

BRB No. 09-0212 BLA

E.F. )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 ARCH OF WEST VIRGINIA/ ) DATE ISSUED: 09/29/2009  
 APOGEE 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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Juliet W. Rundle & Associates), Pineville, West Virginia, for claimant.

Francesca Tan (Jackson Kelly PLLC), Morgantown, 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 (2006-BLA-05854) of Administrative Law Judge Adele Higgins Odegard (the administrative law judge) on a subsequent claim<sup>1</sup> 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). In this

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<sup>1</sup> Claimant filed the current, third application for benefits on August 4, 2003. Director's Exhibit 2.

second subsequent claim, the administrative law judge found a change in an applicable condition of entitlement established, as all of the new medical opinions found that claimant suffered from a totally disabling respiratory impairment, an element of entitlement previously adjudicated against him. *See* 20 C.F.R. §§718.204(b); 725.309(d). Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that the parties had previously stipulated to fifteen years of qualifying coal mine employment. Turning to the merits, the administrative law judge found that the evidence of record failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that pneumoconiosis was not established by the x-ray and medical opinion evidence of record under Section 718.202(a)(1) and (4). Claimant also contends that the administrative law judge erred in finding that claimant's totally disabling respiratory impairment was not due to pneumoconiosis pursuant to Section 718.204(c).<sup>2</sup> Employer responds, urging affirmance of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs, 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,<sup>3</sup> they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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<sup>2</sup> The administrative law judge's findings that pneumoconiosis was not established at 20 C.F.R. §718.202(a)(2) and (3) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>3</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

In challenging the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1), claimant argues that the administrative law judge erred in placing substantial weight on the readings by employer's experts. Specifically, claimant asserts that the administrative law judge erred in crediting the 0/1 negative x-ray readings of employer's physicians because they "admitted that there were actually markings on the x-rays they reviewed and that they were not able to identify the cause of those markings although they were sure somehow that these markings were not the result of pneumoconiosis." Claimant's Brief at 6 (unpaginated). Claimant contends therefore that the administrative law judge's finding "shows [a] predetermination to diagnose the chest x-rays as negative." *Id.*

Considering the x-ray evidence at Section 718.202(a)(1), the administrative law judge noted that it consisted of a 1/1 positive reading of the December 8, 2005 x-ray by Dr. Rasmussen, a B reader, and a negative for pneumoconiosis rereading of the x-ray by Dr. Scatarige, a Board-certified radiologist and B reader. Director's Exhibit 12; Employer's Exhibit 8. The administrative law judge also noted that Dr. Wheeler, a Board-certified radiologist and a B reader, also reread the x-ray as 0/1 negative. Employer's Exhibit 5. Additionally, the administrative law judge noted that Dr. Wheeler read the x-ray of March 6, 2006 as 0/1 negative. Employer's Exhibit 3. In evaluating the x-ray evidence, the administrative law judge stated:

I find that all three physicians possess some qualification for interpreting an [x]-ray; however, I give more weight to [the readings of] both Dr. Wheeler and Dr. Scatarige, who are both Board-certified radiologists and B readers, than I do to [the reading of] Dr. Rasmussen, who is only a B reader. I give more weight to Dr. Wheeler's and Dr. Scatarige's [readings] because radiologists have wider training and experience in [the] interpretation of [x]-rays than do B readers. Therefore, after reviewing the record, I find that the weight of the evidence does not establish sufficient [x]-ray evidence indicating that the [c]laimant has pneumoconiosis.

Decision and Order at 9.

Contrary to claimant's argument, the administrative law judge properly credited the x-rays classified as 0/1, by the better-qualified physicians, as negative, even though the physicians who read the x-rays found other abnormalities on the x-rays.<sup>4</sup> *See* 20

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<sup>4</sup> The administrative law judge noted that all of the physicians who interpreted the x-rays noted additional abnormalities, including calcified granuloma and plate-like atelectasis, but that Drs. Wheeler and Scatarige agreed that the x-rays they read were negative for pneumoconiosis. Decision and Order at 9.

C.F.R. §718.104; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Trent*, 11 BLR at 28; *Preston v. Director, OWCP*, 6 BLR 1-1229 (1984). Therefore, the administrative law judge properly found that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), based on the weight of the negative x-ray readings by the better-qualified physicians. 20 C.F.R. §718.202(a)(1); *Adkins*, 958 F.2d at 52, 16 BLR at 2-66; *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); see *Staton v. Norfolk & Western Ry. 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. 1994).

Claimant next argues that the administrative law judge erred in crediting the opinions of the physicians who ruled out pneumoconiosis, as they were based on negative x-ray findings. The relevant medical opinion evidence consists of the opinion of Dr. Rasmussen, who diagnosed clinical pneumoconiosis and disabling lung disease due to both smoking and coal dust exposure, Director's Exhibit 12; the opinion of Dr. Crisalli who found insufficient evidence to justify a diagnosis of coal workers' pneumoconiosis or any dust disease of the lung, and noted that coal dust had not aggravated claimant's asthma or emphysema, Employer's Exhibit 1; and the opinion of Dr. Zaldivar, who noted that claimant had a severe pulmonary impairment, but found the evidence insufficient to justify a diagnosis of coal workers' pneumoconiosis. Employer's Exhibit 7. Dr. Zaldivar further noted that claimant's impairment was due to emphysema and asthma from smoking. *Id.*

In evaluating the medical opinion evidence at Section 718.202(a)(4), the administrative law judge properly accorded greater weight to the opinions of Drs. Crisalli and Zaldivar than to the contrary opinion of Dr. Rasmussen, because Drs. Crisalli and Zaldivar are Board-certified Pulmonologists, while Dr. Rasmussen is only a Board-certified Internist. See *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). The administrative law judge also properly accorded greater weight to the opinions of Drs. Crisalli and Zaldivar, than to the opinion of Dr. Rasmussen, because he found that they better explained why claimant did not have coal workers' pneumoconiosis and why his respiratory impairment was due to smoking, and not coal mine dust exposure. The administrative law judge, therefore, properly found that the medical opinion evidence failed to establish pneumoconiosis at Section 718.202(a)(4). See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Therefore, the administrative law judge properly found that the x-ray and medical opinion evidence, when weighed together pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), failed to establish pneumoconiosis at Section 718.202(a). Consequently, as we affirm the administrative law judge's findings that pneumoconiosis was not established pursuant to Section 718.202(a), an essential element of entitlement, we need not address claimant's argument

regarding disability causation at Section 718.204(c). *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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