BRB No. 05-0982 BLA

EARNEST FRANCE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	DATE ISSUED: 04/19/2006
	)	
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 – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

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

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

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor), 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-5561) of Administrative Law Judge Robert L. Hillyard rendered 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). Claimant filed his claim on May 20, 2002. Director's Exhibit 2. The district director issued a Proposed Decision and Order denying benefits on September 26, 2003. Director's Exhibit 24. Claimant requested a hearing, which was held on October 7, 2003. Director's Exhibit 25. The administrative law judge

determined that claimant failed to establish the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1), (4). Claimant asserts that, because the administrative law judge refused to assign probative weight to the opinion of the Department of Labor examining physician, Dr. Simpao, that claimant has pneumoconiosis, the Department of Labor has failed to provide claimant with a complete, credible pulmonary evaluation as required by Section 413(b) of the Act, 30 U.S.C. §923(b). Claimant also argues that the administrative law judge erred in finding that he was not totally disabled. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has also filed a brief, arguing that the Department of Labor satisfied its obligation to provide claimant a complete, credible 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.[1] 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, and the issues and arguments raised by the parties on appeal, we affirm as supported by substantial evidence the administrative law judge's denial of benefits. We specifically affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis.

We first reject claimant's assertion that the administrative law judge "may have" selectively analyzed the x-ray evidence at Section 718.202(a)(1) by considering both the qualifications of the readers and the numerical weight of the x-ray interpretations.[2]

[1] Because claimant's last coal mine employment occurred in Kentucky, this claim 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*); Director's Exhibit 7.

[2] Because there was no biopsy evidence of record, the administrative law judge found that claimant was unable to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2). Decision and Order at 8. He also determined that claimant was unable to avail himself of any of the presumptions for establishing the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3). *Id*. The administrative law judge's

Claimant's Brief at 3. In this case, the administrative law judge properly noted that the record contained four readings of three x-rays dated January 12, 2005, August 6, 2003, and August 21, 2002. Decision and Order at 7. The administrative law judge properly found that the January 12, 2005 x-ray was negative for pneumoconiosis based on Dr. Dahhan's sole negative reading of that film. Employer's Exhibit 1; Decision and Order at 8. Likewise, the administrative law judge properly found that the August 6, 2003 x-ray was positive for pneumoconiosis based on Dr. Baker's sole positive reading. Claimant's Exhibit 1; Decision and Order at 8. With regard to the August 21, 2002 x-ray, the administrative law judge correctly noted that Dr. Simpao, who has no radiological qualifications, read the film as positive for pneumoconiosis, while Dr. Wiot, who is dually qualified as a Board-certified radiologist and B-reader, read the x-ray as negative for pneumoconiosis. Director's Exhibits 11, 21; Employer's Exhibit 5; Decision and Order at 8. Based on Dr. Wiot's superior qualifications, the administrative law judge properly found that the August 21, 2002 x-ray was negative for pneumoconiosis. *See Woodward v. Director, OWCP*, 991 F.3d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). Consequently, because the administrative law judge found that two of the three x-rays were negative for pneumoconiosis, the administrative law judge properly concluded that the weight of the x-ray evidence was negative for the disease. Insofar as the administrative law judge permissibly considered the numerical weight of the evidence, in conjunction with the qualifications of the readers, s*ee Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir 1995); *Woodward v. Director, OWCP*, 991 F.2d at 314, 17 BLR at 2-77, we affirm as supported by substantial evidence his finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

We also reject claimant's argument that the administrative law judge erred in his consideration of Dr. Baker's opinion at Section 718.202(a)(4) relevant to the existence of pneumoconiosis. In weighing the conflicting medical opinion evidence, the administrative law judge permissibly assigned less probative weight to Dr. Baker's opinion, that claimant has pneumoconiosis, as the administrative law judge found that Dr. Baker offered no explanation for his diagnosis of pneumoconiosis, other than his own positive-x-ray reading of the August 6, 2003 x-ray, and claimant's history of coal dust exposure. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-265 (6th Cir. 2003); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); 20 C.F.R. §718.101(d)(5); Claimant's Exhibit 1; Decision and Order at 10. Likewise, the administrative law judge permissibly assigned little weight to Dr. Baker's findings on bronchitis and hypoxemia due in part to coal dust exposure as the administrative law judge found that these

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findings with respect to Sections 718.202(a)(2), (3) are affirmed as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

diagnoses were unsupported by the objective evidence. *See Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); Decision and Order at 10. The administrative law judge further found that Dr. Baker under-reported claimant's smoking history, *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993), and that Dr. Baker failed to adequately address other plausible causes of claimant's condition.[3] *Id*.

Conversely, the administrative law judge had discretion to credit Dr. Dahhan's opinion, that claimant does not suffer from clinical or legal pneumoconiosis, since the administrative law judge found that Dr. Dahhan's opinion was better reasoned and better supported by the objective evidence. *See King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Employer's Exhibits 1, 2; Decision and Order at 9, 11. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis based on the medical opinion evidence at 20 C.F.R. §718.202(a)(4).[4]

Additionally, we reject claimant's assertion that he is entitled to a new pulmonary evaluation pursuant to 20 C.F.R. §725.406.[5] Contrary to claimant's contention, the Director's obligation to provide him with a complete pulmonary evaluation is not tantamount to an obligation to provide claimant with an examining physician's opinion that is given controlling weight by the administrative law judge. Claimant is not entitled to a new pulmonary examination simply because the administrative law judge did not find Dr. Simpao's opinion dispositive with regard to the issue of whether claimant has pneumoconiosis, and simply because he found Dr. Simpao's opinion was outweighed by the contrary and better reasoned opinion of Dr. Dahhan, who opined that claimant did not have pneumoconiosis. To the extent that the administrative law judge considered Dr. Simpao to be a credible physician, who offered an opinion on the requisite elements of

[3] The administrative law judge noted that Dr. Baker diagnosed hypoxemia, due in part to coal dust exposure, based on the results of claimant's arterial blood gas testing. Decision and Order at 10. However, the administrative law judge found Dr. Baker's hypoxemia diagnosis to be problematic since Dr. Dahhan had observed that the inconsistencies in claimant's arterial blood gas study results were "not generally compatible with the fixed, permanent effects of coal workers' pneumoconiosis." *Id*.

[4] Claimant does not challenge the weight accorded Dr. Simpao's opinion at 20 C.F.R. §718.202(a)(4).

[5] The Department of Labor has a statutory duty to provide a miner with a complete pulmonary examination sufficient to constitute an opportunity to substantiate the claim. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.405(b); 725.406; *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994).

entitlement in claimant's case, there is no basis for remanding the case for a new pulmonary evaluation. We thus hold that the Director satisfied his obligation under the Act to provide claimant with a complete pulmonary evaluation. *See* 30 U.S.C. §923(b); 20 C.F.R. §725.405(b); 725.406, *Cline v. Director, OWCP*, 917 F.2d 9, 14 BLR 2-102 (8th Cir. 1992); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994).

Because claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement, benefits are precluded.[6] *See* 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *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 – Denial of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

[6] Claimant also argues that the administrative law judge erred by failing to discuss the exertional requirements of claimant's last coal mine employment in his consideration of the medical opinion evidence at 20 C.F.R. §718.204(b)(2). Claimant's Brief at 6-7. Since we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), any error committed by the administrative law judge with respect to Section 718.204(b)(2) would, at best, be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Thus, we decline to address claimant's allegations of error regarding the issue of total disability.