BRB No. 04-0884 BLA

RONNIE BARNETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CREEKVIEW COAL CORPORATION	)	DATE ISSUED: 04/27/2005
	)	
and	)	
	)	
TRAVELERS 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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Helen H. Cox (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 (2003-BLA-6058) of Administrative Law Judge Daniel J. Roketenetz 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, and the parties stipulated to, at least twelve years of qualifying coal mine employment. Decision and Order at 2, 4; Hearing Transcript at 10. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] Decision and Order at 4. The administrative law judge determined, after considering all of the evidence of record, that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 5-14. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1) and in failing to find total disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant also asserts that he was not provided a complete pulmonary evaluation as required by the Act and regulations. Employer responds, urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that claimant has been provided with a complete pulmonary examination.[2]

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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to

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[1] Claimant filed his claim for benefits with the Department of Labor on September 21, 2001, which was denied by the district director on February 24, 2003. Director's Exhibits 2, 37. Claimant subsequently requested a formal hearing before the Office of Administrative Law Judges. Director's Exhibit 38.

[2] The administrative law judge's length of coal mine employment determination as well as his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.[3] Claimant's assertion that the administrative law judge failed to find the existence of pneumoconiosis established lacks merit. The administrative law judge rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Pursuant to 20 C.F.R. §718.202(a)(1), claimant contends that the administrative law judge erred by relying on the physicians' radiological credentials and improperly relied on the numerical superiority of the negative x-ray readings. Claimant also suggests that the administrative law judge "may have 'selectively analyzed' the x-ray evidence ...." Claimant's Brief at 3. We disagree. The administrative law judge considered the six readings of the two x-rays of record and accorded greater weight to the readings by physicians possessing radiological credentials. Decision and Order at 5-7. Because the November 7, 2001 x-ray was read as positive and negative by equally qualified readers and the remaining positive interpretation was rendered by a physician lacking radiological qualifications, the administrative law judge permissibly found that the x-ray evidence did not support a finding of the existence of pneumoconiosis.[4] *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); Director's Exhibits 15, 16, 30, 31, 35; Employer's Exhibits 1, 7; Decision and Order at 5-7. Contrary to claimant's assertions, a review of the record reflects that the administrative law judge conducted a proper qualitative

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[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 3, 6.

[4] The record indicates that Dr. Baker has no special qualifications for the interpretation of x-rays. Director's Exhibit 15. Drs. Wiot, Alexander and Sargent are B-readers and board-certified radiologists. Director's Exhibits 16, 30, 31, 35. Dr. Broudy is a B-reader. Employer's Exhibit 1.

analysis of the conflicting x-ray readings pursuant to 20 C.F.R. §718.202(a)(1). Director's Exhibits 15, 16, 30, 31, 35; Employer's Exhibits 1, 7; Decision and Order at 7; *Staton 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); *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 (1988)(*en banc*).

Claimant further asserts, with respect to 20 C.F.R. §718.202(a)(4), that he has not been provided with a complete and credible pulmonary evaluation sufficient to substantiate his claim as required by the Act. Claimant's Brief at 4. Employer and the Director respond that claimant has been provided the complete and credible pulmonary evaluation required by the Act and regulations.

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), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *see also Newman v. Director, OWCP*, 745 F. 2d 1162, 7 BLR 2-25 (8th Cir. 1984).

The record reflects that Dr. Baker conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director's Exhibits 12-15. The administrative law judge did not find nor does claimant allege that Dr. Baker's report was incomplete.

Initially in addressing the opinion of Dr. Baker, the administrative law judge rationally concluded that it was insufficient to establish the existence of clinical pneumoconiosis as the opinion was neither well reasoned nor well documented since the physician did not offer any other explanation for his diagnosis of pneumoconiosis other than his own x-ray interpretation and claimant's length of coal dust exposure. Decision and Order at 9-10; Director's Exhibit 12. This was proper. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003) *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); Decision and Order at 9-10; Director's Exhibit 12.

In addition to diagnosing clinical pneumoconiosis, Dr. Baker opined that the miner also suffered from chronic obstructive pulmonary disease and bronchitis, both due to coal dust exposure, which, if credited satisfies the definition of legal pneumoconiosis set forth in 20 C.F.R. §718.201(a)(2). Director's Exhibit 12. The administrative law judge, in a proper exercise of his discretion, rationally accorded greater weight to the contrary opinions of Drs.

Rosenberg and Broudy, than to the opinion of Dr. Baker, because the administrative law judge found that Drs. Rosenberg and Brody offered better reasoned and "more persuasive" opinions. Decision and Order at 11; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo*, 17 BLR at 1-8-89; *Clark*, 12 BLR at 1-155. Decision and Order at 10-11; Director's Exhibits 12, 36; Employer's Exhibits 1, 3. Therefore, the administrative law judge permissibly found that the report of Dr. Baker, diagnosing legal pneumoconiosis, was outweighed by the contrary evidence of record. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999). Because Dr. Baker's report was complete and the administrative law judge found it outweighed by "more persuasive" medical opinions, Decision and Order at 11, which is not the same as finding Dr. Baker's report incredible, there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. *Cf. Hodges*, 18 BLR at 1-93; *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990). Consequently, as claimant makes no other specific challenge to the administrative law judge's weighing of the medical opinion evidence pursuant to Section 718.202(a)(4), we affirm the administrative law judge's findings as they are supported by substantial evidence and are in accordance with law. *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Claimant has the burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Ondecko*, 512 U.S. 267, 18 BLR 2A-1; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge permissibly concluded that the evidence of record does not establish the existence of pneumoconiosis, claimant has not met his burden of proof on all the elements of entitlement. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. 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. *Anderson*, 12 BLR at 1-112; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis as it is supported by substantial evidence and is in accordance with law. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Because claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement in a miner's claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded and we need not address the administrative law judge's additional findings pursuant to 20 C.F.R. §718.204. *See Trent*, 11 BLR at 1-27; *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