

BRB No. 07-0224 BLA

M.L.)
(o/b/o the estate of R.L.))
)
Claimant-Petitioner)
)
v.)
)
DIAMOND MAY MINING COMPANY)
)
and) DATE ISSUED: 09/28/2007
)
PROGRESS ENERGY COMPANY)
)
Employer/Carrier-)
Respondents)
)
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 Janice K. Bullard,
Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

James M. Kennedy and Lois A. Kitts (Baird and Baird, P.S.C.), Pikeville,
Kentucky, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits (05-BLA-5044) of Administrative Law Judge Janice K. Bullard 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). The miner filed his claim on March 26, 2001. Director's Exhibit 2. After crediting the miner with at least eighteen years of coal mine employment, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).² Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the x-ray and medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4).³ Moreover, claimant contends that the administrative law judge erred in finding that total disability was not established at 20 C.F.R. §718.204(b). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief.

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'Keefe 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,

¹ The estate of the miner is pursuing the claim, as the miner died on November 8, 2003. Director's Exhibits 48-3, 48-5.

² The administrative law judge also found that her finding that pneumoconiosis was not established made it unnecessary to address causality at 20 C.F.R. §718.203(b). The administrative law judge further found that, although the miner was totally disabled, pursuant to 20 C.F.R. §718.204(b), at the time of his death, it could not be established that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), because pneumoconiosis had not been established.

³ The administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3) are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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 first argues that the administrative law judge erred by finding that the existence of pneumoconiosis was not established at Section 718.202(a)(1) because the administrative law judge is not required to defer to the numerical superiority of the x-ray interpretations by physicians with superior qualifications. Moreover, claimant argues that the administrative law judge “selectively analyzed” the x-ray evidence.

There are four x-ray readings of record of two x-rays dated November 20, 2001, and March 7, 2002. Dr. Wicker, with no known radiological qualifications, and Dr. Poulos, a Board-certified radiologist and B reader, interpreted the November 20, 2001 x-ray as negative for pneumoconiosis.⁴ Director’s Exhibits 11, 13. Drs. Halbert and Rosenberg, both Board-certified radiologists and B readers, interpreted the March 7, 2002 x-ray as negative for pneumoconiosis. Director’s Exhibits 15, 48-180.

Pursuant to Section 718.202(a)(1), the administrative law judge accurately found that none of the physicians interpreted the x-rays as positive for pneumoconiosis. Decision and Order at 8; Director’s Exhibits 11, 13, 15, 48-180. Consequently, claimant’s arguments that the administrative law judge improperly deferred to the numerical superiority of the x-ray readings by physicians with superior qualifications, and that she “may have ‘selectively analyzed’” the readings, lack merit. Claimant’s Brief at 3. We therefore affirm the administrative law judge’s finding pursuant to Section 718.202(a)(1).

Claimant next argues, pursuant to Section 718.202(a)(4), that the administrative law judge erred by discrediting the medical opinion evidence based on a positive x-ray interpretation because it was contrary to the administrative law judge’s weighing of the x-ray evidence, and because the record contains subsequent negative x-rays. Claimant also argues that the administrative law judge substituted her opinion for that of a medical expert.

Regarding Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Wicker, Chaney, Rosenberg, and Repsher, as well as a computerized tomography (CT) chest scan report and the miner’s death certificate. In a report dated November 20, 2001, Dr. Wicker opined that the miner did not have an occupational lung disease caused by coal mine employment, but rather, had a totally disabling pulmonary

⁴ Dr. Sargent, a Board-certified radiologist and B reader, interpreted the November 20, 2001 x-ray for film quality only. Director’s Exhibit 12.

impairment due to cigarette abuse. Director's Exhibit 11-9. Dr. Chaney, the miner's treating physician, submitted progress notes from October 7, 2002 through February 12, 2003, indicating that the miner was treated for lung cancer, acute bronchitis, hemoptysis, and fibrosis, as well as a restrictive and obstructive pulmonary defect, but Dr. Chaney did not identify a cause for these pulmonary problems. Director's Exhibit 48-215, 48-238.

Dr. Rosenberg first examined the miner on March 7, 2002. In a report dated April 3, 2002, Dr. Rosenberg concluded that the miner did not have coal worker's pneumoconiosis, but had a smoking-related pulmonary impairment, which was not "hastened by the past inhalation of coal mine dust." Director's Exhibit 14-25. After reviewing the miner's medical records on April 12, 2006, Dr. Rosenberg concluded that the miner did not have medical or legal coal workers' pneumoconiosis. Employer's Exhibit 1 at 3. Dr. Rosenberg reiterated his conclusion at his deposition on April 28, 2006. Employer's Exhibit 2 at 22-24. Dr. Repsher reviewed the miner's medical reports, and rendered a report on August 12, 2003. In his report, Dr. Repsher concluded that the miner had never suffered from coal workers' pneumoconiosis or any other pulmonary or respiratory disease either caused by or aggravated by his coal mine employment. Director's Exhibit 48-132. Dr. Repsher reiterated his conclusion at his deposition on September 19, 2003. Director's Exhibit 48-114, 48-116.

The CT chest scan dated October 8, 2002, indicated fibrosis, emphysematous bullae, and a strong suspicion of lung cancer, but was not classified as positive for pneumoconiosis. Director's Exhibit 48-243. The death certificate listed the immediate cause of death as lung cancer, with no other causes indicated. Director's Exhibit 48-3.

Pursuant to Section 718.202(a)(4), the administrative law judge found that the existence of pneumoconiosis was not established because there was no evidence that established either clinical or legal pneumoconiosis. Decision and Order at 11-12. Because there is no medical opinion evidence that supports a diagnosis of pneumoconiosis, we affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(4).

In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27. Consequently, we need not address claimant's remaining contentions regarding

the administrative law judge's findings regarding total disability pursuant to Section 718.204(b).⁵ *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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

⁵ We note that the administrative law judge found that the miner was totally disabled pursuant to Section 718.204(b). Decision and Order at 12-15.