BRB No. 07-0169 BLA

D.R.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
J & S COLLIERIES, INCORPORATED	)	
	)	DATE ISSUED: 09/21/2007
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 of William S. Colwell, Administrative Law Judge, United States Department of Labor.

D.R.S., Mouthcard, Kentucky, *pro se*.

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

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (04-BLA-6275) of Administrative Law Judge William S. Colwell 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). This case involves a claim filed on November 1, 2002. After crediting claimant with twenty years of coal mine employment, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a 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. Failure to establish any one of these elements precludes entitlement. *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*).

The administrative law judge correctly found that there were no positive x-ray interpretations in the record.[1] Decision and Order at 16. Consequently, we affirm the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Because there is no biopsy evidence of record, the administrative law judge accurately found that claimant could not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 16. Furthermore, the

[1] The record contains interpretations of three x-rays taken on March 12, 2003, December 4, 2003, and June 17, 2004. Drs. West and Poulos, each dually qualified as a B reader and Board-certified radiologist, interpreted claimant's March 12, 2003 x-ray as negative for pneumoconiosis. Director's Exhibit 11; Employer's Exhibit 5. Dr. Barrett, a B reader and Board-certified radiologist, interpreted this x-ray for quality purposes only. Director's Exhibit 12. Dr. Fino, a B reader, interpreted claimant's December 4, 2003 x-ray as negative for pneumoconiosis. Employer's Exhibit 3. Dr. Rosenberg, a B reader, interpreted claimant's June 17, 2004 x-ray as negative for pneumoconiosis. Employer's Exhibit 1.

administrative law judge properly found that claimant was not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3).[2] *Id.*

A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[3] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In this case, the medical opinion evidence does not contain any diagnoses of clinical pneumoconiosis.

In considering whether the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge reviewed the reports and deposition testimony of Drs. Mettu, Fino, and Rosenberg. The administrative law judge credited the opinions of Dr. Fino and Rosenberg, that claimant does not suffer from a lung condition attributable to his coal dust exposure,[4] over Dr. Mettu's contrary opinion,[5] based upon their superior qualifications.[6] *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Because Drs. Fino

[2] Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed this claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, because this claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

[3] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[4] During a March 30, 2004 deposition, Dr. Fino opined that claimant did not suffer from any respiratory or pulmonary impairment attributable to his coal dust exposure. Employer's Exhibit 4 at 10. During an October 7, 2004 deposition, Dr. Rosenberg opined that claimant did not suffer from either clinical or legal pneumoconiosis. Employer's Exhibit 2 at 25.

[5] In a report dated March 24, 2003, Dr. Mettu diagnosed chronic bronchitis. Director's Exhibit 11. Dr. Mettu attributed claimant's chronic bronchitis to claimant's "working in the mines and smoking." *Id.*

[6] The administrative law judge accurately noted that Drs. Fino and Rosenberg are Board-certified pulmonary specialists. Decision and Order at 12; Employer's Exhibits 6, 7. Dr. Mettu's qualifications are not found in the record.

and Rosenberg explained why claimant's chronic obstructive pulmonary disease was not attributable to his coal dust exposure,[7] the administrative law judge also permissibly found that the opinions of Drs. Fino and Rosenberg were better reasoned than that of Dr. Mettu. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 17. Because it is supported by substantial evidence, the administrative law judge's finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) is affirmed.

In light of our affirmance of the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent*, 11 BLR at 1-27; *Gee*, 9 BLR at 1-5; *Perry*, 9 BLR at 1-2. Consequently, we need not address the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[7] Dr. Fino noted that Dr. Mettu's March 12, 2003 pulmonary function study showed a mild obstructive abnormality and that Dr. Mettu's March 12, 2003 arterial blood gas study showed moderate hypoxemia. Employer's Exhibit 4 at 9. Dr. Fino noted that, by the time that he administered pulmonary function and arterial blood gas studies on December 4, 2003, claimant's obstruction and hypoxemia had resolved. *Id.* Dr. Fino explained that one would not expect the extent of hypoxemia reported by Dr. Mettu to improve in nine months if it was attributable to coal dust inhalation. *Id.*

Because claimant's mild airflow obstruction normalized after the administration of a bronchodilator, Dr. Rosenberg opined that claimant did not suffer from chronic obstructive pulmonary disease or any impairment related to his coal dust exposure. Employer's Exhibit 1. Dr. Rosenberg attributed claimant's airway disease to his smoking history. *Id.* Dr. Rosenberg explained that claimant suffers from "a reversible form of lung disease which comes back to normal," a condition inconsistent with a diagnosis of legal pneumoconiosis. Employer's Exhibit 2 at 26.

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