

BRB No. 06-0240 BLA

HARRY T. AYERS)
)
 Claimant-Petitioner)
) DATE ISSUED: 10/18/2006
 v.)
)
 WESTMORELAND COAL COMPANY)
)
 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 Daniel L. Leland,
Administrative Law Judge, United States Department of Labor.

Harry T. Ayers, Beaver, West Virginia, *pro se*.

Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, West Virginia, for
employer.

Before: SMITH, McGRANERY, and BOGGS, Administrative Appeals
Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order-Denying Benefits (04-BLA-5047) of Administrative Law Judge Daniel L. Leland 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).¹ The

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant was last employed in the coal mine industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 2, 6.

administrative law judge credited claimant with eight years and ten months of coal mine employment, determined that the instant claim is a subsequent claim,² and found that the newly submitted evidence established claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge found, however, that the evidence from the present claim fails to demonstrate that claimant has legal or clinical pneumoconiosis and therefore found that claimant is not totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 6. Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director Office of Workers' Compensation Programs, has filed a letter stating that he will not submit a response brief on the merits of this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to Section 718.202(a)(1), the administrative law judge found that of the newly submitted x-ray evidence consisting of eight readings, only Dr. Patel, a dually qualified B reader and Board-certified radiologist, provided a positive reading for the existence of pneumoconiosis. Decision and Order at 3, 5; Director's Exhibit 18. This positive reading was countered by a negative reading by Dr. Wiot, also a dually qualified radiologist. Employer's Exhibit 1. We therefore affirm the administrative law judge's finding that the preponderance of the newly submitted x-ray evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). The administrative law judge further found that as there are no biopsy results to be considered, and none of the presumptions listed at 20 C.F.R. §718.202(a)(3) are applicable in this living miner's claim filed after January 1, 1982, in which the record contained no evidence of complicated pneumoconiosis, claimant may not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (a)(3).

² The procedural history is summarized in the administrative law judge's Decision and Order at 2 and in *Ayers v. Westmoreland Coal Co.*, BRB No. 00-0447 BLA (Jan. 5, 2001) (unpublished).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the new medical reports by Drs. Rasmussen and Hasan diagnosing pneumoconiosis, the contrary opinions of Drs. Zaldivar and Castle, and the medical records that reflect a history of chronic obstructive pulmonary disease. Director's Exhibit 14; Claimant's Exhibit 1; Employer's Exhibits 3, 6-8. Dr. Rasmussen diagnosed claimant with coal workers' pneumoconiosis due to coal dust exposure based upon Dr. Patel's positive reading of the film dated August 28, 2002 and chronic bronchitis due to both smoking and coal mine dust exposure. Director's Exhibits 14. The administrative law judge permissibly accorded no weight to Dr. Rasmussen's opinion because he found it poorly reasoned and poorly documented. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993); Decision and Order at 6. The administrative law judge noted that Dr. Rasmussen's diagnosis of coal workers' pneumoconiosis was based on both an x-ray reading, which was outweighed by the other interpretations of record, and on a significantly exaggerated history of coal mine employment. Further, the administrative law judge acted within his discretion as fact-finder in rejecting Dr. Rasmussen's opinion that both coal dust exposure and cigarette smoking caused claimant's bronchitis and lung function impairment because it was based on an inaccurate history of coal mine employment (fifteen years) and an inaccurate smoking history (1962-1986). *Id.* The administrative law judge properly found that the record substantiates less than nine years of coal mine employment and that claimant was still smoking as late as 2004. Decision and Order at 2, 6; Employer's Exhibit 6.

Similarly, the administrative law judge permissibly found that although Dr. Hasan is claimant's treating physician, her opinion is not well-reasoned or documented because there is no basis for her diagnosis except for a reference to a January 10, 2004 x-ray that is not part of the record. In addition, Dr. Hasan merely noted claimant's breathing problems, but did not relate them to his coal mine employment. Decision and Order at 6. The administrative law judge also reasonably found the contrary opinions of Drs. Zaldivar and Castle well-reasoned and documented because their opinions were premised upon a review of the medical evidence, negative x-ray interpretations, pulmonary function studies and the carbon monoxide levels that show that claimant is still smoking cigarettes. *Compton*, 211 F.3d 203, 22 BLR 2-162; Decision and Order at 6. We therefore affirm the administrative law judge's finding that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Considering the evidence of the present and prior claims the administrative law judge found that claimant failed to establish the existence of pneumoconiosis. The administrative law judge concluded that Administrative Law Judge John C. Holmes correctly found the prior x-ray evidence and medical opinion evidence overwhelmingly negative. Decision and Order at 6. Of the thirty-two x-ray readings submitted with the

prior claims, only Dr. Patel provided two positive readings that were also countered by negative readings for pneumoconiosis by dually qualified radiologists. Director's Exhibit 1. Similarly, Dr. Rasmussen's diagnosis of pneumoconiosis was countered by the reviewing opinions of Drs. Morgan, Castle, Fino, Zaldivar, and Spagnolo that concluded that claimant does not have pneumoconiosis. *Id.* The administrative law judge therefore rationally found that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a) and necessarily, the existence of a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R §718.204(c). *See Sterling Smokeless Coal Co., v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); Decision and Order at 6.

Accordingly, we affirm the administrative law judge's Decision and Order – Denying Benefits.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge