BRB No. 09-0149 BLA

K.M.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 10/14/2009
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Administrative Law Judge Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

K.M., Crab Orchard, Tennessee, *pro se*.

Barry H. Joyner (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, Acting Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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 (2008-BLA-5073) of Administrative Law Judge Paul C. Johnson, Jr., with respect to 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 determined that only claimant's employment with Waco, Incorporated (Waco), constituted the work of a miner under the Act. Based upon claimant's Social Security Administration (SSA) records, the administrative law judge credited him with one year and nine months of coal mine employment. The administrative law judge also rendered a finding as to claimant's smoking history and

determined that claimant had a thirty-two pack year history of cigarette use. On the merits of entitlement, the administrative law judge adjudicated the claim, filed on February 24, 2006, under the regulations set forth in 20 C.F.R. Part 718 and found that the x-ray and medical opinion evidence of record were insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also determined that claimant could not prove that his pneumoconiosis arose out of coal mine employment under 20 C.F.R. §718.203(c) or that he is totally disabled due to pneumoconiosis under 20 C.F.R. §718.204(b), (c).

Claimant's present appeal followed. The Director, Office of Workers' Compensation Programs (the Director), has responded and urges the Board to affirm the administrative law judge's finding regarding claimant's coal mine employment. The Director further requests, however, that the Board vacate the denial of benefits and remand the claim to the district director to cure defects in the complete pulmonary evaluation provided to claimant as required by Section 413(b) of the Act, 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406. In support of his request, the Director cites the administrative law judge's decision to discredit the opinion of the physician who examined claimant at the request of the Department of Labor (DOL) because she relied upon inaccurate employment and smoking histories.

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. *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.[1] 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 in a living miner's claim filed pursuant to 20 C.F.R. Part 718, 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; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Trent*, 11 BLR at 1-27.

[1] Because claimant's qualifying coal mine employment was in Tennessee, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Decision and Order at 5-6; Director's Exhibits 2, 3, 5, 8.

We will first address the administrative law judge's determination that claimant's only coal mine employment was with Waco. Claimant alleged that he had worked for approximately fifteen years as a coal miner with Waco and Direct Reduction.[2] Director's Exhibits 2, 3, 5, 8; Hearing Transcript at 16, 17. Claimant indicated that while employed by Waco, he drove a truck and that his duties included picking up coal at the mine and delivering it to a tipple and other locations. Director's Exhibits 3-5; Hearing Transcript at 15-16, 28. With respect to his employment with Direct Reduction, claimant stated that he was involved in crushing coal purchased by Direct Reduction and placing it in bins for use in firing an iron ore kiln. Director's Exhibits 8, 9; Hearing Transcript at 16, 30-31.

The administrative law judge found that claimant's job at Waco constituted coal mine employment, as he worked in and around a mine hauling unfinished coal for delivery to other locations. Decision and Order at 6. The administrative law judge further determined, however, that claimant's work at Direct Reduction was not coal mine employment because Direct Reduction "was a consumer of finished coal and was not engaged in the extraction or preparation of coal." Decision and Order at 5. Based upon claimant's SSA records, the administrative law judge credited claimant with one year and nine months of coal mine employment with Waco.

We agree with the Director that the administrative law judge rationally determined that claimant's job with Direct Reduction did not constitute coal mine employment. The United States Court of Appeals for the Sixth Circuit has held that duties that meet situs and function requirements constitute the work of a miner as defined in the Act. *Director, OWCP v. Consolidation Coal Co.*, [*Petracca*], 884 F.2d 926, 13 BLR 2-38 (6th Cir. 1989). Under the situs requirement, the work must take place in or around a coal mine or coal preparation facility. The function requirement mandates that the duties performed be integral to the extraction or preparation of coal. In this case, the administrative law judge acted within his discretion as fact-finder in determining that claimant's job at Direct Reduction did not meet either requirement. The administrative law judge correctly found that claimant's duties did not take place in or around a coal mine or coal preparation facility and were related to the end use of the coal by a consumer, rather than its extraction or preparation. *Petracca*, 884 F.2d at 930, 13 BLR at 2-41-42; *Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984); Decision and Order at 5. We affirm, therefore, the administrative law judge's finding that claimant's work with Direct Reduction did not constitute coal mine employment.

[2] As the administrative law judge found, Direct Reduction was one of a several names by which the company where claimant worked was known. Director's Exhibit 5. The administrative law judge stated, "[f]or simplicity, the company will be referred to as Direct Reduction." Decision and Order at 5 n.2. We hereby adopt the same designation.

We also affirm the administrative law judge's determination that claimant's job as a truck driver with Waco was qualifying coal mine employment. The administrative law judge rationally found that claimant's duties met the situs and function requirements, as claimant's work occurred in and around a coal mine and involved delivering raw coal, which underwent further processing. *Petracca*, 884 F.2d at 930, 13 BLR at 2-41-42; *Southard*, 732 F.2d at 71, 6 BLR at 2-31-32; Decision and Order at 5-6. We further affirm the administrative law judge's finding that claimant was employed by Waco for one year and nine months. The administrative law judge acted within his discretion as fact-finder in basing his determination upon claimant's SSA records. *Clayton v. Pyro Mining Co.*, 7 BLR 1-551 (1984); *Preston v. Director, OWCP*, 6 BLR 1-1229 (1984).

We will now review the administrative law judge's finding that claimant's smoking history totaled thirty-two pack years. Claimant testified at the hearing that he began smoking at age twelve or thirteen and quit in 1989 at age forty-five. Hearing Transcript at 24. Dr. Fernandes, who performed the DOL-sponsored examination on February 27, 2007, indicated that claimant smoked for twenty years. Director's Exhibit 14. In conjunction with a pulmonary function study that was performed on March 13, 2008, a smoking history of thirty-five pack years was recorded. Claimant's Exhibit 4. The administrative law judge considered this evidence and stated:

> I find [c]laimant's testimony under oath to be credible. It was direct evidence as opposed to a recordation by a third party, and it was given under oath; based on these factors and on [c]laimant's demeanor while testifying, I credit his testimony. I find that [c]laimant started smoking at the age of [thirteen], in 1957, and smoked one pack per day until 1989, for a history of [thirty-two] pack years.

Decision and Order at 3. We affirm the administrative law judge's determination, as he acted within his discretion as fact-finder in according greatest weight to claimant's hearing testimony. *See Zyskoski v. Director, OWCP*, 12 BLR 1-159 (1989).

In light of our affirmance of the administrative law judge's findings of one year and nine months of coal mine employment and thirty-two pack years of smoking, we grant the Director's request that we vacate the denial of benefits and remand this case to the district director to cure defects in the DOL-sponsored examination. Dr. Fernandes indicated on Form CM-988 that claimant alleged fourteen years of coal mine employment and reported that he smoked for twenty years.[3] Director's Exhibit 14. The administrative

[3] Dr. Fernandes obtained an x-ray, a pulmonary function study, a blood gas study and an EKG. Director's Exhibit 14. She diagnosed pneumoconiosis 1/0 pp, severe emphysema, chronic respiratory acidosis and coronary artery disease with stable angina. *Id*. In contrast to the fourteen years that she noted on the portion of Form CM-988

law judge rationally determined that Dr. Fernandes's diagnoses of clinical and legal pneumoconiosis were insufficient to satisfy claimant's burden of proving the existence of pneumoconiosis under Section 718.202(a)(4), as Dr. Fernandes had an inaccurate understanding of the length of claimant's coal mine employment and the extent of his use of cigarettes.[4] *See Creech v. Benefits Review Board*, 841 F.2d 706, 11 BLR 2-86 (6th Cir. 1988); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Decision and Order at 8. Because Dr. Fernandes did not have correct information regarding factors that are relevant to the elements of entitlement, the Director requests that, in the interests of fairness, this case be remanded so that claimant may receive a complete pulmonary evaluation based upon accurate information.

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concerning claimant's coal mine employment history, Dr. Fernandes identified twelve years of coal mine employment as a contributing cause of the diagnosed conditions. *Id*. Dr. Fernandes also reported that twenty years of "tobacco abuse" was a causal factor. *Id*. Dr. Fernandes opined that claimant is totally disabled and stated that she "could not determine which factor contributes the most to [claimant's] disability – coal mine employment or smoking history." *Id*.

[4] The administrative law judge also acted within his discretion in determining that Dr. Aycoth's positive reading of the x-ray dated February 27, 2007, was outweighed by Dr. Barrett's negative reading. The administrative law judge rationally found that Dr. Barrett's reading was entitled to greater weight, as he is a dually qualified Board-certified radiologist and B reader, while Dr. Aycoth is a Board-eligible radiologist and B reader. 20 C.F.R. §718.202(a)(1)(i), (ii)(C), (D), (E); *see Staton v Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); Decision and Order at 7; Director's Exhibit 14. Thus, the administrative law judge rationally found that, to the extent Dr. Fernandes relied upon Dr. Aycoth's x-ray reading, her diagnosis of clinical pneumoconiosis was entitled to little weight. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); Decision and Order at 8; Director's Exhibit 14.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and this case is remanded to the district director for further evidentiary development in accordance with the Director's request.

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