BRB No. 09-0484 BLA

JOHN E. THOMAS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KEYSTONE SERVICE INDUSTRIES	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 03/12/2010
	)	
Employer/Carrier-Respondents	)	
	)	
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

John E. Thomas, Kimball, West Virginia, *pro se.*

Francesca Tan (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2009-BLA-5268) of Administrative Law Judge Linda S. Chapman on a subsequent 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).[1] The administrative law judge credited claimant with twenty-two years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[2] Considering the claim on the merits, the administrative law judge found that claimant failed to 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 his claim. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response unless specifically requested to do so by the Board.[3]

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

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[1] Brenda Yates, a benefits counselor with Stone Mountain Health Services of Oakwood, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Yates is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] Claimant has filed two previous claims for benefits. Director's Exhibits 1, 2. Claimant first filed a claim on September 25, 1992, which was denied by the district director on March 24, 1993, because claimant did not establish a totally disabling respiratory impairment. Director's Exhibit 1. Claimant took no action with regard to the denial of that claim until he filed a second claim on June 14, 1994. Director's Exhibit 2. This claim was denied by Administrative Law Judge Richard Stansell-Gamm on March 5, 1998, because the newly submitted evidence failed to establish a totally disabling respiratory impairment. *Id*. Claimant filed his current subsequent claim on January 5, 2007. Director's Exhibit 4. Although a formal hearing was scheduled for November 6, 2008, claimant requested that a decision be made without a hearing, and on the record. After reviewing the record, the administrative law judge issued her Decision and Order Denying Benefits on March 9, 2009, which is the subject of this appeal.

[3] The administrative law judge's findings that claimant has twenty-two years of coal mine employment and that the newly submitted evidence established total disability and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b), 725.309, are affirmed, as they are unchallenged on appeal and are favorable to claimant. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with applicable law.[4] 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

The regulation at 20 C.F.R. §718.202(a) provides four methods by which a claimant may establish the existence of pneumoconiosis: 1) x-ray evidence; 2) biopsy or autopsy evidence; 3) application of the presumptions contained in 20 C.F.R. §§718.304, 718.305 or 718.306; and 4) medical opinion evidence. 20 C.F.R. §718.202(a)(1)-(4). The United States Court of Appeals for the Fourth Circuit has further held that all relevant evidence is to be considered together, rather than merely within discrete subsections of 20 C.F.R. §718.202(a)(1)-(4), in determining whether a claimant has met his or her burden of establishing the existence of pneumoconiosis by a preponderance of the evidence. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge first considered whether claimant established the existence of pneumoconiosis based on the x-ray evidence. As noted by the administrative law judge, the record developed in conjunction with the current subsequent claim contains nine readings of five films dated December 20, 2005, January 31, 2007, July 18, 2007, December 13, 2007 and May 13, 2008.[5] Decision and Order at 4, 13-14. The administrative law judge found that the

[4] Because claimant's last coal mine employment was in West Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibits 1, 5.

[5] The administrative law judge noted, with respect to the x-ray evidence in claimant's previous claims, that the July 28, 1984 x-ray was read by Dr. Ranavaya, a B reader, as positive for pneumoconiosis and by Dr. Sargent, a Board-certified radiologist and B reader, and Dr. Gaziano, a B reader, as negative. Decision and Order at 13-14; Director's Exhibits 1, 2. She further noted that the January 6, 1993 x-ray was read by Dr.

December 20, 2005 x-ray did not establish the existence of pneumoconiosis as it was read by Dr. Eryilmaz as showing chronic obstructive pulmonary disease, and by Dr. Meyer, dually-qualified as a Board-certified radiologist and B reader, as negative for pneumoconiosis.[6] Decision and Order at 13; Claimant's Exhibit 2; Employer's Exhibit 10. The administrative law judge determined that the January 31, 2007 x-ray was read by Dr. Forehand, a B reader, as positive for pneumoconiosis, and by Dr. Wiot, a Board-certified radiologist and B reader, as negative for the disease.[7] Decision and Order at 13; Director's Exhibits 15, 18. Based on the superior qualifications of Dr. Wiot, the administrative law judge determined that the January 31, 2007 x-ray was negative. Decision and Order at 13.

The administrative law judge further determined that the July 18, 2007 x-ray failed to establish the existence of pneumoconiosis as it was read as negative by both Dr. Zaldivar, a B reader, and by Dr. Wiot. Decision and Order at 13; Director's Exhibit 19; Employer's Exhibit 4. Similarly, she found that the December 13, 2007 x-ray had only one reading by Dr. Fino, a B reader, which was negative for pneumoconiosis. Decision and Order at 13; Employer's Exhibit 2. Lastly, the administrative law judge found that the May 13, 2008 x-ray was read by Dr. Subramaniam, whose qualifications were not in the record, as positive for pneumoconiosis, and by Dr. Meyer, as negative. Decision and Order at 13; Claimant's Exhibit 1; Employer's Exhibit 11. Relying on the dual qualifications of Dr. Meyer, the administrative law judge concluded that the May 13, 2008 x-ray was negative. Decision and Order at 13.

The administrative law judge considered the x-ray evidence as a whole and found, based "on the superior qualifications of the dually qualified physicians," that the weight of the readings was negative for pneumoconiosis. Decision and Order at 14. Because the

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Gaziano as positive, and by Dr. Francke, a Board-certified radiologist and B reader, as positive. *Id*. Finally, she noted that the May 24, 1996 x-ray was read by Dr. Forehand, a B-reader, as negative. *Id*.

[6] A Board-certified radiologist is one who is certified as a radiologist or diagnostic roentgenologist by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. §718.202(a)(ii)(C). A "B reader" is a physician who has demonstrated designated levels of proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Safety and Health. *See* 42 C.F.R. §37.51.

[7] There is also a quality reading of this x-ray by Dr. Gaziano. Director's Exhibit 15.

administrative law judge properly performed both a qualitative and quantitative review of the x-ray evidence, taking into consideration the radiological qualifications of the physicians, we affirm her finding that claimant failed to establish the existence of pneumoconiosis by a preponderance of the x-ray evidence at 20 C.F.R. §718.202(a)(1). *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294 (2003).

Pursuant to 20 C.F.R. §718.202(a)(2), because there is no biopsy evidence of record, claimant is unable to establish the existence of pneumoconiosis under this subsection. 20 C.F.R. §718.202(a)(2). Additionally, pursuant to 20 C.F.R. §718.202(a)(3), the administrative law judge correctly found that the existence of pneumoconiosis cannot be established by the presumptions set forth at 20 C.F.R. §§718.304, 718.305 or 718.306.[8] 20 C.F.R. §718.202(a)(3); Decision and Order at 14.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered claimant's treatment records from Drs. Felsinger and Cofer. The administrative law judge correctly found that Dr. Felsinger treated claimant from 2002 to 2007, but did not diagnose clinical pneumoconiosis or any pulmonary impairment that arose out of coal mine employment. Employer's Exhibit 6. The administrative law judge noted that Dr. Cofer diagnosed chronic obstructive pulmonary disease and coal workers' pneumoconiosis in 1984, but reasonably found that Dr. Cofer "provided absolutely no basis for this summary notation." Decision and Order at 15; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989); Claimant's Exhibit 5.

The administrative law judge next considered whether the medical opinions established the existence of either clinical or legal pneumoconiosis.[9] Dr. Vasudevan

[8] The administrative law judge determined correctly that the irrebuttable presumption of total disability due to pneumoconiosis set forth at 20 C.F.R. §718.304 is not available in this case, as the record contains no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §718.304; Decision and Order at 14. The administrative law judge also rationally found that claimant is not eligible for the presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.305, as that presumption does not apply to a claim, such as this one, which was filed on or after January 1, 1982. *See* 20 C.F.R. §718.305; Decision and Order at 14. Lastly, the administrative law judge's determination that the presumption related to survivors' claims set forth at 20 C.F.R. §718.306 does not apply is correct, because this is not a survivor's claim. 20 C.F.R. §718.306; Decision and Order at 14.

[9]Pursuant to 20 C.F.R. §718.201:

examined claimant on January 6, 1993, in conjunction with a prior claim, and opined that claimant did not have pneumoconiosis. Director's Exhibit 1. Dr. Ranavaya examined claimant on July 28, 1994, in conjunction with a prior claim, and diagnosed pneumoconiosis, based on claimant's history of coal dust exposure and a positive x-ray reading. Director's Exhibit 2. Dr. Forehand examined claimant on January 27, 2005, at the request of the Department of Labor, and diagnosed pneumoconiosis, based on claimant's twenty-five year history of coal mine employment, shortness of breath, crackles heard in the chest, a positive x-ray and pulmonary function study results, which showed an obstructive respiratory defect. Director's Exhibit 15. Dr. Forehand diagnosed "cigarette smoker's lung disease," which he attributed to claimant's fifty year history of smoking. *Id*. Dr. Forehand opined that cigarette smoking "impaired claimant's lungs" but that exposure to coal dust "materially worsened [the] already damaged lungs and substantially aggravated claimant's shortness of breath." *Id*.

In contrast, Dr. Zaldivar examined claimant on July 18, 2007, and opined that there was no evidence to justify a diagnosis of clinical or legal pneumoconiosis. Director's Exhibit 19; Employer's Exhibit 9. Dr. Zaldivar opined that claimant suffers from a mild restriction of vital capacity, which he attributed to emphysema from smoking. Director's Exhibit 19. In addition, Dr. Fino examined claimant on December 13, 2007 and stated that there was "insufficient objective medical evidence to justify a diagnosis of coal workers' pneumoconiosis." Employer's Exhibit 2. He also concluded that "there is no intrinsic respiratory impairment present." *Id*.

> Clinical pneumoconiosis consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1). Under the terms of 20 C.F.R. §718.201(a)(2), legal pneumoconiosis is defined as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

In weighing the conflicting medical evidence, the administrative law judge found that claimant was unable to establish the existence of clinical pneumoconiosis. She permissibly gave less weight to the opinions of Drs. Forehand and Ranavaya, as she found that the weight of the credible x-rays was negative for pneumoconiosis and they based their diagnoses of clinical pneumoconiosis, in part, on positive x-rays that were read by more qualified radiologists as negative for the disease. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); Decision and Order at 14, 15.

Furthermore, the administrative law judge also acted within her discretion in finding that Dr. Forehand's opinion was outweighed by the opinions of Drs. Zaldivar and Fino on the issue of legal pneumoconiosis. *Clark*, 12 BLR at 1-153. The administrative law judge properly found that, although Dr. Forehand stated that there were factors that led him to conclude that "[claimant's] obstructive impairment was not due entirely to smoking" and was aggravated by coal dust exposure, "he did not indicate what those factors were." Decision and Order at 16.

The administrative law judge also reasonably assigned the opinions of Drs. Zaldivar and Fino, that claimant did not suffer from clinical or legal pneumoconiosis, controlling weight since she found that their opinions were reasoned and documented, and that they "explained in detail the factors that led them to conclude that [claimant's] test results, and his pulmonary symptoms, were secondary to the effects of his obesity" and smoking, but not coal dust exposure. Decision and Order at 16; *see Milburn Colliery Co. v. Hicks*, 138 3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Clark*, 12 BLR at 1-153; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Claimant has the burden to establish entitlement to benefits and bears the risk of non-persuasion if his evidence does not establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). The administrative law judge, as trier-of-fact, has discretion to make credibility determinations, and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Anderson*, 12 BLR at 1-111; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that the medical opinion

evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 16. We further affirm the administrative law judge's finding that the evidence, overall, fails to establish that claimant has pneumoconiosis. *See Compton*, 211 F.3d at 211, 22 BLR at 2-174; Decision and Order at 16. Because claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement, benefits are precluded. *Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge