BRB No. 04-0743 BLA

RUSSELL MORGAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NALLY & HAMILTON ENTERPRISES	)	
	)	
and	)	
	)	DATE ISSUED: 04/29/2005
LIBERTY MUTUAL INSURANCE 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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Francesca L. Maggard (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-5742) of Administrative Law Judge Joseph E. Kane 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 credited claimant with twenty-two years of coal mine employment and adjudicated this subsequent claim pursuant to the regulations contained in 20 C.F.R. Part 718.[1] The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the newly submitted evidence insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). However, the administrative law judge found the newly submitted evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found the evidence sufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, however, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found the evidence insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also challenges the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).[2] Further, claimant generally challenges the administrative law judge's finding that the evidence is insufficient to establish total disability due to

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[1]Claimant filed his initial claim on April 30, 1984. Director's Exhibit 1. On July 16, 1984, the district director ordered claimant to show cause within thirty days why this claim should not be denied by reason of abandonment. *Id*. On August 24, 1984, the district director administratively closed this claim due to abandonment. *Id*. Claimant filed another claim on January 21, 1992. Director's Exhibit 2. On July 20, 1993, Administrative Law Judge Richard K. Malamphy issued a Decision and Order denying benefits. Director's Exhibit 2. Judge Malamphy's denial was based on claimant's failure to establish the existence of pneumoconiosis and total disability. *Id.* The Board affirmed Judge Malamphy's denial of benefits. *Morgan v. Nally & Hamilton Enterprises*, BRB No. 93-2336 BLA (Nov. 18, 1994)(unpub.). Because claimant did not pursue this claim any further, the denial of benefits became final. Claimant filed his most recent claim on February 26, 2001. Director's Exhibit 4.

[2]Although claimant asserts that the administrative law judge erred in finding the evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge actually found the newly submitted evidence sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv) and he found the evidence sufficient to establish total disability at 20 C.F.R. §718.204(b) overall.

pneumoconiosis at 20 C.F.R. §718.204(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[3]

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Specifically, claimant asserts that the administrative law judge improperly relied on the qualifications of the physicians submitting negative x-ray readings, and the numerical superiority of the negative x-ray readings. The record consists of seven interpretations of three newly submitted x-rays, dated February 24, 2001, August 15, 2001 and May 17, 2002.[4] Dr. Baker read the February 24, 2001 x-ray as positive for pneumoconiosis, Director's Exhibit 8, while Dr. Fino, a B reader, reread the same x-ray as negative for pneumoconiosis, Director's Exhibit 28. The administrative law judge indicated that Dr. Baker was not a B reader when he read the February 24, 2001 x-ray. Specifically, the administrative law judge stated that "Dr. Baker's certification as a NIOSH Certified 'B' Reader expired on January 31, 2001 and was subsequently reinstated on June 1, 2002." Decision and Order at 5. Further, although Dr. Alexander, a B reader and a Board-certified radiologist, read the August 15, 2001 x-ray as positive for pneumoconiosis, Director's Exhibit 18, Dr. Wheeler, a B reader and a Board-certified radiologist, reread the same x-ray as negative for

[3]Since the administrative law judge's length of coal mine employment finding and his finding at 20 C.F.R. §§725.309 are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Furthermore, since there is no biopsy or autopsy evidence of record, we hold that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) as a matter of law. In addition, since there is no evidence of complicated pneumoconiosis in this living miner's claim filed after January 1, 1982, we hold that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) as a matter of law.

[4]Of the seven newly submitted x-ray interpretations, two readings are positive for pneumoconiosis, Director's Exhibits 8, 18, and five readings are negative for pneumoconiosis, Director's Exhibits 11, 28, 29; Employer's Exhibits 1, 2.

pneumoconiosis, Employer's Exhibit 2.[5] Dr. Hussain also reread the August 15, 2001 x-ray as negative for pneumoconiosis. Director's Exhibit 11. The record does not contain Dr. Hussain's credentials. Lastly, Drs. Dahhan and Wheeler read the May 17, 2002 x-ray as negative for pneumoconiosis. Director's Exhibit 29; Employer's Exhibit 1. Dr. Dahhan is a B reader. Director's Exhibit 29.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge must consider the quantity of the evidence in light of the difference in qualifications of the readers. *Stanton v. Norfolk & Western Railroad 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). In this case, the administrative law judge properly accorded greater weight to the negative x-ray readings that were provided by physicians who are B readers and/or Board-certified radiologists. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). In considering the conflicting x-ray readings, the administrative law judge stated:

> The newly submitted medical records contain two positive x-ray interpretations, one of which was rendered by a B-reader and [B]oard-certified radiologist. The remaining x-ray readings are negative, with two such readings having been rendered by physicians who are B-readers.

Decision and Order at 9-10. Thus, we reject claimant's assertion that the administrative law judge improperly relied on the qualifications of the physicians submitting negative x-ray readings, and the numerical superiority of the negative x-ray readings.

