BRB No. 06-0709 BLA

RICHARD CHARLES ACHUFF	)	
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Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 04/30/2007
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Richard Charles Achuff, Wilkes Barre, Pennsylvania, *pro se*.

Sarah M. Hurley (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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 (05-BLA-05802) of Administrative Law Judge Robert D. Kaplan 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 found one year and three months of coal mine employment established. Decision and Order at 6-7. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 5. After determining that the instant claim was a subsequent claim,[1] the administrative law judge found that a

[1] Claimant's first claim for benefits, filed on June 25, 2002, was finally denied by the Department of Labor on January 23, 2003, as claimant failed to establish any element

change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 was established since the newly submitted evidence was sufficient to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), an element of entitlement previously adjudicated against claimant. Decision and Order at 2, 5, 6, 13-15; Director's Exhibit 1. Considering all the evidence of record, the administrative law judge concluded that it was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), an essential element of entitlement. Decision and Order at 9-12, 15. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial of benefits.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). If the findings of fact and conclusions of law of the administrative law judge 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence, in accord with law, and contains no reversible error.[2] The administrative law judge reasonably found that claimant established only one

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of entitlement. Director's Exhibit 1. Claimant took no further action until he filed the instant claim on April 13, 2004.

[2] The record indicates that claimant was last employed in the coal mine industry in Pennsylvania. Director's Exhibit 4; Decision and Order at 8. Accordingly, this case

and one-quarter years of coal mine employment based on claimant's testimony and Social Security Earnings records. *See Clayton v. Pyro Mining Co.*, 7 BLR 1-551 (1984). Considering all the evidence of record, the administrative law judge acted within his discretion, as fact-finder, in concluding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *See White v. New White Coal Co., Inc.*, 23 BLR 1-1 (2004); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered the newly submitted x-ray evidence, as well as the x-ray evidence submitted in the prior claim. Decision and Order at 9, 15. Taking into account that the August 2, 2004 x-ray was read as negative for the existence of pneumoconiosis by Dr. Levinson, who was neither a B reader nor a Board-certified radiologist, Director's Exhibit 17, and negative by Dr. Navani, a B reader and Board-certified radiologist, Director's Exhibit 18, the administrative law judge found that the August 2, 2004 x-ray was negative for the existence of pneumoconiosis. Decision and Order at 9. The administrative law judge additionally found that the February 9, 2006 x-ray did not support a finding of pneumoconiosis, as Dr. Navani, a dually qualified physician, interpreted the x-ray as negative. Decision and Order at 9; Director's Exhibit 30. Further, the administrative law judge found that since the August 3, 2002 x-ray, submitted in the prior claim, was read as both positive and negative for pneumoconiosis by equally qualified physicians, it did not support a finding of pneumoconiosis. Decision and Order at 15.

The administrative law judge, therefore, properly concluded that the x-ray evidence as a whole did not support a finding of pneumoconiosis. Decision and Order at 9, 15; *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Worhach v. Director*, OWCP, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Accordingly, the administrative law judge's finding that the existence of pneumoconiosis was not established by x-ray evidence at Section 718.202(a)(1) is affirmed.

The administrative law judge also correctly found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2)-(3) since the record did not contain any biopsy or autopsy results demonstrating the presence of pneumoconiosis and the presumptions set forth at 20 C.F.R. §§718.304, 718.305, 718.306 were not

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arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

applicable.[3] *See* 20 C.F.R. §§718.202(a)(2)-(3); Decision and Order at 9-10; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge properly considered the quality of the evidence *i.e.*, whether the opinions were supported by their underlying documentation and were adequately explained. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 10-12, 15. The administrative law judge acted rationally in concluding that the reports of Drs. Levinson and Rashid, opining that the miner did not suffer from coal workers' pneumoconiosis or chronic obstructive pulmonary disease due to coal mine employment, were entitled to greater weight as they were better reasoned and documented than the report of Dr. Kerrigan, who opined that claimant's anthracosilicosis and chronic obstructive pulmonary disease/emphysema were due to coal mine employment.[4] The administrative law judge found that Dr. Kerrigan's opinion was unreasoned and undocumented because the doctor failed to explain what medical evidence he relied upon in reaching in his finding of pneumoconiosis. Decision and Order at 11. Further, the administrative law judge found that even though Dr. Kerrigan was claimant's treating physician, his opinion was not entitled to controlling weight as it was substantially contradicted by better reasoned evidence. *See* 20 C.F.R. §718.104(d)(5); *Lango v. Director, OWCP*, 104 F.3d

[3] The presumption at 20 C.F.R. §718.304 was inapplicable because there was no evidence of complicated pneumoconiosis in the record. Claimant was not entitled to the presumption at 20 C.F.R. §718.305 because this claim was filed after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 3. Lastly, as the claim was not a survivor's claim, the presumption at 20 C.F.R. §718.306 was inapplicable.

[4]As a result of a physical examination done on August 2, 2004, Dr. Levinson found that claimant did not have coal workers' pneumoconiosis and that his chronic obstructive pulmonary disease was due to cigarette smoking. In addition to a physical examination, Dr. Levinson's report is based on x-ray, pulmonary function study, blood gas study, history, and symptoms. Director's Exhibit 12.

Based on a February 9, 2006 physical examination, Dr. Rashid opined that claimant had emphysema due to anthracosilicosis and extensive coal mine exposure, but also found no silicosis, referring to Dr. Navani's negative x-ray reading of February 2, 2006. Dr. Rashid also opined that claimant's emphysema was due to his long and heavy smoking history. Dr. Rashid's opinion was based on physical examination, x-ray, pulmonary function study, blood gas study, ekg, symptoms, and history. Director's Exhibit 31. The administrative law judge, as fact-finder, permissibly found that Dr. Rashid opined that claimant did not have pneumoconiosis or a coal mine induced respiratory disease. *See Brown v. Director, OWCP*, 7 BLR 1-730, 1-733 (1985).

573, 577, 21 BLR 2-12, 2-20 (3d Cir. 1997)(administrative law judge may permissibly require the treating physician to provide more than a conclusory opinion); *see also Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 11-12; Director's Exhibits 12, 31. The administrative law judge also permissibly accorded no weight to the opinion of Dr. Talati, which was the only opinion submitted in the prior claim to find that claimant had pneumoconiosis, because he found Dr. Talati's opinion, that claimant's pulmonary impairment was due to both smoking and coal mine employment, to be based on four years of coal mine employment, which was an inaccurate length of coal mine employment. *See Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997); *Lango*, 104 F.3d at 577, 21 BLR at 2-20; *Tedesco v. Director*, OWCP, 18 BLR 1-103 (1994); *Clark*, 12 BLR at 1-155; *Anderson*, 12 BLR 1-113; *Addison v. Director, OWCP*, 11 BLR 1-68 (1988) (administrative law judge may discredit doctor's opinion on etiology of impairment if doctor relies on an inaccurate coal mine employment history); Decision and Order at 10-11, 15; Director's Exhibit 1; Claimant's Exhibits 1, 2. Further, considering the x-ray and medical opinion evidence together, the administrative law judge found that it failed to establish the existence of pneumoconiosis at Section 718.202(a). *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d. Cir. 1997). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a).[5]

[5] The administrative law judge properly noted that as claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement, he need not consider the cause of pneumoconiosis or whether claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §§718.203 and 718.204(c). *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); Decision and Order at 15.

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

BETTY JEAN HALL
Administrative Appeals Judge