BRB No. 97-1796 BLA

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| RUFUS KEEN | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | DATE ISSUED: |
| SEA "B" MINING COMPANY | ) | |
| | ) | |
| | ) | |
| Employer-Respondent | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | DECISION and ORDER |
| Party-in-Interest | ) | |

Appeal of the Decision and Order of Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

Rufus Keen, Pilgrim Knob, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order

[1] Claimant is Rufus Keen, the miner. Tim White, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. White is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

(97-BLA-0964) of Administrative Law Judge Edward J. Murty, Jr. denying benefits 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 administrative law judge credited claimant with thirty-three years of coal mine employment, found that he has one dependent for purposes of benefits augmentation, and determined that employer is the responsible operator. The administrative law judge found that the medical evidence of record failed to establish either the existence of pneumoconiosis or total respiratory disability pursuant to 20 C.F.R. §§718.202(a), 718.204(c). Accordingly, he denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[2]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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).

To be entitled to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 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); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

[2] We affirm the administrative law judge's findings regarding length of coal mine employment, dependency, and responsible operator status as they are unchallenged on appeal and are not adverse to claimant. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

Pursuant to Section 718.202(a)(1), the administrative law judge considered all twenty-six readings of the nine x-rays that were taken for the purpose of detecting pneumoconiosis.[3] There were twenty-two negative readings and four positive readings. Director's Exhibits 13-16, 26, 27, 31, 33, 35, 39, 43-46; Employer's Exhibits 1-4. All of the negative readings were by physicians who are Board-certified radiologists, B-readers, or both, while one of the positive readings was by a similarly-credentialed physician. The administrative law judge permissibly determined to accord weight only to the interpretations by qualified readers. Decision and Order at 2; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). In this context, the administrative law judge considered the positive reading of the July 3, 1996 x-ray by Board-certified radiologist and B-reader Dr. Alexander, Director's Exhibit 31 at 2, but accurately noted that the same x-ray was reread as completely negative by three other Board-certified radiologists and B-readers. Director's Exhibits 44 at 2, 3; 45 at 2. Substantial evidence supports the administrative law judge's finding that the x-ray evidence viewed in light of the readers' radiological qualifications "fail[ed] to establish that [claimant] has pneumoconiosis." Decision and Order at 2; *see Adkins, supra*; *Edmiston v. F & R Coal Co*., 14 BLR 1-65 (1990). We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

[3] Because claimant filed this claim for benefits more than one year after the final denial of his previous claim, Director's Exhibits 1, 46, the administrative law judge should have first determined whether the evidence developed since the previous denial established a material change in conditions, a threshold showing that claimant must make to avoid a denial of his duplicate claim. 20 C.F.R. §725.309(d); *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). However, because the administrative law judge considered all of the evidence on the merits and denied benefits, his failure to make a preliminary material change in conditions finding is at best a harmless error. *See Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984).

Pursuant to Section 718.202(a)(2) and (3), the administrative law judge correctly found that the record contains no biopsy evidence and that the presumptions at Sections 718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. Decision and Order at 2; *see* 20 C.F.R. §§718.304, 718.305, 718.306. We therefore affirm these findings.

Pursuant to Section 718.202(a)(4), the administrative law judge discussed the three medical opinions of record. Decision and Order at 3-4. Dr. Sutherland, whose credentials are not of record, examined and tested claimant and diagnosed pneumoconiosis based on claimant's complaints, physical examination results, and chest x-ray, which Dr. Sutherland read as positive.[4] Director's Exhibit 46. Drs. Iosif and Hippensteel examined and tested claimant, and Dr. Hippensteel, who the administrative law judge accurately noted is Board-certified in Internal Medicine and Pulmonary Diseases, also reviewed the medical evidence of record. Director's Exhibit 11; Employer's Exhibit 1. Both physicians concluded that pneumoconiosis was absent. *Id*. Because an administrative law judge may question the basis of a medical opinion where an x-ray relied upon by the physician is subsequently read negative by more highly-qualified readers, *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985), the administrative law judge permissibly accorded less weight to Dr. Sutherland's diagnosis because it was based, in part, on the physician's positive reading of the October 1, 1991 x-ray which was subsequently read negative by two Board-certified radiologists and B-readers and by a third physician qualified as a B-reader. Director's Exhibits 35 at 2, 3; 46 at 11, 13. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(4).

Pursuant to Section 718.204(c)(1)-(3), the administrative law judge correctly noted that all of the pulmonary function studies and blood gas studies were non-qualifying[5] and that the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Director's Exhibits 10, 12, 42, 46; Employer's Exhibit 1. We therefore affirm these findings.

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[4] In the November 19, 1991 cover letter submitted with his examination report, Dr. Sutherland appears to suggest that he is claimant's treating physician. Director's Exhibit 46. However, at the hearing claimant testified that Drs. Baker and Modi are his treating physicians. Hearing Transcript at 11-12.

[5] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

Pursuant to Section 718.204(c)(4), the administrative law judge compared Dr. Sutherland's opinion that claimant is "disabled to work" due to pneumoconiosis, Director's Exhibit 46, with the opinions of Drs. Iosif and Hippensteel that claimant retains the respiratory capacity to perform his usual coal mine employment as a beltman.[6] Director's Exhibit 11; Employer's Exhibit 1. In light of the non-qualifying objective studies, the administrative law judge, within his discretion as fact-finder, found the opinions of Drs. Iosif and Hippensteel to be "amply supported by the other medical evidence" of record. Decision and Order at 4; *see Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Therefore, we affirm the administrative law judge's finding pursuant to Section 718.204(c)(4).

Because claimant has failed to establish the existence of pneumoconiosis or total respiratory disability pursuant to 20 C.F.R. §§718.202(a), 718.204(c), necessary elements of entitlement under Part 718, we affirm the denial of benefits. *See Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[6] Dr. Hippensteel found no "more than [a] minimal pulmonary impairment," while Dr. Iosif assesed a "mild" ventilatory impairment. Employer's Exhibit 1; Director's Exhibit 11. Both concluded that claimant is disabled by his orthopedic problems.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge