BRB No. 03-0631 BLA

ERNEST P. CLARK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
	)	DATE ISSUED: 04/29/2004
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-Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

S.F. Raymond (Rundle & Rundle, L.C.), Pinesville, West Virginia.

Laura Metcoff Klaus (Greenberg Traurig), Washington, D.C., for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (2002-BLA-0402) of Administrative Law Judge Robert L. Hillyard on a petition for modification 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). This case is before the Board for the third time. The Board previously affirmed Administrative Law Judge Paul H. Teitler's finding that claimant established total disability, but vacated his findings that the evidence established the existence of pneumoconiosis and that claimant's total disability was due to pneumoconiosis. *Clark v. Eastern Associated Coal Corp.,* BRB No. 98-1543

BLA (Sept. 16, 1999) (unpublished). The Board remanded the case for further consideration of the evidence under 20 C.F.R. §718.202(a)(1), (4) and, if necessary, under 20 C.F.R. §718.204(c).

On April 20, 2000, Judge Teitler issued a decision denying benefits, finding that claimant failed to establish the existence of pneumoconiosis. Claimant appealed Judge Teitler's decision to the Board, but later filed a Motion to Remand the case for further proceedings consistent with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The Board dismissed claimant's appeal and remanded the case to the Office of Administrative Law Judges. *Clark v. Eastern Associated Coal Corp.*, BRB No. 00-0787 BLA (Dec. 5, 2000) (unpublished Order). Judge Teitler issued a Decision and Order on Remand Denying Benefits on September 17, 2001, finding that claimant failed to establish the existence of pneumoconiosis.

On November 21, 2001, claimant filed a request for modification of the prior denial. Judge Hilliard (the administrative law judge) found that claimant failed to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. On appeal, claimant contends the administrative law judge erred in his findings under Sections 718.202(a) and 718.204(c). In response, employer argues that the administrative law judge's denial of benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond 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).

In order to establish entitlement to benefits in a living miner's claim 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.[1] *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2001); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987). 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*).

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, inasmuch as claimant's coal mine employment occurred in the State of West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Under Section 718.202(a), claimant asserts that the administrative law judge did not comply with the Fourth Circuit's requirement for evaluating the evidence under *Compton*, 211 F.3d 203, 22 BLR 2-162, and erred in relying exclusively on the negative x-ray evidence submitted by employer in finding that claimant failed to establish the existence of pneumoconiosis. Claimant further argues that the administrative law judge erred in crediting the medical opinions of employer's physicians, particularly Drs. Fino and Branscomb.

We reject claimant's arguments. The administrative law judge found that the newly submitted evidence consists of twelve interpretations of four x-rays and the medical opinions of Drs. Fino and Branscomb. Decision and Order-Denial of Benefits at 7, 8. The administrative law judge found that Dr. Ahmed's reading of the November 6, 2001 x-ray as 1/1, simple pneumoconiosis is the sole positive x-ray reading submitted with claimant's request for modification. *Id.;* Director's Exhibits 73, 75. The administrative law judge further found that four dually-qualified[2] physicians, Drs. Sargent, Wheeler, Scott, and Gaylor and a B reader, Dr. Goldstein, read the same x-ray as negative. Director's Exhibits 74, 76, 78. Although Dr. Ahmed described a 1.2-centimeter nodule that "could represent malignancy," he suggested a CT scan for further evaluation. Similarly, Drs. Wheeler, Scott, Gayler also noted a nodule greater than 1 centimeter, not related to pneumoconiosis. After considering that Dr. Ahmed's qualifications are not part of the record and that there is no indication that he has specialized qualifications in the interpretation of x-rays, the administrative law judge rationally found that Dr. Ahmed's positive interpretation is outweighed by the numerous negative x-ray readings by dually-qualified physicians. *Melnick v. Consolidation Coal Co.,* 16 BLR 1-31 (1991)(*en banc*); Decision and Order-Denial of Benefits at 8.

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[2] A dually-qualified physician is a B reader and a Board-certified radiologist. A B reader is a physician who has demonstrated proficiency in evaluating chest roentgenograms for roentgenographic quality and in the use of the ILO-U/C classification for interpreting chest roentgenograms for pneumoconiosis and other diseases by taking and passing a specially designed proficiency examination given on behalf of or by the Appalachian Laboratory for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E) (2000); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP,* 484 U.S. 135, 145 n. 16, 11 BLR 2-1, 2-16 n.16 (1987), *reh'g denied,* 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A designation of Board-certified radiologist means certification in radiology or diagnostic roentgenology by the American Board of Radiology, or the American Osteopathic Association. *See* 20 C.F.R. §718.202(a)(1)(ii)(C) (2000).

Claimant, citing *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), alleges that Dr. Fino's opinion is hostile to the Act, based upon the physician's statement that claimant's pulmonary impairment is not caused by his pneumoconiosis because it was obstructive in nature. We reject claimant's characterization of Dr. Fino's opinion because Dr. Fino did not rely on the erroneous assumption that obstructive disorders could not be caused by coal mine employment. *See Id.* Dr. Fino explained that "obstruction can be seen in coal workers' pneumoconiosis" but that claimant's obstruction was unrelated to coal mine dust exposure based on the absence of any interstitial abnormality and that the "obstruction shows involvement in the small airways" consistent with cigarette smoking, pulmonary emphysema, non-occupational chronic bronchitis and asthma. Director's Exhibit 25. Contrary to claimant's assertion, the administrative law judge, within a proper exercise of his discretion, found that the opinions of Drs. Fino and Branscomb, that claimant does not have pneumoconiosis, were entitled to substantial weight because they are supported by the medical evidence dated between 1994 and 2001, including hospital records, examination reports, pulmonary function, and blood gas studies. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en* banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order-Denial of Benefits at 8, 9. We affirm the administrative law judge's finding that the newly submitted medical evidence does not establish a change in conditions.

With respect to the previously submitted medical evidence, the administrative law judge noted that in the prior Decision and Order, Judge Teitler found that the x-ray evidence was "evenly balanced," and thus failed to establish the presence of pneumoconiosis by a preponderance of the evidence. Decision and Order-Denial of Benefits at 9; September 17, 2001 Decision and Order on Remand-Denying Benefits at 3. Judge Teitler correctly found that all of the readings of the previously submitted x-ray evidence taken on September 7, 1994 and January 26, 1998 were negative and that the eight readings of the June 24, 1996 x-ray were in conflict.[3] Regarding the medical opinion evidence, the administrative law judge noted that Judge Teiter found that the opinions of Drs. Maas and Rasmussen, who diagnosed "possible pneumoconiosis," and

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[3] Judge Tietler specifically found that two dually-qualified physicians and a B reader found pneumoconiosis 1/1 with a one centimeter opacity characterized as complicated pneumoconiosis Category A, but that a neoplasm could not be ruled out. *Id.* at 2; Claimant's Exhibit 1. In contrast, Judge Teitler also found equally persuasive the readings of four dually-qualified physicians indicating that pneumoconiosis was not present, three of which acknowledged that the etiology of the opacity was "not clear, but could be granuloma or neoplasm." September 17, 2001 Decision and Order on Remand-Denying Benefits at 3; Employer's Exhibit 1.

pneumoconiosis due to coal mine employment, were outweighed by Dr. Fino's contrary opinion because he had the best credentials and his opinion was supported by the evidence of record. Decision and Order-Denial of Benefits at 9. After a review of Judge Teitler's Decision and Order and all the medical evidence of record, the administrative law judge, within a proper exercise of his discretion, found no mistake in a determination of fact in the prior denial. *Compton*, 211 F.3d 203, 22 BLR 2-162; Decision and Order-Denial of Benefits at 10.

Claimant argues that the administrative law judge failed to "perform the equivalency determinations" to establish complicated pneumoconiosis and entitlement under Section 718.304. *See* 20 C.F.R. §718.202(a)(3). The x-ray evidence in the record submitted prior to claimant's request for modification reflects that none of the radiologists found an opacity "greater than one centimeter in diameter," as mandated in Section 718.304(a) and there is no biopsy or equivalent evidence demonstrating the presence of complicated pneumoconiosis.[4] *Clark v. Eastern Associated Coal Corp.*, BRB No. 98-1543 BLA (Sept. 16, 1999) (unpublished). In support of his request for modification, claimant failed to submit new evidence to trigger invocation of the irrebutable presumption under Section 718.304. Dr. Ahmed read the November 6, 2001 x-ray as 1/1, "simple pneumoconiosis" and Drs. Wheeler, Scott, and Gayler, found that the film showed a nodular density greater than one centimeter compatible with granuloma or possible tumor, but did not diagnose the existence of pneumoconiosis. Director's Exhibits 73, 75, 78. Dr. Scatarige also found that the June 28, 2001 film showed a nodular density greater than one centimeter, but did not diagnose the existence of pneumoconiosis. Contrary to claimant's assertion there is no evidence that would allow the administrative law judge to make an equivalency determination under Section 718.304. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000).

Because claimant failed to establish the existence of pneumoconiosis, an award of benefits pursuant to 20 C.F.R. Part 718 is precluded and we need not address claimant's arguments under Section 718.204(c). *Anderson v. Valley Camp of Utah, Inc.* 12 BLR 1-111(1989); *Perry* 9 BLR 1-1 (1986).

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[4] Drs. Capiello, Aycoth and Ahmed each read the x-ray film dated June 24, 1996 and found a left upper lung nodule measuring one centimeter, and classified it as category A, complicated pneumoconiosis. Drs. Binns, Baek and Gogineni also found the nodular density, but did not diagnose the existence of pneumoconiosis. Employer's Exhibits 1, 2; Claimant's Exhibit 1.

Accordingly, the administrative law judge's Decision and Order-Denial of Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge