BRB No. 06-0752 BLA

JOHN C. YOUNG	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIAMOND MAY MINING, INCORPORATED	)	DATE ISSUED: 04/27/2007
	)	
and	)	
	)	
PROGRESS FUELS CORPORATION	)	
	)	
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 Thomas F. Phalen, Jr., 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 (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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 (04-BLA-6191) of Administrative Law Judge Thomas F. Phalen, Jr. denying benefits on a claim filed on October 28, 2002 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-six years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and insufficient to establish total disability pursuant to 20 C.F.R. 718.204(b). 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 that it is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Further, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director filed a limited response in a letter brief, urging the Board to reject claimant's contention that he failed to provide claimant with a complete and credible pulmonary evaluation.[1]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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 20 C.F.R. Part 718, claimant must establish 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 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).

[1] The administrative law judge's length of coal mine employment finding and his findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant initially 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 six interpretations of three x-rays, dated February 20, 2003, March 11, 2003 and June 8, 2004.[2] Of the six x-ray interpretations, two readings are positive for pneumoconiosis, Director's Exhibit 11; Claimant's Exhibits 1, 2, and four readings are negative for pneumoconiosis, Director's Exhibit 13; Employer's Exhibits 1, 2, 4. Dr. Simpao, who is not a B reader or a Board-certified radiologist, read the February 20, 2003 x-ray as positive for pneumoconiosis. Director's Exhibit 11. In contrast, Dr. Wiot, a dually qualified B reader and Board-certified radiologist, read the February 20, 2003 x-ray as negative for pneumoconiosis. Director's Exhibit 13. Dr. Alexander, a dually qualified B reader and Board-certified radiologist, read the March 11, 2003 x-ray as positive for pneumoconiosis, Claimant's Exhibits 1, 2, while Dr. Rosenberg, a B reader, read this x-ray twice as negative for pneumoconiosis, Employer's Exhibits 1, 2. Dr. Dahhan, a B reader, read the June 8, 2004 x-ray as negative for pneumoconiosis. Employer's Exhibit 4. After considering the quantitative and qualitative nature of the conflicting interpretations, the administrative law judge found the x-ray evidence insufficient to establish the existence of pneumoconiosis.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises,[3] has held that an administrative law judge must consider the quantity of the evidence in light of the differences in the qualifications of the readers. *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). In this case, the administrative law judge properly accorded greater weight to the x-ray readings by physicians who are dually qualified as B readers and Board-certified radiologists. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). The administrative law judge specifically stated, "[a]ccording more weight to the dually credentialed reading by Dr. Wiot, I find that the February 20, 2003 x-ray is negative." Decision and Order at 9. Similarly, the administrative law judge stated, "[a]ccording more weight to the dually credentialed reading by Dr. Alexander, I find that the March 11, 2003 x-ray is positive." *Id.* Dr. Dahhan, a B reader, was the only

[2] Dr. Barrett, a B reader and Board-certified radiologist, read the February 20, 2003 x-ray for quality only. Director's Exhibit 12.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment occurred in Kentucky. Director's Exhibit 3; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

physician of record to read the June 8, 2004 x-ray. Employer's Exhibit 4. As discussed *supra*, Dr. Dahhan read the June 8, 2004 x-ray as negative for pneumoconiosis. *Id*. The administrative law judge further stated:

> I have determined that two of the [three] films of record are negative for pneumoconiosis, and that the third film is positive. In addition, I have found the most recent film of record is negative for the disease. On the other hand, I have found that the two dually credentialed interpretations of record are in disagreement as to whether [c]laimant has pneumoconiosis, and that these films were taken within one month of each other. As a result, I find that the x-ray evidence, at best, is inconclusive for pneumoconiosis.

Decision and Order at 9. Thus, because the administrative law judge reasonably considered the quantitative and qualitative nature of the conflicting x-ray readings, 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. *Staton*, 65 F.3d at 59, 19 BLR at 2-280; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87. Further, because 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).[4]

Next, claimant contends that the Director failed to provide him with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). Specifically, claimant argues that "the ALJ concluded that Dr. Simpao's report was based merely upon an erroneous x-ray interpretation, and that he failed to explain how his findings supported a diagnosis of pneumoconiosis" pursuant to 20 C.F.R. §718.202(a)(4). Claimant's Brief at 4. The Director, in the instant case, maintains that the statutory obligation to provide claimant with a complete pulmonary evaluation has been fulfilled.

[4] 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 5, 9. Thus, we reject claimant's suggestion.

With regard to Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Simpao, Dahhan and Rosenberg. Dr. Simpao diagnosed coal workers' pneumoconiosis, 1/0.[5] Director's Exhibit 11. In contrast, Drs. Dahhan and Rosenberg opined that claimant does not have coal workers' pneumoconiosis or any lung disease caused by the inhalation of coal mine dust.[6] Employer's Exhibits 1, 3-5. The administrative law judge reasonably found that the opinions of Drs. Dahhan and Rosenberg are the most probative medical opinions of record because they are well reasoned and well documented.[7] *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). In addition, the administrative law judge permissibly gave less weight to Dr. Simpao's diagnosis of pneumoconiosis because Dr. Simpao's diagnosis is based, in part, on a positive x-ray reading that was reread as negative for the disease by a better qualified physician. *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). Further, the administrative law judge permissibly gave less weight to Dr. Simpao's opinion because he found that Dr. Simpao failed to explain how the physical findings support his diagnosis of pneumoconiosis.[8] *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Fuller*, 6 BLR at 1-1294. The administrative law judge, therefore, concluded that

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[5] A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

[6] Legal pneumoconiosis includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R §718.201(a)(2).

[7] The administrative law judge stated, "I find that the objective evidence [Drs. Dahhan and Rosenberg] considered adequately supports their opinions." Decision and Order at 10.

[8] The administrative law judge stated:

> While subjectively reported symptomatology does not constitute adequate support for a finding of pneumoconiosis under subsection (a)(4), and an x-ray and coal dust exposure alone are insufficient to constitute the basis for a reasoned opinion, since Dr. Simpao's physical examination revealed some abnormalities, I find that his diagnosis is not without reason or documentation. However, an unsupported medical conclusion is not a reasoned diagnosis. *Duke v. Director, OWCP*, 6 BLR 1-673 (1983).

Decision and Order at 10.

claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Because this finding is supported by substantial evidence, it is affirmed. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Additionally, with regard to the issue of whether the Director satisfied his statutory obligation to provide claimant with an opportunity to substantiate the claim with a complete pulmonary evaluation, the administrative law judge found that remand is unwarranted because the evidence of record is sufficient to reach a conclusion as to the elements of entitlement. The administrative law judge specifically stated:

> I have found that both Dr. Simpao's pneumoconiosis and total disability analyses are entitled to little weight due to his failure to explain how the objective evidence he considered supports his diagnosis. As a result, I find that his opinion is insufficient to constitute an opportunity to substantiate [claimant's] claim. However, I have also found that Dr. Dahhan's and Dr. Rosenberg's opinions on these issues were well-reasoned and well-documented, and thus, provided a sufficient basis for the undersigned to make a determination as to whether [c]laimant suffers from pneumoconiosis or is totally disabled. Stated another way, absent evidence sufficient to determine total disability, remand to the Director to provide a reasoned and documented opinion would be in order. The undersigned, however, finds that the evidence of record is sufficient to reach a conclusion as to these elements of entitlement, and therefore, I find that remand is unwarranted.

Decision and Order at 13.

In response to claimant's assertion that the Director failed to provide him with a complete, credible pulmonary evaluation, the Director contends that "[he] is only required to provide each claimant with a complete and credible examination, not a dispositive one." Director's Letter Brief at 2. The Director notes that "[g]enerally, the mere fact that [the administrative law judge] found Dr. Simpao's opinion on the presence of pneumoconiosis and total disability entitled to little weight would not mean that the Director failed to satisfy his statutory obligation." *Id*. However, the Director acknowledges that "[the administrative law judge] stated [that] he found Dr. Simpao's opinion insufficient to constitute an opportunity to substantiate claimant's claim." *Id*. Nonetheless, the Director states that "the [administrative law judge] specifically determined that any deficiencies in Dr. Simpao's opinion would not require remand because, even if the doctor's opinion were fully credited, it would be outweighed by the contrary evidence – the well-reasoned and well-documented findings of no pneumoconiosis and no disabling respiratory impairment from Drs. Rosenberg and Dahhan." *Id*. The Director therefore asserts that he has satisfied his statutory obligation,

under Section 413(b) of the Act, of providing claimant with a complete and credible pulmonary evaluation with regard to the issue of the existence of pneumoconiosis. *Id*.

We agree with the Director that claimant is entitled to a complete pulmonary evaluation,[9] not a dispositive one. *Hodges*, 18 BLR at 1-89-90 (1994); *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989)(*en banc order*). In this case, the administrative law judge reasonably found that the opinions of Drs. Dahhan and Rosenberg are the most probative medical opinions of record, because he found that they are well reasoned and well documented. *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Lucostic*, 8 BLR at 1-47; *Fuller*, 6 BLR at 1-1294; Decision and Order at 10-11. In addition, the administrative law judge reasonably found that Dr. Simpao's opinion is entitled to little weight because his diagnosis of pneumoconiosis was based, in part, on a positive x-ray that was reread by a better qualified physician as negative for the disease and Dr. Simpao did not explain how his physical findings supported his opinion. *Id.* Consequently, because the administrative law judge found Dr. Simpao's opinion outweighed by the contrary opinions of Drs. Dahhan and Rosenberg, rather than finding that Dr. Simpao's opinion is devoid of value, we agree with the Director that remand is not necessary for a complete pulmonary evaluation. *See generally Cline v. Director, OWCP*, 972 F.2d 234, 16 BLR 2-137 (8th Cir. 1992).

In light of our affirmance of 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), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718.[10] *Trent*, 11 BLR at 1-27; *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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[9] *Gallaher v. Bellaire Corp*., 71 Fed.Appx. 528, 2003 WL 21801463 (6th Cir. Aug. 4, 2003)(unpub.).

[10] In view of our disposition of the case at 20 C.F.R. §718.202(a), we decline to address claimant's contentions at 20 C.F.R. §718.204(b). *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *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

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge