BRB No. 05-0733 BLA

EDD T. CARROLL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
VOLUNTEER MINING CORPORATION	)	
	)	DATE ISSUED: 05/12/2006
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 Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

Edd T. Carroll, Wartburg, Tennessee, *pro se*.

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

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (04-BLA-5440) of Administrative Law Judge Stephen L. Purcell rendered on a subsequent claim[1] filed pursuant to the provisions of Title IV of the Federal

[1] Claimant's initial claim for benefits, filed on February 19, 1980, was denied on December 15, 1980 because claimant did not establish any element of entitlement. Director's Exhibit 1. Claimant requested and was granted additional time in which to decide whether to submit additional evidence or appeal the denial. Thereafter, there is no indication that he further pursued his 1980 claim. Claimant's second claim, filed on March 10, 2000, was denied on June 8, 2000 because claimant did not establish any

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 seven years of coal mine employment.[2] The administrative law judge found that the medical evidence developed since the prior denial of benefits established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), an element of entitlement that was previously decided against claimant. *See* 20 C.F.R. §725.309(d); *White v. New White Coal Co.,* 23 BLR 1-1, 1-3 (2004). Reviewing all of the medical evidence of record, the administrative law judge found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to claimant's appeal.

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, 1-177 (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 the Act, claimant must demonstrate by a preponderance of the evidence 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, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered the x-ray readings of record in light of the readers' radiological qualifications. The

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element of entitlement. Director's Exhibit 2. Claimant filed his current claim on May 10, 2002. Director's Exhibit 3.

[2] The record indicates that claimant's coal mine employment occurred in Tennessee. Director's Exhibits 5, 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, 1-202 (1989)(*en banc*).

administrative law judge accurately noted that the September 10, 1980 and May 1, 2000 x-rays submitted in claimant's two prior claims received only negative readings. Decision and Order at 12; Director's Exhibits 1, 2.

Three new x-rays, taken on July 15, 2002, April 21, 2003, and July 3, 2003, were submitted in claimant's current claim. The administrative law judge accurately noted that "Dr. Kelly, who is neither a B-reader nor a [B]oard-certified radiologist," read the July 15, 2002 x-ray as positive for pneumoconiosis, and that "Dr. Bosak, who is also not a B-reader or a [B]oard-certified radiologist, found interstitial markings" on the April 21, 2003 x-ray.[3] Decision and Order at 10; Director's Exhibits 13, 17. The administrative law judge properly considered, however, that these x-rays were read as negative for pneumoconiosis by "more highly qualified physicians . . . ." Decision and Order 10; *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993).

Substantial evidence supports the administrative law judge's finding. Dr. Perme, who is qualified as a Board-certified radiologist and B-reader, read the July 15, 2002 x-ray as negative for pneumoconiosis. Director's Exhibit 14. Similarly, Dr. Wiot, who is a Board-certified radiologist and B-reader, read the April 21, 2003 x-ray as negative for pneumoconiosis. Employer's Exhibit 3. As the administrative law judge noted, neither Dr. Kelly nor Dr. Bosak possesses radiological qualifications. The July 3, 2003 x-ray was read as negative for pneumoconiosis by Dr. Wiot, and as negative by Dr. Spitz, who is also a Board-certified radiologist and B-reader. Employer's Exhibits 1, 2. The administrative law judge conducted a proper qualitative analysis of the x-ray readings, and substantial evidence supports his finding that the x-ray evidence did not establish the existence of pneumoconiosis. *See Staton*, 65 F.3d at 59, 19 BLR at 2-279-80; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; *White*, 23 BLR at 1-4-5. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(2),(a)(3), the administrative law judge accurately determined that there were no biopsy or autopsy results to be considered, and that none of the presumptions listed at 20 C.F.R. §718.202(a)(3) was applicable in this living miner's claim filed after January 1, 1982 in which the record contained no evidence of complicated pneumoconiosis. We therefore affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2), (a)(3).

