BRB No. 07-0650 BLA

C.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LARRY ROSE COAL COMPANY	)	
	)	
and	)	
	)	
FIRST SOUTHERN INSURANCE COMPANY	)	DATE ISSUED: 04/25/2008
	)	
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 – Denial of Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

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

Richard A. Seid (Gregory F. Jacob, Solicitor of Labor; 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 – Denial of Benefits (05-BLA-06051) of Administrative Law Judge Donald W. Mosser on a subsequent claim[1] 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). In a decision dated March 28, 2007, the administrative law judge credited claimant with at least eight years of coal mine employment[2] and found that because the weight of the newly submitted evidence established that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), an element of entitlement previously decided against claimant, claimant established a "material change in conditions" pursuant to 20 C.F.R. §725.309(d). Decision and Order at 6. In reviewing all the evidence of record, however, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find that the evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Additionally, claimant argues that the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. Employer has not filed a response. The Director, Office of Workers' Compensation Programs (the Director), responds urging affirmance of the administrative law judge's denial of benefits.

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 filed his initial claim for benefits on September 15, 1988, Director's Exhibit 1-650. The claim was denied by Administrative Law Judge Richard D. Mills for failure to establish total disability. Director's Exhibit 1-219. The Board affirmed Judge Mills's denial of benefits on September 3, 1993. Director's Exhibit 1-192. Claimant requested modification on July 14, 1994. Judge Mills evaluated the newly submitted x-ray evidence with the x-ray evidence submitted previously, and denied modification on the grounds that claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 1-40. On September 15, 1997, the Board affirmed the denial of benefits. Director's Exhibit 1-2. Claimant filed his current claim for benefits on June 25, 2002. Director's Exhibit 22.

[2] The law of the United States Court of Appeals for the Sixth Circuit is applicable as the miner was employed in the coal mining industry in Kentucky. *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).

Claimant initially asserts that the administrative law judge erred in his evaluation of the x-ray evidence at 20 C.F.R. §718.202(a)(1). Claimant's Brief at 3. Claimant contends that the administrative law judge erred in relying "almost solely on the qualifications of the physicians providing the x-ray interpretations. . . . [and in placing] substantial weight on the numerical superiority of the x-ray interpretations." *Id*. Claimant further asserts that "[the administrative law judge] may have 'selectively analyzed' the x-ray evidence." *Id*. We disagree.

In weighing the x-ray evidence of record pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge initially noted that the newly submitted x-ray evidence contained readings of five x-rays, two of which had conflicting interpretations.[3] Decision and Order at 11. In resolving the conflict of opinions over the September 12, 2002 x-ray, the administrative law judge properly stated that Dr. Simpao, Board-certified in Internal Medicine, read the film as positive for pneumoconiosis. Director's Exhibit 21. However, because Dr. Wiot, a B reader and Board-certified radiologist, interpreted the same film as negative for pneumoconiosis, the administrative law judge rationally afforded his opinion greater weight. 20 C.F.R. §718.202(a)(1); *Roberts v. Bethlehem Mines Corp*., 8 BLR 1-211, 1-213 (1985). Similarly, in resolving the difference of opinions regarding the April 10, 2004 x-ray, the administrative law judge noted that Dr. Baker, a B reader, read the x-ray as positive for pneumoconiosis, but Dr. Spitz, a B reader and Board-certified radiologist, read the same x-ray as negative for pneumoconiosis. As Dr. Spitz's qualifications are superior to those of Dr. Baker, the administrative law judge reasonably afforded Dr. Spitz's interpretation more weight. *Id*. Because the remaining newly submitted x-ray readings were read as negative, the administrative law judge rationally found that the newly submitted x-rays did not establish pneumoconiosis.

In weighing the previously submitted x-ray evidence, the administrative law judge properly noted that the majority of the x-rays were read as negative for pneumoconiosis and agreed with the prior administrative law judge, finding that the x-ray evidence did not establish pneumoconiosis. Decision and Order at 11. As an administrative law judge

[3] The uncontradicted x-ray readings are dated April 26, 2004; November 1, 2005; and December 8, 2005, all of which were read as negative for pneumoconiosis. Employer's Exhibits 3, 4, 8.

may afford greater weight to readings by physicians with superior expertise, and take into consideration the quantity and quality of the x-ray evidence, the administrative law judge acted within his discretion in finding that the x-ray evidence of record did not establish the existence of pneumoconiosis. *See White v. New White Coal Co*., 23 BLR 1-1, 1-4 (2004). We reject claimant's comment that the administrative law judge "may have selectively analyzed" the x-ray evidence. *White*, 23 BLR at 1-5. Claimant has not provided any support for that assertion, nor does a review of the evidence and the administrative law judge's Decision and Order reveal selective analysis of the x-ray evidence. We, therefore, affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1) as it is supported by substantial evidence.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge reviewed the previously submitted medical reports of record, finding that they failed to establish the existence of pneumoconiosis. Claimant does not challenge this finding. Claimant contends, however, that the administrative law judge erred in finding that Dr. Baker's newly submitted medical report was outweighed by the newly submitted opinions of Drs. Broudy and Westerfield. Claimant's Brief at 4. Claimant maintains that "an [administrative law judge] may not discredit the opinion of a physician whose report is based on a positive x-ray interpretation which is contrary to the [administrative law judge's] findings." *Id*. Claimant additionally maintains that "it is error for an [administrative law judge] to interpret medical tests and thereby substitute his own conclusion for those of a physician, which Judge Mosser appears to have done in this instance." *Id*. at 5. Claimant's assertions are without merit and essentially amount to a request to reweigh the evidence, which is beyond the Board's scope of review. *See Anderson*, 12 BLR at 1-113.

In determining the probative value of the newly submitted medical opinions of record at 20 C.F.R. §718.202(a)(4), the administrative law judge rationally considered the underlying reasoning and objective evidence upon which the opinions were based.[4]

[4] Reviewing the five newly submitted medical opinions of record, the administrative law judge noted that Drs. Simpao, Niazi, and Baker opined that the miner suffered from pneumoconiosis, while Drs. Broudy and Westerfield found no evidence of the disease. Decision and Order at 12; Director's Exhibits 12, 15; Claimant's Exhibit 1; Employer's Exhibit 4. The administrative law judge found that: Dr. Simpao's opinion was weakened by his reliance on a positive x-ray interpretation that was reread as negative by a better qualified physician, Dr. Niazi's opinion was entitled to little weight because he did not specify which x-ray evidence he relied upon when formulating is report, and that the opinions of Drs. Broudy and Westerfield outweighed the opinions of Drs. Simpao and Niazi. Decision and Order at 12. As claimant does not challenge the administrative law judge's determinations regarding the credibility of the opinions of Drs.

Decision and Order at 9-12. *See Collins v. J & L Steel*, 21 BLR 1-181, 1-189 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989). In considering Dr. Baker's opinion, although the administrative law judge noted Dr. Baker's reliance on a discredited x-ray, he specifically stated that "Dr. Baker explained his diagnosis on the basis of examination findings and symptoms." Decision and Order at 12. Ultimately, however, the administrative law judge found Dr. Baker's opinion less persuasive than the opinions of Drs. Broudy and Westerfield in light of the latter physicians' superior qualifications, more recent examinations of claimant, and because their opinions were more consistent with the objective evidence of record. Decision and Order at 12. Thus, contrary to claimant's assertions, the administrative law judge did not reject Dr. Baker's opinion solely because he relied on a discredited x-ray, nor did the administrative law judge interpret medical tests and substitute his own conclusions for those of a physician. Rather, the administrative law judge fulfilled his role as the trier-of-fact, finding Dr. Baker's opinion to be outweighed by the contrary, well reasoned opinions of Drs. Broudy and Westerfield. Decision and Order at 12. *See White*, 23 BLR at 1-5; *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). Because the administrative law judge weighed all of the medical opinions and rationally concluded that the preponderance of the evidence did not establish the existence of pneumoconiosis, we affirm his conclusion as it is supported by substantial evidence and in accordance with law. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Clark*, 12 BLR at 1-155; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986).

Because claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), a requisite element of entitlement under Part 718, we affirm the administrative law judge's denial of benefits. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Lastly, claimant argues that, because the administrative law judge determined that Dr. Simpao's diagnosis of clinical pneumoconiosis was based on an erroneous x-ray interpretation, he erred in not remanding this case for a complete pulmonary evaluation. The Director responds, stating that it his obligation to provide a complete and credible pulmonary evaluation, but not necessarily the dispositive evidence that resolves the case. Director's Brief at 4. The Director contends that Dr. Simpao's evaluation fulfilled this obligation, because the physician stated an opinion on each element of entitlement and explained his conclusions. *Id.* at 4-5.

Broudy, Westerfield, Simpao, and Niazi, we affirm his findings with respect to these opinions. *See Skrack*, 6 BLR at 1-711.

Pursuant to Section 413(b) of the Act, "Each miner who files a claim for benefits under this subchapter shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). The regulation at 20 C.F.R. §725.406(a) provides that "[a] complete pulmonary evaluation includes a report of physical examination, a pulmonary function study, a chest roentgenogram and, unless medically contraindicated, a blood gas study." 20 C.F.R. §725.406(a). The record reflects that 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 12.

We agree with the position taken by the Director, whose duty it is to ensure the proper enforcement and lawful administration of the Act, *Hodges*, 18 BLR at 1-87, that a remand of the case is not warranted based on the facts of this case. As the Director correctly argues, Dr. Simpao's diagnosis of "CWP 1/1," based on Dr. Simpao's positive reading of the September 12, 2002 x-ray, was not found to lack credibility, but was merely found outweighed by the negative reading of the same x-ray by Dr. Wiot, whose radiological qualifications are superior to those of Dr. Simpao. Because the Director is only required to provide claimant with a complete pulmonary evaluation, not a dispositive one, Dr. Simpao's report fulfills the Director's statutory obligation. Therefore, we decline to remand this case for another pulmonary evaluation.

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

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge