BRB No. 04-0707 BLA

CHARLES H. OWENS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SOUTH AKERS MINING COMPANY	)	
	)	DATE ISSUED: 04/27/2005
and	)	
	)	
AMERICAN INTERNATIONAL SOUTH COMPANY	)	
	)	
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 of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

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

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

PER CURIAM**:**

Claimant appeals the Decision and Order (03-BLA-5380) of Administrative Law Judge Pamela Lakes Wood 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). The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1)-

(4). 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 pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). 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.[1]

The Board 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).

After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the evidence of record, we conclude that substantial evidence supports the administrative law judge's denial of benefits under 20 C.F.R. Part 718. The administrative law judge found that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). We reject claimant's contention that the administrative law judge erred in not according greater weight to Dr. Martin's diagnosis of pneumoconiosis based upon his status as claimant's treating physician. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims.[2] 20 C.F.R.

[1]Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Moreover, claimant's statements neither raise any substantive issue nor identify any specific error on the part of the administrative law judge in determining that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Consequently, we also affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *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).

[2]Section 718.104(d) provides that an adjudicator must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. 20 C.F.R. §718.104(d). The United States Court of Appeals for the Sixth Circuit has recognized that this provision codifies judicial precedent and does not work a substantive change in the law. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002).

§718.104(d); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). The Sixth Circuit has held that the opinions of treating physicians should be given the deference they deserve based upon their power to persuade. *Id.* The Sixth Circuit explained that the case law and applicable regulatory scheme clearly provide that the administrative law judge must evaluate treating physicians just as they consider other experts. *Id.* Although the administrative law judge recognized Dr. Martin's status as claimant's treating physician, he found that his opinion was not entitled to "controlling weight under 20 C.F.R. §718.104(d)." *See* Decision and Order at 10. The administrative law judge acted within her discretion in according less weight to Dr. Martin's diagnosis of pneumoconiosis because the May 8, 2003 x-ray that he interpreted as positive for pneumoconiosis was interpreted by Dr. Poulos, a better qualified physician, as negative for pneumoconiosis, thus calling into question the reliability of his opinion. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984)*; Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order at 10; Claimants Exhibit 3.

The administrative law judge similarly acted within her discretion in discrediting the diagnoses of pneumoconiosis rendered by Drs. Baker and Simpao because the respective x-rays that these physicians interpreted as positive for pneumoconiosis were interpreted by better qualified physicians as negative for pneumoconiosis, thus calling into question the reliability of their opinions. *See Sheckler*, *supra; Arnoni*, *supra*; *White*, *supra*; Decision and Order at 10-12; Director's Exhibit 10; Claimant's Exhibit 1. Because the administrative law judge permissibly discredited the diagnoses of pneumoconiosis rendered by Drs. Martin, Baker and Simpao,[3] the only medical evidence supportive of a finding of clinical pneumoconiosis, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis.[4] *See* 20 C.F.R. §718.202(a)(4).

[3]Claimant contends that the administrative law judge erred in not recognizing Dr. Simpao's qualifications as a Board-certified pulmonologist. However, because the administrative law judge's basis for discrediting Dr. Simpao's opinion is not dependent upon his qualifications, we hold that the administrative law judge's error, if any, in not recognizing Dr. Simpao's qualifications as a Board-certified pulmonologist, is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[4]The administrative law judge also found that Dr. Baker's opinion was insufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See* Decision and Order at 11; Director's Exhibit 10. Because this finding is not challenged on appeal, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Because Dr. Baker's opinion is the only opinion which, if credited, could support a finding of legal pneumoconiosis, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of legal

In light of our affirmance of the administrative law judge's findings that the evidence is insufficient to 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 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*).

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

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pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).