The record additionally consists of twenty-three interpretations of eleven previously submitted x-rays dated January 8, 1991, January 19, 1991, January 23, 1991, March 18, 1991, August 27, 1991, September 3, 1991, September 17, 1991, February 21, 1992, July 14, 1992, December 1, 1992, and December 10, 1993. Of the twenty-three interpretations, five readings were positive for pneumoconiosis and eighteen readings were negative for pneumoconiosis. However, none of the positive readings was provided by a B reader or a Board-certified radiologist. Although the administrative law judge did not specifically identify the x-ray evidence submitted in the prior January 21, 1992 claim, he indicated that he considered the previously submitted x-ray evidence with the newly submitted x-ray evidence. Specifically, the administrative law judge stated, "I also find that the evidence regarding the existence of pneumoconiosis as was submitted before [Administrative Law Judge Richard K. Malamphy], when coupled with that submitted

[5]Dr. Sargent, a B reader and a Board-certified radiologist, also interpreted the August 15, 2001 x-ray as a quality 3 x-ray film. Director's Exhibit 12.

with the instant claim, is insufficient to establish the existence of the disease." Decision and Order at 14. Thus, since it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).[6] *Staton*, 65 F.3d at 59, 19 BLR at 2-280; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990).

Next, claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R §718.202(a)(4). Claimant specifically asserts that the administrative law judge erred in substituting his opinion for that of Dr. Baker by finding that Dr. Baker's positive x-ray reading is outweighed by the negative x-ray readings of record. The newly submitted medical opinion evidence of record consists of the opinions of Drs. Baker, Hussain, Fino and Dahhan. Dr. Baker opined that claimant suffers from pneumoconiosis, Director's Exhibit 8, while Drs. Dahhan, Fino, and Hussain opined that claimant does not suffer from pneumoconiosis, Director's Exhibits 11, 29; Employer's Exhibit 4. The administrative law judge properly discredited Dr. Baker's opinion because it is not reasoned, noting that Dr. Baker's diagnosis of pneumoconiosis is based only on an x-ray reading and a history of coal dust exposure. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). The administrative law judge stated:

> Dr. Baker relies upon a positive chest x-ray reading, while I have found that evidence to be negative. He also fails to adequately explain how he is able to attribute the impairment suffered by [c]laimant to his coal dust exposure, relying solely on years spent in the mines and his own positive reading of a chest x-ray to do so.

Decision and Order at 11.

The administrative law judge also properly accorded greater weight to Dr. Dahhan's opinion than to Dr. Baker's contrary opinion because he found that Dr. Dahhan's opinion is better reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v.*

[6]Claimant generally suggests that the administrative law judge may have selectively analyzed the x-ray evidence. Claimant provides no support for his contention, however, and the Decision and Order reflects that the administrative law judge properly considered all of the x-ray evidence, as discussed *supra*, without engaging in a selective analysis. Decision and Order at 9-10, 14. Thus, we reject claimant's suggestion.

Gibraltar Coal Corp., 6 BLR 1-1291 (1984). The administrative law judge stated, "[a]s Dr. Baker fails to state any bases for his diagnosis of pneumoconiosis beyond the x-rays and exposure history, I find his report neither well-reasoned nor well-documented." Decision and Order at 11. In contrast, the administrative law judge stated, "I find that Dr. Dahhan provided a detailed and well-reasoned medical opinion." *Id*. The administrative law judge specifically stated:

> Based upon his examination, which included taking a chest x-ray, pulmonary function testing and blood gas studies, Dr. Dahhan found that there was (sic) insufficient objective findings to justify the diagnosis of coal workers' pneumoconiosis. He did diagnose chronic obstructive lung disease, concluding that the [c]laimant was disabled from a respiratory standpoint from performing his previous coal mine work. In his opinion, the etiology of that disease was [c]laimant's smoking habit. Dr. Dahhan pointed out that the [c]laimant's airway obstruction demonstrated significant response to bronchodilator therapy and [c]laimant's family physician was treating him with multiple bronchodilators, findings which were inconsistent with the permanent adverse effects of coal dust on the respiratory system.

Id. at 8.

Further, the administrative law judge properly found that Dr. Dahhan's opinion is supported by the opinions of Drs. Fino and Hussain. *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). Thus, we reject claimant's assertion that the administrative law judge erred in discrediting Dr. Baker's opinion.

The record additionally contains the previously submitted opinions of Drs. Anderson, Broudy, Bushey, Clarke, Dahhan, Dineen, Harrison, Lane, Westerfield, Wicker, and Wright. Drs. Anderson, Bushey, Clarke, Westerfield, Wicker, and Wright opined that claimant suffers from pneumoconiosis while Drs. Broudy, Dahhan, Dineen, Harrison and Lane opined that claimant does not suffer from pneumoconiosis. Although the administrative law judge did not specifically identify the medical opinion evidence submitted in the prior January 21, 1992 claim, he indicated that he considered the previously submitted medical opinion evidence with the newly submitted medical opinion evidence. The administrative law judge stated:

> Accordingly, the entire record will be reviewed. The medical evidence submitted before Judge Malamphy and detailed in his decision and order, while not set forth herein, has been considered. That evidence, combined with the evidence newly submitted, remains insufficient to establish the existence of pneumoconiosis….

Decision and Order at 14. Thus, since it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Since claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement, we hold that the administrative law judge properly denied benefits under 20 C.F.R. Part 718.[7] *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *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

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[7]In view of our disposition of the case at 20 C.F.R. §718.202(a), we decline to address claimant's general contention with regard to the administrative law judge's finding that the evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).