

BRB No. 04-0720 BLA

EDWARD MERRILL)	
)	
Claimant-Petitioner)	
v.)	
)	
MANALAPAN MINING COMPANY)	DATE ISSUED: 04/26/2005
)	
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 Denying Benefits of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Paul E. Jones (Jones, Walyers, Turner & Shelton, PLLC), Pikesville, Kentucky, for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor, Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (03-BLA-5089) of Administrative Law Judge Mollie W. Neal (the administrative law judge) 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 pursuant to 20

C.F.R. §718.202(a) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied the claim.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (4) and total disability pursuant to Section 718.204(b).¹ Claimant also contends that the administrative law judge erred in admitting x-rays, doctors' interpretations of x-rays, and medical opinions, submitted by employer, in excess of the regulatory limitations set forth in 20 C.F.R. §725.414. Additionally, claimant contends that the Director, Office of Workers' Compensation Programs, (the Director) failed to provide him with a complete and credible pulmonary evaluation pursuant to Section 413(b) of the Act. Employer responds, urging affirmance of the administrative law judge's award of benefits. The Director responds, asserting that any error made by the administrative law judge in admitting evidence from employer in excess of the evidentiary limitations is harmless, since, even if such evidence were excluded, the other evidence failed to establish the existence of pneumoconiosis. The Director further contends that Dr. Hussain's medical report satisfied his obligation to provide claimant with a complete and credible pulmonary evaluation pursuant to Section 413(b) of the Act.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe 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 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, 718.201, 718.202, 718.203, 718.204. Failure to establish any 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*).

Claimant contends that the administrative law judge erred in failing to find that the x-ray evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

¹ Contrary to claimant's contention, however, the administrative law judge did find that claimant established total respiratory disability based on the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 13-14.

Specifically, claimant asserts that the administrative law judge improperly relied upon the interpretations by physicians with superior credentials and the numerical superiority of the negative x-ray readings, noting that the Board has held that an administrative law judge is not required to defer to doctors with superior qualifications, nor to accept as conclusive the numerical superiority of negative x-ray interpretations. Claimant's Brief at 3-4. Claimant's contentions have no merit.

The administrative law judge considered the eleven interpretations of the six x-rays of record, in conjunction with the readers' radiological qualifications, and noted that there were seven negative interpretations and four positive interpretations.² Decision and Order at 3-5. Additionally, the administrative law judge noted that of the seven negative x-ray readings, three were by physicians who were Board-certified radiologists and B-readers and four were by B-readers. Decision and Order at 3-5; Director's Exhibits 13, 14, 17, 18; Employer's Exhibits 1, 2, 12. The administrative law judge then found that the record contained only four positive readings, all by physicians who possessed no special radiological qualifications. Decision and Order at 5; Director's Exhibits 12, 31; Claimant's Exhibits 1, 2. In weighing the conflicting evidence, the administrative law judge permissibly exercised his discretion, as trier-of-fact, by giving greater weight to the interpretations of those physicians who possessed superior radiological qualifications than to the interpretations of those physicians who possessed no special radiological qualifications. This was a proper qualitative and quantitative analysis of the x-ray interpretation evidence. *See* 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk and Western Railway Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Decision and Order at 5. The administrative law judge's finding that the x-ray evidence failed to establish the existence of pneumoconiosis is, therefore, affirmed.

Claimant next contends that the administrative law judge erred in not crediting the opinion of Dr. Baker, claimant's treating physician. Claimant asserts that Dr Baker's opinion is based on a thorough physical examination, review of claimant's medical and work histories, results of a pulmonary function and arterial blood gas study, and chest x-ray and that the administrative law judge erred, therefore, in rejecting it as based solely on his

² Dr. Sargent reread Dr. Hussain's May 16, 2001 x-ray, and noted only that the film quality was "1", the highest quality possible, without commenting on whether the film was positive or negative for pneumoconiosis. Director's Exhibit 12.

positive x-ray interpretation. Claimant also asserts that the administrative law judge did not accord Dr. Baker's opinion appropriate weight based on Dr. Baker's status as claimant's treating physician. Claimant's Brief at 4-5.

In addressing the medical opinion evidence pursuant to Section 718.202(a)(4), the administrative law judge found that Drs. Baker and Hussain opined that claimant suffered from pneumoconiosis whereas Drs. Dahhan, Broudy and Branscomb opined that claimant did not have pneumoconiosis. Decision and Order at 8-10; Director's Exhibits 5, 12, 13, 16, 18; Claimant's Exhibits 1, 2; Employer's Exhibits 2, 4, 6 and 7. The administrative law judge accorded less weight to the opinion of Dr. Baker because he found that his diagnosis of coal workers' pneumoconiosis was based solely on an x-ray and a history of coal dust exposure and that this finding was contradicted by the preponderance of negative readings by the more highly qualified physicians, including the negative rereading by Dr. Wheeler, a Board-certified, B-reader, of the same x-ray read positive by Dr. Baker. Decision and Order at 4, 7. Regarding Dr. Baker's diagnosis of a pulmonary impairment due at least in part to coal mine employment, the administrative law judge found that Dr. Baker failed to adequately discuss this finding or the supporting documentation for it, and failed to explain how he was able to determine that the impairment suffered was due to coal dust exposure, as opposed to tobacco abuse, and failed to discuss the effect of Claimant's morbid obesity on claimant's pulmonary capacity, as was discussed by Drs. Dahhan, Broudy, and Branscomb. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003); *Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-216, 1-226 (2002)(*en banc*); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). Decision and Order at 9-10. In according greater weight to the opinions of Drs. Dahhan, Broudy and Branscomb, the administrative law judge stated:

I find their reasoning and explanation in support of their conclusions more complete and thorough than that provided by Drs. Baker and Hussain. Thus, Drs. Broudy, Dahhan, and Branscomb were better able to explain how all of the evidence they developed and/or reviewed supported their conclusions. I find that the credible and well reasoned opinions are convincing for the purposes of establishing that the Claimant does not have pneumoconiosis or any other respiratory or pulmonary impairment arising out of coal mine work.

