BRB No. 04-0122 BLA

JAMES A. RICHMOND	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SOUTHERN OHIO COAL COMPANY	)	DATE ISSUED: 09/28/2004
	)	
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 Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Timothy F. Cogan (Cassidy, Myers, Cogan, Voegelin & Tennant, L.C.), Wheeling, West Virginia, for claimant.

Christopher C. Russell (Porter, Wright, Morris & Arthur, L.L.P.), Columbus, Ohio, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (02-BLA-0015) of Administrative Law Judge Gerald M. Tierney 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). Claimant filed his application for benefits on August 11, 2000. Director's Exhibit 1. The district director awarded benefits and employer requested a hearing, Director's Exhibits 25, 27, which was held before the administrative law judge on November 5, 2002.

In the Decision and Order – Denying Benefits, the administrative law judge credited claimant with "at least" twenty-five years of coal mine employment.[1] Decision and Order at 2. However, the administrative law judge found that claimant did not establish the existence of pneumoconiosis by a preponderance of either the chest x-ray or medical opinion evidence. Decision and Order at 3-6. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray evidence when he found that claimant did not establish the existence of either simple or complicated pneumoconiosis. Claimant further asserts that the administrative law judge erred in his analysis of the medical opinion evidence when he determined that claimant did not establish the existence of pneumoconiosis. Employer responds, urging affirmance of the denial of benefits, and the Director, Office of Workers' Compensation Programs (the Director), has not 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 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 contends that the administrative law judge erred in finding that claimant did not establish the existence of either simple or complicated pneumoconiosis by the chest x-ray evidence of record. Claimant's Brief at 30.

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[1] Claimant's coal mine employment occurred in Ohio. Director's Exhibit 2. Accordingly, 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, 1-202 (1989)(*en banc*).

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant has at least twenty-five years of coal mine employment. *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).

Section 411(c)(3)(A) of the Act, implemented by 20 C.F.R. §718.304(a) of the regulations, provides in relevant part that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C. 30 U.S.C. §921(c)(3)(A); 20 C.F.R. §718.304(a). In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, the administrative law judge must consider all relevant evidence. *Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89, 21 BLR 2-615, 2-626-29 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991).

The administrative law judge considered six readings of four x-rays. Of these readings, two were classified as positive for the existence of simple pneumoconiosis, two were classified as negative, and two were classified as unreadable. Director's Exhibits 13, 14, 22, 24, 26. One of the positive readings for simple pneumoconiosis also bore a notation indicating the presence of Category B large opacities. Director's Exhibit 22. All of the readings were rendered by physicians qualified as B-readers or as both Board-certified radiologists and B-readers.

Contrary to claimant's assertion, the administrative law judge permissibly considered the physicians' radiological qualifications and reasonably weighed the x-ray readings. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995). Specifically, the administrative law judge found that Dr. Gaziano's positive reading of the July 13, 2000 x-ray conflicted with Dr. Gaziano's negative reading of the September 26, 2000 x-ray. The administrative law judge further noted that, in any event, equally qualified readers classified both the July 13, 2000 and September 26, 2000 x-rays as unreadable. Director's Exhibits 13, 14, 24, 26. Additionally, the administrative law judge found that Dr. Ranavaya's positive reading of the March 20, 2001 x-ray, identifying small and large opacities, was countered by Dr. Zaldivar's negative reading of the June 27, 2001 x-ray.[3] Although claimant asserts that Dr. Ranavaya is better qualified than Dr. Zaldivar because Dr. Ranavaya teaches occupational medicine, the administrative law judge properly considered Dr. Zaldivar "an equally qualified reader," Decision and Order at 3, because Dr. Zaldivar possesses the same B-reader certification as Dr. Ranavaya. *See Melnick*, 16 BLR at 1-37 (specifying that an administrative law judge need consider only radiological qualifications when weighing x-rays). Because the administrative law judge permissibly considered the x-ray

[3] Claimant asserts that "a faint mark" on Dr. Zaldivar's report of the June 27, 2001 x-ray is some evidence of a positive reading. Claimant's Brief at 30. Claimant's assertion is unavailing where the record confirms Dr. Zaldivar's negative reading of that x-ray. Director's Exhibit 24.

readings in light of the readers' radiological credentials, *see Staton*, 65 F.3d at 59, 19 BLR at 2-279-80, and substantial evidence supports his credibility determinations, we affirm the administrative law judge's finding that claimant did not establish the existence of either simple or that claimant has complicated pneumoconiosis by a preponderance of the chest x-ray evidence pursuant to Sections 718.202(a)(1),(a)(3) and 718.304(a).

Pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge made several errors in weighing the medical opinions when he found that claimant did not establish the existence of pneumoconiosis. The administrative law judge considered the opinions of Drs. Mavi, Ranavaya, and Zaldivar, and claimant's treatment records from the Holzer Clinic.[4] Director's Exhibits 8-10, 16, 22, 24; Claimant's Exhibits 1, 3; Employer's Exhibit 7. The physicians' opinions conflicted regarding whether claimant's interstitial lung fibrosis and pulmonary impairment were related to coal mine dust exposure or were instead manifestations of the disease neurofibromatosis.[5]

Dr. Mavi, whose credentials are not of record, diagnosed chronic obstructive pulmonary disease due to smoking, and pneumoconiosis based on "history of work in coal mines, x-ray changes," Director's Exhibit 10 at 4, and "pulmonary limitation." Director's Exhibit 16 at 1. Dr. Mavi indicated, however, that to determine whether claimant's lung fibrosis was neurofibromatosis or pneumoconiosis, claimant "will need more sophisticated testing, which may not be possible in our institution." Claimant's Exhibit 1. Although Dr. Mavi had apparently treated claimant as one of several physicians employed by the Holzer Clinic, Dr. Mavi specified that he "had seen Mr.

[4] On appeal, no party challenges the administrative law judge's decision to accord less weight to the opinion of a fourth physician, Dr. Pacht, contained in Employer's Exhibit 4.

[5] The physicians agreed that claimant suffers from neurofibromatosis, a genetic disease marked by the formation of skin lesions and multiple tumors along nerve endings. Director's Exhibits 10, 24; Claimant's Exhibits 1, 2; Employer's Exhibit 7 at 10-11. The physicians also agreed that some patients with neurofibromatosis may develop lung fibrosis and pulmonary symptoms, and that claimant's x-rays and CT-scans show lung fibrosis. Dr. Ranavaya stated that approximately ten percent of neurofibromatosis patients develop lung fibrosis. Employer's Exhibit 7 at 11-12. Dr. Mavi stated initially that neurofibromatosis "is known to involve lungs and cause interstitial disease and hypoxemia," Director's Exhibit 10 at 4, but later described an "uncommon association of pulmonary fibrosis with neurofibromatosis." Claimant's Exhibit 1. Dr. Zaldivar cited medical literature identifying neurofibromatosis as a cause of interstitial lung fibrosis, but did not specify a percentage of patients who develop lung fibrosis because of neurofibromatosis. Director's Exhibit 24 at 6.

Richmond on only two occasions, once for his black lung evaluation and once after that in about January of 2002." *Id*.

Dr. Ranavaya, who is Board-certified in Occupational Medicine and as a Medical Examiner, initially diagnosed "complicated coal workers' pneumoconiosis" based on large opacities on claimant's chest x-ray, hypoxemia, and coal dust exposure history. Director's Exhibit 22 at 4. After reviewing Dr. Pacht's report stating that claimant's chest x-ray revealed neurofibromas outside the lungs, not any nodules within the lungs, Dr. Ranavaya opined that claimant has "pneumoconiosis," based on x-ray evidence, hypoxemia, a diffusion capacity impairment, and coal dust exposure. Claimant's Exhibit 3 at 3. Dr. Ranavaya recommended a high-resolution CT-scan to confirm whether the large opacities he had seen were inside or outside the lungs, and to determine the shape of the opacities. Claimant's Exhibit 3 at 3; Employer's Exhibit 7 at 13-16. Dr. Ranavaya stated that there was no way to determine whether claimant's interstitial lung fibrosis is neurofibromatosis or pneumoconiosis. Employer's Exhibit 7 at 13-14.

Dr. Zaldivar, who is Board-certified in Internal Medicine and Pulmonary Disease, opined that claimant does not have pneumoconiosis but suffers from disabling interstitial lung fibrosis due to neurofibromatosis.[6] Director's Exhibit 24 at 6-7. Dr. Zaldivar opined that claimant's x-rays and breathing tests were not consistent with pneumoconiosis but were characteristic of pulmonary fibrosis. *Id.* Dr. Zaldivar cited and attached to his report medical literature articles linking neurofibromatosis and pulmonary fibrosis. Dr. Zaldivar explained that claimant's lung condition is unrelated to coal mine dust exposure, and advised a high-resolution CT-scan and open lung biopsy so that "treatment can be attempted." Director's Exhibit 24 at 7.

Claimant asserts that the administrative law judge "breached the treating physician rule" when he accorded less weight to Dr. Mavi's opinion diagnosing pneumoconiosis. Claimant's Brief at 21. Claimant's assertion lacks merit. The United States Court of Appeals for the Sixth Circuit has "recognized that there is no 'treating physician rule' in black lung cases . . . ." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 511, 22 BLR 2-625, 2-642 (6th Cir. 2003). Instead, "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Williams*, 338 F.3d at 513, 22 BLR at 2-647. In this case, the administrative law judge was not persuaded by Dr. Mavi's opinion because he found that the doctor "left unanswered" the origin of claimant's interstitial lung fibrosis, and did not adequately explain why the presence of pulmonary limitation meant that claimant had pneumoconiosis. Decision and Order at 6. The administrative law judge acted within his authority to assess the reasoning of Dr. Mavi's opinion. *See*

[6] Dr. Zaldivar expressed claimant's condition variously as "neurofibromatosis," "tuberous sclerosis," and "lymphangioleiomyomatosis." Director's Exhibit 24 at 6.

Director, OWCP v. Rowe, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). Moreover, the administrative law judge reasonably took into account Dr. Mavi's statement that he had seen claimant only twice when the administrative law judge found that Dr. Mavi was not providing the opinion of a "treating pulmonary specialist." Decision and Order at 6; *cf. Williams*, 318 F.3d at 513, 22 BLR at 2-647 (observing that a physician's "lengthy experience with a miner" may merit deference). Therefore, we reject claimant's contention that the administrative law judge failed to accord proper weight to Dr. Mavi's opinion.

Additionally, contrary to claimant's contention, the administrative law judge considered the diagnoses of pneumoconiosis and pulmonary fibrosis that were listed in claimant's treatment records from the Holzer Clinic, Director's Exhibits 8, 9, and permissibly found that the records did "not specify the basis of the diagnosis of pneumoconiosis" or address "the possible relationship between the [c]laimant's pulmonary fibrosis and neurofibromatosis." Decision and Order at 6; *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103. A review of the record supports the administrative law judge's finding that these treatment records do not explain the diagnoses of pneumoconiosis listed or address the etiology of the pulmonary fibrosis also listed as a diagnosis. Director's Exhibits 8, 9. Because the administrative law judge considered claimant's treatment records but found the diagnoses they contained to be insufficiently documented and reasoned, we reject claimant's assertion that the administrative law judge ignored claimant's treatment records when he weighed the medical opinion evidence.

Claimant contends that the administrative law judge did not give a valid reason for declining to credit Dr. Ranavaya's opinion. Claimant's Brief at 22-26. We disagree. The administrative law judge found, within his discretion, that Dr. Ranavaya's opinion was "uncertain[]" in that it "le[ft] open the door to a diagnosis of legal pneumoconiosis, but d[id] not establish it in a reasoned and documented way." Decision and Order at 6; *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Trumbo*, 17 BLR at 1-88-89 and n.4. In making this finding, the administrative law judge emphasized Dr. Ranavaya's statements that neurofibromatosis can cause interstitial lung fibrosis, that there is no way to determine whether claimant's interstitial lung fibrosis is neurofibromatosis or pneumoconiosis, but that Dr. Ranavaya would continue to diagnose pneumoconiosis "[u]nless a high resolution CT scan provides evidence to the contrary," because claimant's pulmonary problems cannot be explained away by neurofibromatosis. Claimant's Exhibit 3 at 3; Employer's Exhibit 7 at 10-11, 13-14. Since it is claimant's burden to establish affirmatively the existence of pneumoconiosis by a preponderance of the evidence, the administrative law judge could consider whether Dr. Ranavaya's opinion adequately excluded the proposition that claimant's interstitial lung fibrosis was "related to neurofibromatosis, not coal mine dust exposure . . . ." Decision and Order at 6; *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Trumbo*, 17 BLR at 1-88-89 and n.4. Because

substantial evidence supports the administrative law judge's permissible credibility determinations, we reject claimant's contention that the administrative law judge erred in declining to credit Dr. Ranavaya's opinion.[7]

Claimant argues that Dr. Zaldivar's opinion, that claimant does not have pneumoconiosis, merited no weight because it reflected bias and was flawed in several other respects. Claimant's Brief at 5-14, 19-21. We need not address claimant's argument because, as just discussed, the administrative law judge properly found that the medical opinions favorable to claimant's case were insufficient to carry claimant's burden to prove the existence of pneumoconiosis by a preponderance of the evidence. Any error in the administrative law judge's treatment of Dr. Zaldivar's opinion could not change this result. Based on the foregoing, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(4).

Claimant additionally argues that the administrative law judge erred in failing to consider the lay testimony of claimant and his wife. Claimant's Brief at 25. The applicable regulation provides that "[a] determination of the existence of pneumoconiosis shall not be made solely on the basis of a living miner's statements or testimony." 20 C.F.R. §718.202(c). Accordingly, "at least a quantum of medical evidence" must corroborate the lay testimony in a living miner's case. *Madden v. Gopher Mining Co.*, 21 BLR 1-122, 1-125 (1999). Because we have affirmed the administrative law judge's finding that the medical evidence in this living miner's case does not establish the existence of pneumoconiosis, the testimony provided by claimant and his wife could not serve as the basis of a determination of the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(c). Therefore, we reject claimant's contention that the administrative law judge erred by not considering and weighing the lay testimony in this case.

Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a miner's claim under Part 718, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

[7] Claimant's contention that the administrative law judge applied the wrong standard of proof in weighing the medical opinions also lacks merit. Review of the administrative law judge's Decision and Order reflects that he explicitly applied the preponderance of the evidence standard. Decision and Order at 2, 6.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge