basis of claimant having failed to establish any of the elements of entitlement. Director's Exhibit 1. No further action was taken until the filing of the instant, subsequent claim on May 28, 2002. Director's Exhibit 3. After denials by the district director, Director's Exhibits 21, 24, and a hearing, the administrative law judge issued the instant Decision and Order – Denying Benefits on January 27, 2005 from which claimant now appeals.

[2] We affirm as unchallenged on appeal, the administrative law judge's finding on length of coal mine employment, his finding of a change in an applicable condition of entitlement based on newly submitted evidence and his finding that the evidence considered as a whole supports a finding of total disability. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.[3] In finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), the administrative law judge considered the five x-ray readings of record, determining that only one x-ray was read positive for the existence of pneumoconiosis, that of Dr. Prakash, Director's Exhibit 17, while the other x-rays of record were read negative for the existence of the disease. Director's Exhibit 1; Employer's Exhibit 1.[4] Based on Dr. Binns' superior qualifications as a B-reader and board-certified radiologist,[5] the administrative law judge found that Dr. Binns's negative reading of the July 2, 2002 x-ray, Employer's Exhibit 1, was entitled to greater weight than the positive reading by Dr. Prakash of the same x-ray 20 C.F.R. §718.202(a)(1); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-65 (1985); *Aimone v. Morrison Knudson Co.*, 8 BLR 1-32 (1985). The administrative law judge permissibly concluded, therefore, that the x-ray evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and his finding thereunder is affirmed. Decision and Order at 11-12. Likewise, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(2) and (3) as the biopsy evidence did not

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was last employed in the coal mine industry in the state of West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

[4] Dr. Spieden's interpretation of the June 21, 1989, was 0/1 for the existence of pneumoconiosis. Director's Exhibit 1. Such a reading is not considered positive for the existence of the disease. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Canton v. Rochester & Pittsburgh Coal Co.*, 8 BLR 1-475 (1986); *Stanford v. Director, OWCP*, 7 BLR 1-541 (1984).

[5] A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A board-certified radiologist is a physician who has been certified by the American Board of Radiology as having a particular expertise in the field of radiology.

support a finding of the existence of the disease,[6] there was no autopsy evidence of record, and there was no evidence of complicated pneumoconiosis in this living miner's claim filed subsequent to January 1, 1982. *See* Director's Exhibits 1, 3; Claimant's Exhibit 3; 20 C.F.R. §§718.202(a)(2), (3), 718.304, 718.305, 718.306.

In finding that the medical opinions of record did not support a finding of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical report of Dr. Fino, who opined that claimant did not suffer from the existence of the disease, Employer's Exhibit 2, and the reports of Drs. Rasmussen and Prakash, Director's Exhibits 1, 17, who opined that claimant suffered from pneumoconiosis. The administrative law judge permissibly found that the opinion of Dr. Prakash, diagnosing the existence of pneumoconiosis, was not well-reasoned and documented as it was based, in part, on a positive x-ray interpretation of a film which was later re-read negative by a better-qualified physician. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge permissibly found that Dr. Rasmussen's finding of pneumoconiosis was entitled to little weight as his opinion was based on coal mine employment history and x-ray and was equivocal,[7] *see Justice v. Island Creek Coal Co.*, 11 BLR 1-191 (1988); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). The administrative law judge noted that Dr. Rasmussen's x-ray reading of 0/1 was, in fact, a negative reading for the existence of pneumoconiosis, 20 C.F.R. §718.202(a)(1); *see Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269, and that the x-ray was, in fact, reread negative by Dr. Zaldivar, a B-reader. *See Winters*, 6 BLR 1-877, 1-881 n.4. The administrative law judge permissibly concluded, therefore, that there was no credible medical opinion evidence of record which supported a finding of the existence of pneumoconiosis. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Furthermore,

[6] The record demonstrates that a biopsy was performed on June 5, 2002. Claimant's Exhibit 3. None of the diagnoses, *i.e.*, acute and chronic pleuritis, fibrinous exudates, and necrotic material with acute inflammatory cells, is supportive of a finding of pneumoconiosis as defined by the Act. 20 C.F.R. §718.201.

[7] The administrative law judge noted the physician's findings that claimant's x-ray readings were "consistent with" but "not entirety diagnostic of pneumoconiosis and that claimant demonstrated signs of "pleural plaquing which could be secondary to his exposure to asbestos which also could have acquired through his years of working as an electrician." Director's Exhibit 1.

inasmuch as the administrative law judge considered all of the evidence of record together, 20 C.F.R. §718.202(a)(1)-(4), and provided sufficient reasons in support of his analysis of the evidence, we hold that administrative law judge's analysis of the evidence is in compliance with the holding of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Compton*, 211 F.3d 203, 22 BLR 2-162 Since claimant is unable to establish the existence of pneumoconiosis, a requisite element of entitlement pursuant to Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*), we must affirm the denial of benefits and we need not address the administrative law judge's finding on disability causation. *See Trent*, 11 BLR 1-26; *Perry v. Director, OWCP*, 9 BLR 1-1.

Accordingly, the administrative law judge's Decision and Order-Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge