BRB No. 09-0255 BLA

J.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STONEY RIDGE COAL COMPANY	)	DATE ISSUED: 09/16/2009
	)	
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 of William S. Colwell, Administrative Law Judge, United States Department of Labor.

J.B., Clinton, Tennessee, *pro se*.[1]

John C. Morton and Keith A. Utley (Morton Law LLC), Henderson, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (06-BLA-6153) of Administrative Law Judge William S. Colwell (the administrative law

[1] Sadie Tipton, a benefits counselor with Regional Education and Community Health Services of Jacksboro, Tennessee, filed an appeal on behalf of claimant, but Ms. Tipton is not representing claimant on appeal. *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

judge) denying benefits on a subsequent claim[2] 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 credited claimant with 18 years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, although the administrative law judge found that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2)-(4), he found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b). The administrative law judge also found that the evidence did not establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Further, the administrative law judge found that the evidence did not establish the presence of complicated pneumoconiosis and, thus, he found that the evidence did not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[3]

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

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[2] Claimant filed his first claim on April 25, 1997. Director's Exhibit 1. It was finally denied by a claims examiner on August 5, 1997 because the evidence did not establish any of the elements of entitlement. *Id*. Claimant filed his current claim on August 1, 2005. Director's Exhibit 3.

[3] Because the administrative law judge's length of coal mine employment finding, his finding that the new evidence established total disability at 20 C.F.R. §718.204(b), his finding that the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and his findings that the evidence established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1) and 718.203(b), on the merits, are not adverse to this *pro se* claimant, and are not challenged on appeal, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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.[4] 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 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 (1989).

Initially, we will address the administrative law judge's finding that the evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304. Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(1), as implemented by 20 C.F.R. §718.304 of the regulations, provides 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, (A) 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; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, is a condition which would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. In determining whether a claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33-34 (1991)(*en banc*).

At Section 718.304(a), the administrative law judge found that the x-ray evidence did not establish the presence of complicated pneumoconiosis. The record consists of five x-rays dated July 7, 1997, June 28, 2005, November 21, 2005,[5] December 29, 2005,

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[4] The record indicates that claimant was employed in the coal mining industry in Tennessee. Director's Exhibits 1, 4, 9. 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 (1989)(*en banc*).

[5] Dr. Barrett, a B reader and a Board-certified radiologist, read the November 21,

and September 8, 2006. Neither Dr. Pharaoh nor Dr. Sargent, a B reader and a Board-certified radiologist, classified the large opacities on the July 7, 1997 x-ray. Director's Exhibit 1. Dr. Ahmed, a B reader and a Board-certified radiologist, classified the large opacities on the June 28, 2005 x-ray as Category A, Director's Exhibit 14, while Dr. Broudy, a B reader, classified the large opacities on this x-ray as Category 0, Employer's Exhibit 3. Dr. Ahmed and Dr. Baker, a B reader, classified the large opacities on the November 21, 2005 x-ray as Category 0. Director's Exhibit 13; Claimant's Exhibit 2. Further, Dr. Ahmed classified the large opacities on the December 29, 2005 x-ray as Category A, Director's Exhibit 15, while Dr. Broudy classified the large opacities on this x-ray as Category 0, Employer's Exhibit 4. Lastly, Dr. Ahmed classified the large opacities on the September 8, 2006 x-ray as Category 0, Claimant's Exhibit 1, and Dr. Dahhan found that this x-ray was completely negative, Employer's Exhibit 1.

The administrative law judge noted that only three readings by Dr. Ahmed arguably described the presence of complicated pneumoconiosis.[6] Decision and Order at 19. In considering Dr. Ahmed's classifications and comments with respect to the large opacities seen on x-rays,[7] the administrative law judge stated:

> While his opinion regarding the presence of simple pneumoconiosis is consistent throughout his four interpretations, he goes back and forth in his

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2005 x-ray for quality only. Director's Exhibit 13.

[6] The administrative law judge stated that "[n]o other physician diagnosed the presence of complicated pneumoconiosis by chest x-ray." Decision and Order at 20.

[7] Dr. Ahmed classified the large opacities on the June 28, 2005 x-ray as Category A, but he noted, in a summary x-ray report, that "[an] [o]pacity in the right upper lung could be part of complicated pneumoconiosis; however, malignancy cannot be excluded." Director's Exhibit 14. Dr. Ahmed classified the large opacities on the November 21, 2005 x-ray as Category 0, and he noted, in a summary x-ray report, that "[a] vague nodular density is also seen in the right upper lung field, a chest CT could be performed for further evaluation; malignancy cannot be excluded." Claimant's Exhibit 2. Dr. Ahmed classified the large opacities on the December 29, 2005 x-ray as Category A, but he noted, in a summary x-ray report, that "[a] [n]odule-like density in the right upper lung is very likely part of complicated pneumoconiosis; however, malignancy cannot be excluded." Director's Exhibit 15. Lastly, Dr. Ahmed classified the large opacities on the September 8, 2006 x-ray as Category 0, and he noted, in a summary x-ray report, that "[a] nodular-like density in the right upper lung is seen, this could be further evaluated by apical lordotic view; this could be either complicated pneumoconiosis or neoplastic process." Claimant's Exhibit 1.

> classification of opacities (between Category 0 and Category A) in his interpretations. Moreover, Dr. Ahmed consistently stated that the nodule density was "possibly" or "very likely" due to complicated pneumoconiosis but repeatedly admitted he could not rule out malignancy. I find the equivocal opinion of Dr. Ahmed fails to meet the reasonable degree of medical certainty standard and therefore is accorded less weight.

Id. at 19-20. The administrative law judge therefore stated, "[b]ecause there are no credible chest x-ray interpretations positive for complicated pneumoconiosis, I find [c]laimant has failed to establish the existence of complicated pneumoconiosis pursuant to §718.304(a)." *Id*. at 19.

An administrative law judge, as the trier-of-fact, has broad discretion to assess the evidence of record and determine whether a party has met its burden of proof. *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). In this case, the administrative law judge reasonably found that Dr. Ahmed's x-ray interpretations were equivocal for the presence of complicated pneumoconiosis. *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). Consequently, we affirm the administrative law judge's finding that the x-ray evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), based on Dr. Ahmed's x-ray readings.

We also affirm the administrative law judge's finding that the evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b) because there is no biopsy evidence in the record. Additionally, we affirm the administrative law judge's finding that the evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(c) because there is no other medical evidence in the record indicating that claimant has a condition which would yield results equivalent to the criteria set forth in prongs (A) or (B) of Section 718.304.[8] 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

Furthermore, because the administrative law judge properly found that the evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), (b), and (c), we affirm the administrative law judge's finding that the

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[8] The administrative law judge stated that "[t]here are no medical reports that mention or discuss a diagnosis of complicated pneumoconiosis." Decision and Order at 20.

evidence did not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304.

Next, because the administrative law judge's disability causation finding was affected by his legal pneumoconiosis finding, we address the administrative law judge's finding that the evidence did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).[9] The administrative law judge considered the reports of Drs. Baker, Hughes,[10] Dahhan, and Pharaoh. Dr. Baker opined that claimant has coal workers' pneumoconiosis (CWP), chronic obstructive pulmonary disease (COPD) related to coal dust exposure, and chronic bronchitis related to coal dust exposure. Director's Exhibit 13. Dr. Hughes opined that claimant has "[an] [a]bnormal chest x-ray most consistent with pneumoconiosis with probable bilateral upper lobe fibrosis and nonspecific pleural plaques" and that he has "[m]ild to moderate airflow obstruction with a reduced diffusion capacity in the setting of a nonsmoker which at this point can really only be attributed to his coal mining." Claimant's Exhibit 3. By contrast, Dr. Dahhan opined that claimant does not have clinical or legal pneumoconiosis. Employer's Exhibit 1. Dr. Pharaoh opined that claimant does not have pneumoconiosis, but has COPD related to cigarette smoking. Director's Exhibit 1.

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[9] Regarding the issue of clinical pneumoconiosis at Section 718.202(a)(4), the administrative law judge discussed the opinions of Drs. Baker, Hughes, Dahhan, and Pharaoh. However, the administrative law judge did not render a specific finding of whether the medical opinion evidence was sufficient to establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4). Nonetheless, in light of our affirmance of the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), any error by the administrative law judge in failing to render a specific finding on the issue of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4) was harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[10] Although the administrative law judge found that Dr. Hughes diagnosed clinical pneumoconiosis, he excluded Dr. Hughes's diagnosis of this disease because it was inextricably tied to a positive chest x-ray that was not admitted into the record. Decision and Order at 23-24. However, the administrative law judge did not find that Dr. Hughes's diagnosis of legal pneumoconiosis was inextricably tied to this x-ray. Rather, the administrative law judge stated, "[a]ssuming arguendo the medical report of Dr. Hughes could be utilized as evidence in this case, I find that his opinion regarding the presence of legal pneumoconiosis would ultimately be accorded less weight due to the fact that he attributed [c]laimant's obstructive defect to coal mine dust exposure in the setting of a non-smoker." *Id*. at 24 n.11. The administrative law judge noted, "[a]s discussed above, I rejected [c]laimant's assertion that he never smoked." *Id*.

The administrative law judge properly gave less weight to the opinions of Drs. Baker and Hughes, that claimant has legal pneumoconiosis, because he found that they were based on an inaccurate smoking history.[11] *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988). Because the administrative law judge properly discounted the opinions of Drs. Baker and Hughes, the only medical opinions of record that support a finding of legal pneumoconiosis, we affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Finally, the administrative law judge found that the evidence did not establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). The record consists of the reports of Drs. Baker, Hughes, Dahhan, and Pharaoh. Dr. Baker opined that CWP, COPD related to coal dust exposure, and chronic bronchitis related to coal dust exposure "fully" contributed to claimant's moderate pulmonary impairment. Director's Exhibit 13. Dr. Hughes opined that claimant has "[m]ild to moderate airflow obstruction with a reduced diffusion capacity in the setting of a nonsmoker which at this point can really only be attributed to his coal mining." Claimant's Exhibit 3. By contrast, Dr. Dahhan opined that neither the inhalation of coal dust nor CWP contributed to claimant's ventilatory impairment. Employer's Exhibit 1. Dr. Pharaoh opined that claimant's mild impairment was secondary to COPD related to cigarette smoking. Director's Exhibit 1.

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[11] In separate reports, Dr. Baker and Dr. Hughes noted that claimant never smoked. Director's Exhibit 13; Claimant's Exhibit 3. In considering claimant's smoking history, the administrative law judge stated:

> As noted above there is quite a discrepancy in [c]laimant's smoking history: from negative to 15 pack years. Even more disturbing is [c]laimant's admission that he lied to a consulting physician, Dr. Pharaoh[,] and to his own treating physician, [Dr. Meece,] in an effort to improve his chances of obtaining Black Lung Benefits. Moreover, he admitted to lying under oath at a deposition when he denied ever telling a physician that he had smoked in the past. Now [c]laimant is maintaining that he never smoked.

Decision and Order at 22. The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Because the administrative law judge acted within his discretion in finding that claimant's testimony regarding his smoking history was not credible, *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986), the administrative law judge permissibly rejected claimant's assertion that he never smoked. Decision and Order at 22-23.

The administrative law judge properly discounted Dr. Baker's disability causation opinion because he found that the doctor's diagnosis of clinical pneumoconiosis was based on an inaccurate smoking history.[12] However, the administrative law judge did not address Dr. Baker's opinion that legal pneumoconiosis contributed to claimant's moderate pulmonary impairment. Director's Exhibit 13. Nevertheless, we hold that the administrative law judge's error in this regard was harmless, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), because the administrative law judge properly discounted Dr. Baker's opinion that claimant has legal pneumoconiosis at Section 718.202(a)(4), as he found that it was based on an inaccurate smoking history. *Trumbo*, 17 BLR at 1-89; *Bobick*, 13 BLR at 1-54. Further, we hold that any error by the administrative law judge in finding that Dr. Hughes did not render a disability causation opinion was harmless, *Larioni*, 6 BLR at 1-1278, because the administrative law judge properly discounted Dr. Hughes's opinion that claimant has legal pneumoconiosis at Section 718.202(a)(4), as he found that it was based on an inaccurate smoking history. *Trumbo*, 17 BLR at 1-89; *Bobick*, 13 BLR at 1-54. Thus, because it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence did not establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).

In light of our affirmance of the administrative law judge's finding that the evidence did not establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), an essential element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112.

[12] The administrative law judge stated that "Dr. Baker based his opinion on the assumption that [c]laimant was a non-smoker which I have found in this opinion to be untrue." Decision and Order at 26. The administrative law judge therefore stated that "Dr. Baker did not have an accurate picture of [c]laimant's smoking habit when rendering his report." *Id.*

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