[3] Dr. Bosak's findings of "interstitial markings" and "fibrotic changes" are not positive x-ray classifications for the existence of pneumoconiosis under the regulations. *See* 20 C.F.R. §718.102(b); Director's Exhibit 17.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the opinions of seven physicians. Drs. Kelly and Bosak diagnosed claimant with pneumoconiosis, while Drs. Swann, Hudson, Repsher, and Fino concluded that he does not have pneumoconiosis. Director's Exhibits 1, 2, 13, 17; Employer's Exhibits 5, 6. Additionally, Dr. Crater diagnosed "emphysema of uncertain etiology" and noted a "[s]uggestion on x-ray" of "markings worrisome for coal workers' pneumoconiosis." Director's Exhibit 17 at 8.

Substantial evidence supports the administrative law judge's finding that the opinions of Drs. Kelly, Bosak, and Crater were "insufficient to meet Claimant['s] burden of proof" to establish the existence of pneumoconiosis. Decision and Order at 10. Specifically, the administrative law judge was within his discretion to find that Dr. Kelly's and Dr. Bosak's reports were not well-reasoned or documented, because "these physicians appear[ed] to rely heavily upon their own positive readings of chest x-rays," when "more highly qualified physicians" read those x-rays as negative for pneumoconiosis. Decision and Order at 10; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); *Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985). Substantial evidence supports the administrative law judge's finding. Director's Exhibits 13, 17 at 2. Additionally, the administrative law judge properly discounted Dr. Kelly's and Dr. Bosak's opinions because he found that "neither physician sufficiently explained why the symptoms they found to be present were the result of coal mine dust exposure as opposed to Claimant's smoking history." Decision and Order at 10; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983) *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Further, the administrative law judge permissibly found Dr. Crater's opinion to be "equivocal." Decision and Order at 10; *see Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000); *Justice v. Island Creek Coal Co*., 11 BLR 1-91, 1-94 (1988).

As the administrative law judge permissibly discounted the only medical opinions diagnosing pneumoconiosis, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(4).

In reviewing the administrative law judge's Decision and Order Denying Benefits, the Board has considered claimant's letter alleging that employer was permitted to submit excessive evidence. Review of the administrative law judge's Decision and Order reflects that the administrative law judge enforced the evidentiary limitations at 20 C.F.R. §725.414 in all respects save one. The administrative law judge considered two additional negative readings of the July 15, 2002 x-ray by Drs. Wiot and Spitz, which were submitted by employer. Decision and Order at 5; Director's Exhibit 14. These two readings appear to exceed employer's limit under 20 C.F.R. §725.414, in view of the

other x-ray readings that employer had already submitted.[4] However, even were these two readings excluded, the administrative law judge's finding as to the weight of the x-ray evidence under 20 C.F.R. §718.202(a)(1) is supported by substantial evidence. The administrative law judge found Dr. Perme's admissible, negative reading of the July 15, 2002 x-ray supported by his superior credentials.[5] Consequently, any error by the administrative law judge in admitting Dr. Wiot's and Dr. Spitz's readings at Director's Exhibit 14 was harmless in this case. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a miner's claim under Part 718, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

[4] The district director returned these two readings to employer because they exceeded employer's limits under 20 C.F.R. §725.414, Director's Exhibits 36, 45, yet for reasons not reflected by the record, they remained in the record at Director's Exhibit 14. At the hearing, employer did not designate Dr. Wiot's reading as evidence on its evidence summary form submitted to the administrative law judge. Although employer did designate Dr. Spitz's reading as excess evidence that should be admitted for good cause under 20 C.F.R. §725.456(b)(1), the administrative law judge found that good cause was not established and excluded Dr. Spitz's reading. Hearing Tr. at 17. Arguably, employer would have been entitled to one additional interpretation of the July 15, 2002 x-ray as rebuttal evidence. 20 C.F.R. §725.414(a)(3)(ii).

[5] The record reflects that employer designated Dr. Perme's x-ray reading as employer's rebuttal to the complete pulmonary evaluation x-ray taken and read by Dr. Kelly on July 15, 2002. Employer was entitled to submit Dr. Perme's rebuttal reading under 20 C.F.R. §725.414(a)(3)(ii).

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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JUDITH S. BOGGS
Administrative Appeals Judge