BRB No. 05-0787 BLA

JOHN CHANEY Claimant-Petitioner v. WOODS CREEK CORPORATION and KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND Employer/Carrier-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/19/2006 DECISION and ORDER

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

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

Rodney E. Buttermore, Jr. (Buttermore & Boggs), Harlan, Kentucky, for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (04-BLA-5431) of Administrative Law Judge Joseph E. Kane rendered on a subsequent 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).[1] The administrative law judge credited claimant with twenty-four years of coal mine employment[2] and found that employer was the responsible operator. The administrative law judge found that the evidence developed since the previous denial established that claimant is totally disabled by a respiratory or pulmonary impairment, and thus demonstrated a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). Weighing all of the evidence of record, however, the administrative law judge found that claimant did not establish the existence of pneumoconiosis to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred when he found that claimant did not establish the existence of pneumoconiosis. Claimant argues further that the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds that he met his obligation to provide claimant with a complete pulmonary evaluation.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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).

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[1] Claimant's initial claim for benefits filed on March 18, 1992, was denied on March 19, 1999 because claimant did not establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Claimant filed his current claim on April 2, 2002. Director's Exhibit 3.

[2] The record indicates that claimant's last coal mine employment occurred in Kentucky. Director's Exhibit 15. 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 (1989)(*en banc*).

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 a finding of 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).

Pursuant to 718.202(a)(1), the administrative law judge considered nine readings of four x-rays taken on April 29, 2002, July 2, 2002, May 28, 2003, and June 4, 2003, in light of the readers' radiological qualifications.[3] Decision and Order at 6-7; Director's Exhibits 11, 14, 23, 23A, 27; Claimant's Exhibits 2-4. The administrative law judge noted that Dr. Simpao, who lacks radiological credentials, read the April 29, 2002 x-ray as positive for pneumoconiosis, and that Dr. Simpao's reading was countered by a negative reading from Dr. Poulos, who is a Board-certified radiologist and B-reader.[4] Director's Exhibits 11, 21. The July 2, 2002 x-ray was read as negative by Dr. Broudy, who is a B-reader, but the administrative law judge noted that Dr. Alexander, who is a Board-certified radiologist and B-reader, read the July 2 x-ray as positive. Director's Exhibit 14; Claimant's Exhibit 2. Dr. Baker, who is a B-reader, read the May 28, 2003 x-ray as positive for pneumoconiosis, but Dr. Poulos read the May 28 x-ray as negative. Director's Exhibits 23A, 27. Finally, the administrative law judge considered that Dr. Dahhan, a B-reader, read the June 4, 2003 x-ray as negative for pneumoconiosis, but that Dr. Alexander read the June 4 x-ray as positive. Director's Exhibit 23; Claimant's Exhibit 3.

Based on these x-ray readings, administrative law judge found that "two x-rays were read as positive by a highly qualified physician and two x-rays were interpreted as negative by a highly qualified physician." Decision and Order at 8. Because two x-rays were positive and two were negative for pneumoconiosis, the administrative law judge found that the x-ray evidence was in equipoise and therefore did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). The administrative law judge conducted a proper qualitative analysis of the x-ray evidence, and substantial

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[3] The administrative law judge gave "greater weight" to the newly submitted evidence because "the medical evidence in the Miner's previous claim is over nine years old." Decision and Order at 14. Claimant does not challenge this aspect of the administrative law judge's decision.

[4] A third reading of the April 29, 2002 x-ray, by Dr. Sargent, was solely for purposes of assessing the x-ray's quality. Director's Exhibit 11.

evidence supports his finding. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White*, 23 BLR at 1-4-5. Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' radiological credentials, merely counted the negative readings, and that he "may have 'selectively analyzed' the x-ray evidence," lack merit. Claimant's Brief at 3. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to Section 718.202(a)(4), the administrative law judge considered four medical opinions. Drs. Baker and Simpao diagnosed claimant with pneumoconiosis, while Drs. Broudy and Dahhan opined that claimant does not suffer from pneumoconiosis but has chronic obstructive pulmonary disease (COPD) due to smoking. Director's Exhibits 11, 14, 23, 23A, 41; Claimant's Exhibit 1; Employer's Exhibit 1. The administrative law judge found that Dr. Baker's diagnosis of clinical pneumoconiosis was "neither well-reasoned nor well-documented" because Dr. Baker did "not indicate any other reasons for his diagnosis . . . beyond the x-ray and exposure history . . . ." Decision and Order at 10. The administrative law judge also chose to assign "less weight" to Dr. Simpao's diagnosis of clinical pneumoconiosis because Dr. Simpao relied on his own positive reading of the April 29, 2002 x-ray, which was read as negative by a Board-certified radiologist and B-reader. *Id*. Regarding whether claimant suffers from legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), the administrative law judge found that Dr. Baker's diagnosis of COPD due to both smoking and coal dust exposure was "well-reasoned and well-documented," but he found it outweighed by the "well-documented and well-reasoned opinions of Drs. Broudy and Dahhan" that claimant's COPD is due solely to smoking. Decision and Order at 11.