Decision and Order at 10.

The administrative law judge did not, therefore, err in according less weight to the opinion of Dr. Baker. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Williams*, 338 F. 2d 501, 22 BLR 2-625; *Worhach*, 17 BLR at 1-110; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Clark*, 12 BLR at 1-155; *Cooper v. Director, OWCP*, 11 BLR 1-95 (1988)(Ramsey,

CJ, concurring). Nor, contrary to claimant's contention, was the administrative law judge required to accord greater weight to Dr. Baker's opinion as claimant's treating physician, when he found it to be less reasoned than the other opinions of record. *See* 20 C.F.R. §718.104(d)(5); *Williams*, 338 F.3d 501, 22 BLR 2-625.

Claimant also contends that the administrative law judge erred by admitting into evidence, x-rays, x-ray readings, and medical opinions obtained by employer in excess of those permitted by Section 725.414.³ We accept the Director's argument, however, that even if the administrative law judge erred by admitting evidence from employer in excess of the evidentiary limitations at Section 725.414, such error would be harmless, as the remaining evidence supports the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Staton*, 65 F. 3d 55, 19 BLR 2-271; *Woodward*, 991 F. 2d 314, 17 BLR 2-77; *Edmiston*, 14 BLR 1-65; *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). In addition, we reject claimant's contention that the administrative law judge may have "selectively analyzed" the x-ray evidence. Claimant's Brief at 4. Claimant cites to no example in the administrative law judge's decision or in the record to support this speculation. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986).

Additionally, claimant asserts that because the administrative law judge did not credit Dr. Hussain's May 16, 2001 medical opinion, which was provided claimant by the Director, "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 8. The Director responds that he "is only required to provide claimant with a complete and credible examination, not a dispositive one." Director's Brief at 4. The record reflects that Dr. Hussain conducted an examination and a full range of testing required by the regulations, and that he addressed each element of entitlement of the Department of Labor examination form. *See* 20 C.F.R. §§718.101(a); 718.104, 725.406(a); Director's Exhibit 12. Claimant

³ In support of its affirmative case, employer submitted, and the administrative law judge admitted into the record, x-ray interpretations from Dr. Dahhan of the January 16, 2003 x-ray, Employer's Exhibit 2, from both Drs. Broudy and Branscomb of the April 3, 2001 x-ray, Director's Exhibits 13, 18 and from Dr. Stallard of the March 3, 1977 x-ray. Director's Exhibit 14. Employer submitted, and the administrative law judge admitted, three medical reports; one each by Dr. Dahhan, Employer's Exhibit 2, Dr. Broudy, Director's Exhibit 13; Employer's Exhibit 7, and Dr. Branscomb, Director's Exhibit 16.

does not allege that the evaluation was incomplete and the administrative law judge did not find that Dr. Hussain's report was incomplete.

In weighing the medical opinion evidence, the administrative law judge found that Dr. Hussain's report was outweighed by opinions which were found to be better reasoned and "more complete and thorough." Decision and Order at 10. Thus, the administrative law judge did not reject Dr. Hussain's opinion. The administrative law judge "did not [accord] greater weight" to Dr. Hussain's diagnosis of pneumoconiosis because the administrative law judge found it to be based on Dr. Hussain's positive reading of an x-ray which was subsequently reread negative by better qualified readers and because the preponderance of the x-ray readings were negative for the existence of pneumoconiosis. Decision and Order at 10; *see Williams*, 338 F. 3d at 514, 22 BLR 2-644. As the Director asserts, the mere fact that the administrative law judge found other medical opinions more persuasive does not mean that the Director failed to satisfy his statutory obligation. The Act requires that "[e]ach miner who files a claim...be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406. The Director only fails to meet this duty where "the administrative law judge finds a medical opinion incomplete", or where "the administrative law judge finds that the opinion, although complete, lacks credibility", and is not entitled to any weight at all. *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88, n.3 (1994), *see also Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984). In the instant case, Dr. Hussain's report was complete and the administrative law judge did not find that it completely lacked credibility. We reject, therefore, claimant's contention that the Director did not fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. *See Hodges*, 18 BLR at 1-93.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element of entitlement. *See Trent*, 11 BLR at 1-27; *White v. Director, OWCP*, 6 BLR 1-368 (1983). Further, the administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Anderson*, 12 BLR at 1-113; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20(1988); *Short v. Westmoreland Coal Co.*, 1- BLR 1-127 (1987). Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a miner's claim under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. *See Trent*, 11 BLR at 1-29; *Perry*, 9 BLR at 1-2.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge