BRB No. 06-0183 BLA

FRANK B. GRUBB	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
VALLEY CAMP COAL COMPANY	)	DATE ISSUED: 09/22/2006
	)	
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.

Sandra M. Fogel, (Culley & Wissore), Carbondale, Illinois, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (03-BLA-6509) 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). Based on the date of filing, July 19, 2002, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718, and found that claimant established twenty-five years of coal mine employment. The administrative law judge found that although the evidence established a totally disabling respiratory impairment, it failed to establish the existence of pneumoconiosis or that total disability was due to pneumoconiosis. Because the existence of pneumoconiosis was not established, the administrative law judge found that claimant failed to establish a basis for

modifying the prior denial of benefits. 20 C.F.R. §§718.202, 718.204, 725.310. Accordingly, benefits were denied again.

On appeal, claimant argues that the administrative law judge erred in finding that the evidence did not establish the existence of coal workers' pneumoconiosis or that pneumoconiosis was totally disabling. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence.[1] The Director, Office of Workers' Compensation Programs, (the Director) is not participating in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

After review of the arguments on appeal, the administrative law judge's Decision and Order, and the evidence of record, we conclude that the administrative law judge's Decision and Order denying benefits is supported by the record and in accordance with law. Contrary to claimant's argument, the administrative law judge properly found that Dr. Patel's interpretation of the June 5, 2001 x-ray was negative as Dr. Patel did not classify the x-ray as positive for pneumoconiosis. 20 C.F.R. §§718.202(a); 718.102(b). The administrative law judge also properly found that Dr. Patel's narrative statement was not sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1). Further, contrary to claimant's contention, there is no evidence that the form Dr. Patel filled out was tampered with. Accordingly, the administrative law judge's finding that the preponderance of the x-ray evidence failed to establish the existence of pneumoconiosis at Section 718.202(a) is affirmed. *See* 20 C.F.R. §§718.102(b), 718.202(a)(1); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-28 (1987).

Likewise, we reject claimant's argument that the administrative law judge erred in crediting the opinions of Drs. Crisalli and Castle, who found that claimant's chronic obstructive pulmonary disease was due solely to smoking over the opinions of Drs. Rasmussen and Cohen, who found that claimant's chronic obstructive pulmonary disease

[1] We reject employer's contention that the evidence limitations contained at 20 C.F.R. §725.414, are arbitrary, and violate the provisions of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(c), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2) and the Black Lung Act, 30 U.S.C. §923(b), as incorporated by 30 U.S.C. §932(a), that all relevant evidence must be considered. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (*en banc*).

was due to both coal mine employment and smoking. While, as claimant contends, Dr. Rasmussen stated that claimant did not have a significant cough or sputum production, the doctor went on to state that his diagnosis was based on claimant's symptoms of chronic productive cough. Moreover, contrary to claimant's contention, the administrative law judge acted properly in finding that Dr. Rasmussen relied on medical literature which only indicates that miners may be disabled due to coal dust exposure, despite negative x-ray readings, and that the doctor failed to specify how claimant's particular medical evidence supported such a diagnosis. Thus, contrary to claimant's contentions, the administrative law judge permissibly found Dr. Rasmussen's report inconsistent and worthy of little weight as his form report specifically stated that his opinion was based, in part, on claimant's chronic productive cough, thereby, contradicting information in his own form in which he lists under history that claimant denied having significant cough or sputum production. Director's Exhibit 9; Decision and Order at 4, 8-9; *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986). In addition, the administrative law judge acted within his discretion in finding Dr. Rasmussen's report poorly reasoned as Dr. Rasmussen stated that coal dust exposure must be considered a significant cause of claimant's lung condition in view of the medical literature indicating that coal miners lose significant ventilatory capacity and can be disabled due to coal dust even with negative x-ray readings, without providing any additional explanation as to how he determined that claimant's particular condition was due to pneumoconiosis, and not merely to smoking. Director's Exhibit 9; Decision and Order-Denying Benefits at 4, 8-9; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *see also Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Nat'l Min. Assn. v. Dept. of Labor*, 292 F.3d 849, 862-63 (D.C. Cir. 2002).

Turning to Dr. Cohen's opinion, there is no merit to claimant's contention that the administrative law judge erred by finding Dr. Cohen's diagnosis of coal workers' pneumoconiosis unsupported by the evidence, as the record supports the administrative law judge's finding that Dr. Cohen based his opinion on a twenty-seven year history of underground mining which was contradicted by claimant's testimony that he worked only one year in underground mining, while the remainder of his coal mine employment was above ground. While Dr. Cohen, in parts of his report, acknowledges that claimant had only one year of underground coal mine employment, he also states that his diagnosis is based on 27 years of underground coal mine employment. Claimant's Exhibit 2. We cannot say, therefore, that the administrative law judge erred in discounting Dr. Cohen's opinion for the reason given. Further, the administrative law judge properly found that Dr. Cohen failed to provide a rationale for his diagnosis other than his discussion of the medical literature. Thus, the administrative law judge permissibly found that Dr. Cohen's opinion did not establish that coal dust exposure contributed to claimant's lung disease. Claimant's Exhibit 2; Hearing Transcript at 22-23, Decision and Order at 6, 8-9; *Clark*, 12 BLR 1-149; *DeBusk v. Pittsburg & Midway Coal Co.*, 12 BLR 1-15 (1988);

Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Piniansky v. Director, OWCP*, 7 BLR 1-171 (1984). Because these are the only opinions which, if credited, could establish the existence of legal pneumoconiosis, we need not reach claimant's contentions regarding the opinions of Drs. Crisalli and Castle, which do not support claimant's case. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1986). Accordingly, we affirm the administrative law judge's findings at Section 718.202(a)(4). Moreover, we note that the administrative law judge properly weighed together both x-ray and medical opinion evidence together in this case. *Island Coal Creek Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Thus, because we affirm the administrative law judge's finding that as claimant has failed to establish the existence of pneumoconiosis, claimant cannot establish total disability due to pneumoconiosis, and is thereby precluded from establishing a change in condition or a mistake in a determination of fact pursuant to Section 725.310. Decision and Order-Denying Benefits at 10; *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

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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BETTY JEAN HALL
Administrative Appeals Judge