Claimant contends that the administrative law judge erred in discounting Dr. Baker's opinion because it was based on a positive x-ray interpretation. Claimant's Brief at 4-5. Contrary to claimant's contention, the administrative law judge permissibly found that Dr. Baker's diagnosis of clinical "Coal Workers' Pneumoconiosis 1/0" was not well-reasoned because Dr. Baker based the diagnosis solely on his x-ray reading and a reference to claimant's coal mine employment history. *See Cornett v. Benham Coal*, 227 F.3d 569, 576, 22 BLR 2-107, 2-123 (6th Cir. 2000); Director's Exhibit 23A at 4. Claimant further asserts that Dr. Baker's opinion was "well reasoned, [and] therefore Judge Kane should not have rejected it for the reasons he provided." Claimant's Brief at 5. As discussed above, however, the administrative law judge did not reject Dr. Baker's opinion. Although the administrative law judge discounted Dr. Baker's diagnosis of clinical pneumoconiosis, he found Dr. Baker's diagnosis of COPD due partly to coal dust exposure to be well-reasoned and documented, but outweighed. Claimant contends that the administrative law judge should not have accorded greater weight to the opinions of Drs. Broudy and Dahhan, because those physicians relied upon their own negative readings of x-rays that were reread as positive for pneumoconiosis by a Board-certified radiologist and B-reader. Claimant's Brief at 5. We disagree. First, the administrative law judge did not weigh the conflicting medical opinions regarding the existence of legal pneumoconiosis on the basis of the x-ray evidence. Decision and Order at 11; *see* 20 C.F.R. §§718.201(a)(1), (a)(2), 718.202(a)(4). Second, even had the administrative law judge chosen to discount Dr. Broudy's and Dr. Dahhan's opinions that clinical pneumoconiosis was absent, this would not change that he discounted Dr. Baker's and Dr. Simpao's opinions that clinical pneumoconiosis was present, thus leaving no medical opinion supportive of claimant's burden of proof on this issue. Therefore, we reject claimant's allegations of error and affirm the administrative law judge's finding pursuant to Section 718.202(a)(4).

Claimant further contends that because the administrative law judge did not credit a diagnosis of pneumoconiosis contained in Dr. Simpao's medical report provided by the Department of Labor, "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 6. The Director responds that he is required to "provide each claimant with a complete and credible examination, not a dispositive one," and he argues that "the mere fact that [the administrative law judge] found Dr. Simpao's opinion . . . less probative than the opinions of Drs. Broudy and Dahhan does not mean that the Director failed to satisfy his statutory obligation." Director's Brief at 2.

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 (2000), 725.406 (2000). 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*, 18 BLR 1-84, 1-88 n.3 (1994); *accord 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).

The record reflects that on April 29, 2002, Dr. Simpao 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. Director's Exhibit 11; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). On December 2, 2004, Dr. Simpao prepared a supplemental report. Director's Exhibit 41. On the issue of the existence of pneumoconiosis, the administrative law judge found that Dr. Simpao's diagnosis of "CWP 1/1" was based on a positive x-ray reading that the administrative law judge found outweighed by the negative reading of a physician with superior credentials, and he therefore gave the diagnosis "less weight." Decision and Order at 11; Director's Exhibit 11 at 4. This was the sole cardiopulmonary diagnosis listed in Dr. Simpao's report, and the administrative law judge merely found the specific medical data for the diagnosis of clinical pneumoconiosis to be outweighed. Consequently, there is no need to remand this case to the district director.[5] *Cf. Hodges*, 18 BLR at 1-93.

Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a miner's claim under Part 718, we must affirm the administrative law judge's denial of benefits. *See Anderson*, 12 BLR at 1-112.

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[5] The Director challenges the administrative law judge's finding that Dr. Simpao's pulmonary function study was invalid because of claimant's suboptimal effort. Director's Brief at 3 n.1. We need not address this issue, in view of the administrative law judge's finding that the x-ray reading that was the basis for Dr. Simpao's diagnosis of "CWP 1/1" was outweighed, and that for this reason, Dr. Simpao's diagnosis of clinical pneumoconiosis merited less weight.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge