BRB No. 06-0215 BLA

LEON ENGLE Claimant-Petitioner v. EARNEST COOK & SONS MINING, INCORPORATED and AMERICAN INTERNATIONAL SOUTH Employer/Carrier-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/05/2006 DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Leon Engle, Viper, Kentucky, *pro se*.

Timothy J. Walker (Ferreri & Fogle), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order – Denying Benefits (04-BLA-5488) of Administrative Law Judge Joseph E. Kane 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). In a Decision and Order dated October 24, 2005, the administrative law judge credited the miner with thirty

years of coal mine employment[1] and found that the evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), and failed to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not filed a brief in this 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 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 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).

In finding the x-ray evidence insufficient to establish the existence of pneumoconiosis, the administrative law judge properly noted that the relevant x-ray evidence of record consists of three readings of two x-rays.[2] Decision and Order at 4, 8. An August 12, 2002 x-ray was read once as positive by Dr. Baker, a B reader, and once as negative by Dr. Wiot, a dually qualified Board-certified radiologist and B reader. Director's Exhibits 10, 13. The administrative law judge permissibly found this x-ray to be negative based on Dr. Wiot's superior qualifications. *Staton v. Norfolk & Western Railway Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Dempsey v. Sewell*

[1] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 4. 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*).

[2] The August 12, 2002 x-ray was also read for quality only (Quality 1) by Dr. Barrett, a Board-certified radiologist and B reader. Director's Exhibit 12.

Coal Corp., 23 BLR 1-47, 1-65 (2004)(*en banc*); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc on recon.*); Director's Exhibits 10, 13; Decision and Order at 8. A November 11, 2003 x-ray was read as negative by Dr. Westerfield, a B reader. Employer's Exhibit 1. The administrative law judge permissibly found this x-ray to be negative based on Dr. Westerfield's uncontroverted B reading. *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Dempsey*, 23 BLR at 1-65; *Cranor*, 22 BLR at 1-7; Employer's Exhibit 1; Decision and Order at 8. The administrative law judge then found that the preponderance of the chest x-ray evidence does not establish the presence of pneumoconiosis. Decision and Order at 8. As the administrative law judge properly considered both the quantity and the quality of the x-ray readings of record, and permissibly concluded, based on the weight of the negative x-ray readings, that claimant failed to meet his burden of proof to establish the existence of pneumoconiosis by a preponderance of the x-ray evidence, *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Dempsey*, 23 BLR at 1-65; *Cranor*, 22 BLR at 1-7; Decision and Order at 8, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

The administrative law judge also found, correctly, that the record contains no biopsy evidence to be considered pursuant to 20 C.F.R. §718.202(a)(2), and that the presumptions set forth at 20 C.F.R. §§718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306; Decision and Order at 8.

Finally, the administrative law judge considered the medical reports of Drs. Baker and Westerfield pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge found that Dr. Baker conducted a physical examination and objective testing and in a report dated August 12, 2002, diagnosed clinical coal workers' pneumoconiosis as well as hypoxemia and chronic bronchitis, due in part to coal dust exposure. Director's Exhibit 10; Decision and Order at 5, 9. By contrast, in a report dated November 11, 2003, and in his deposition testimony given on February 6, 2004, Dr. Westerfield opined that claimant does not suffer from either clinical coal workers' pneumoconiosis or any coal dust related respiratory condition. Employer's Exhibits 1, 2; Decision and Order at 5-6, 9-10. The administrative law judge noted that in addition to the results of his own findings on physical examination and objective testing, Dr. Westerfield had also reviewed the other medical evidence of record, including Dr. Baker's medical testing and findings. Decision and Order at 6, 9.

In evaluating the conflicting medical opinions, the administrative law judge acted within his discretion in finding that Dr. Baker's diagnosis of coal workers' pneumoconiosis was based solely on abnormal x-ray and history of coal dust exposure, and, therefore, did not constitute a reasoned opinion. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); Decision and Order at 9. In addition, the

administrative law judge permissibly accorded determinative weight to Dr. Westerfield's opinion, that claimant does not suffer from any coal dust related respiratory or pulmonary condition, because the administrative law judge found Dr. Westerfield's conclusions to be better reasoned, more comprehensive and better supported by the probative objective evidence of record than those of Dr. Baker. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 9.

It is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Because the administrative law judge examined each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6, and explained whether the diagnoses contained therein constituted reasoned medical judgments under 20 C.F.R. §718.202(a)(4), we affirm the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Cornett*, 227 F.3d at 576, 22 BLR at 2-120; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Consequently, we affirm the administrative law judge's finding that the existence of pneumoconiosis, an essential element of entitlement, was not established pursuant to 20 C.F.R. §718.202(a). We therefore affirm the administrative law judge's denial of benefits.

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