BRB Nos. 05-0927 BLA
and 05-0927 BLA-A

DAVID C. PRUETT	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 05/23/2006
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams, and Rutherford), Norton, Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Denying Benefits (05-BLA-5170) of Administrative Law Judge Thomas M. Burke 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 that this case involves the filing of a subsequent claim on October 25, 2002, pursuant to

20 C.F.R. §725.309.[1] The administrative law judge then credited claimant with twenty-three years of coal mine employment, based on a stipulation of the parties, and adjudicated the claim pursuant to 20 C.F.R. Part 718. Initially, the administrative law judge rejected employer's argument that claimant's 1986 claim was improperly withdrawn, finding that claimant's request to withdraw his 1986 claim was properly granted in 1988 and, therefore, is considered not to have been filed. Weighing the newly submitted evidence, the administrative law judge found that claimant established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Consequently, he found that claimant established the element of entitlement previously adjudicated against him in the denial of his 1981 claim and, thus, the administrative law judge considered the merits of the instant claim *de novo*. Addressing the merits of entitlement, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis. In particular, claimant contends that the administrative law judge erred in according Dr. Rasmussen's opinion, that claimant is suffering from pneumoconiosis, little weight. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has submitted a letter stating that he is not responding on the merits of the appeal.

Employer, in a cross-appeal, contends that claimant's 1986 claim was not properly withdrawn and, therefore, should be considered an effective denial and not a withdrawn

[1] Claimant filed his initial application for benefits on January 20, 1981, which was denied by the district director on April 20, 1981, because claimant failed to establish a totally disabling respiratory impairment. Director's Exhibit 2. Claimant filed a second application for benefits on March 20, 1986, which was denied by the district director on August 18, 1986. Director's Exhibit 2. On September 3, 1986, claimant requested a formal hearing, and the case was transferred to the Office of Administrative Law Judges on April 30, 1987. Director's Exhibit 2. Employer submitted a Motion for Removal, requesting that the case be removed to the Board under *Lukman v. Director, OWCP*, 11 BLR 1-71 (1988). By Order dated July 25, 1988, the administrative law judge held that he would reserve the motion until the validity of *Lukman* was determined and, that he would hold a hearing in order to ensure claimant his day in court as well as preserve claimant's testimony. Director's Exhibit 2. However, by Order dated August 22, 1988, the administrative law judge granted claimant's August 16, 1988 request that his claim be withdrawn. In a letter dated September 29, 1988, the claims examiner notified the parties that the claim was being withdrawn per the administrative law judge's Order.

claim. In addition, employer contends that the administrative law judge erred in finding that the medical evidence established a totally disabling respiratory impairment and, thus, one of the elements previously adjudicated against claimant in this subsequent claim. Employer, however, further states that if the administrative law judge's denial of benefits is affirmed, the Board need not address its cross-appeal. Neither claimant nor the Director has responded to employer's cross-appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

Employer, in its cross-appeal, contends that claimant's 1986 application was not properly withdrawn because the district director's proposed Decision and Order constitutes a determination on the merits and, therefore, the disposition of the case should be considered an effective denial and not a withdrawn claim. This contention lacks merit. Because claimant appealed the district director's proposed Decision and Order within 30 days, by requesting a formal hearing with the Office of Administrative Law Judges, the district director's proposed decision did not become a final determination. 20 C.F.R. §725.419(a), (d); *Lester v. Peabody Coal Co*, 22 BLR 1-184, 1-190 n.7 (2002)(*en banc*). Consequently, claimant's request to withdraw his 1986 claim was properly granted as there had not yet been a final determination on the merits by an adjudicative officer. 20 C.F.R. §725.419(a), (d); *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-194, 1-200 (2002)(*en banc*); *Lester*, 22 BLR at 1-191.

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to Section 718.202(a)(4), the administrative law judge found that the weight of the medical opinion evidence does not support a finding of pneumoconiosis. Decision and Order at 14. The administrative law judge found that the record contained the medical opinions of four physicians, Drs. Mullins and Rasmussen, both of whom diagnosed the existence of clinical and legal pneumoconiosis, and the contrary opinions of Drs. Castle and Hippensteel, that claimant does not suffer from pneumoconiosis. Decision and Order at 11-14; Director's Exhibits 14, 38; Claimant's Exhibit 1; Employer's Exhibits 1, 9, 10. The administrative law judge accorded little weight to the

medical opinions of Drs. Mullins and Rasmussen, finding that their diagnoses of clinical pneumoconiosis were based on their positive x-ray interpretations which were at odds with the x-ray evidence of record. Decision and Order at 14. In addition, he accorded little weight to these opinions on the issue of the presence of legal pneumoconiosis, finding that the physicians failed to adequately explain their conclusions that claimant suffers from legal pneumoconiosis, other than to note claimant's history of coal mine employment. Decision and Order at 14. Rather, the administrative law judge accorded determinative weight to the contrary opinions of Drs. Castle and Hippensteel, that claimant does not suffer from either clinical or legal pneumoconiosis, finding these opinions reasoned and documented because they were better supported by the underlying documentation of record and because the physicians fully explained their conclusions. Decision and Order at 14. Consequently, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis.

In challenging the administrative law judge's denial of benefits, claimant contends generally that the administrative law judge erred in weighing the medical opinion evidence pursuant to Section 718.202(a)(4). Specifically, claimant contends that the administrative law judge erred in according little weight to the medical opinion of Dr. Rasmussen, arguing that because the administrative law judge credited this opinion at total disability, he erred in not also crediting it in determining whether claimant established the existence of pneumoconiosis and, thus, has not considered the report in its entirety. Claimant's Brief at 4. In addition, claimant contends that the administrative law judge should have found Dr. Rasmussen's diagnosis of pneumoconiosis reasoned based on his experience in the diagnosis and treatment of individuals with pneumoconiosis. *Id*. These contentions lack merit.

Contrary to claimant's contention, the administrative law judge considered the entirety of Dr. Rasmussen's report, including the underlying documentation on which the physician relied, and reasonably exercised his discretion as trier-of-fact in finding that Dr. Rasmussen failed to adequately explain his diagnosis of pneumoconiosis. Decision and Order at 11-12, 14; Claimant's Exhibit 1; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Thus, it was not irrational for the administrative law judge to accord Dr. Rasmussen's opinion less weight on issue of the existence of pneumoconiosis, even though he credited this same physician's opinion as reasoned and documented on the issue of total disability. *See Luketich v. Director, OWCP*, 8 BLR 1-477, 1-480 n.3 (1986). Moreover, contrary to claimant's contention, because the administrative law judge rationally found that Dr. Rasmussen's opinion was not a reasoned or documented opinion and, thus, not credible, he was not required to defer to Dr. Rasmussen's opinion based on his experience in examining and treating individuals with pneumoconiosis. *Hicks*, 138 F.3d 524, 21 BLR

2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *Underwood* 105 F.3d 946, 21 BLR 2-23; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Because claimant does not otherwise challenge the administrative law judge's weighing of the medical opinion evidence and his crediting of the opinions of Drs. Hippensteel and Castle, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Because we have affirmed the administrative law judge's findings that the medical evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement, we must also affirm the denial of benefits. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. In light of this disposition of claimant's appeal, we need not reach the arguments raised in employer's cross-appeal regarding the administrative law judge's Section 718.204(b)(2) findings.

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