BRB No. 04-0139 BLA

GARRETT TAYLOR Claimant-Petitioner v. RB COAL COMPANY and AMERICAN MINING INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/26/2004 DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

W. Stacy Huff (Huff Law Offices), Harlan, Kentucky, for employer/carrier.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (02-BLA-5202) of Administrative Law Judge Thomas F. Phalen, Jr. 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).[1] After crediting claimant with twenty-three years of coal mine employment, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Although the administrative law judge found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), he found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also argues that the administrative law judge erred in finding the evidence insufficient to establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[2]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The x-ray evidence consists of interpretations of four x-rays taken on April 28, 2001, August 8, 2001, August 10, 2001 and December 20, 2002.[3] In

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). Because this case was filed after January 19, 2001, all citations to the regulations refer to the amended regulations.

[2] Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] Although the administrative law judge indicated that Dr. Baker rendered a positive interpretation of a December 21, 2002 x-ray, *see* Decision and Order at 4, our review indicates that the doctor most likely interpreted a December 20, 2002 film. On the x-ray report form, Dr. Baker indicated that he interpreted the x-ray in question on December 20, 2002. *See* Claimant's Exhibit 1. Moreover, claimant's pulmonary function studies, presumably conducted on the same date that the x-ray was taken, are

considering whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge acted within his discretion in according the greatest weight to the x-ray interpretations rendered by physicians dually qualified as B readers and Board-certified radiologists. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 9-10. Although Dr. Baker, a B reader, interpreted claimant's April 28, 2001 and December 20, 2002 x-rays as positive for pneumoconiosis, Director's Exhibit 12; Claimant's Exhibit 1, the administrative law judge noted that these x-rays were interpreted by better qualified physicians as negative for the disease.[4] Decision and Order at 10; Director's Exhibit 15; Employer's Exhibit 1. Because it is supported by substantial evidence,[5] we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to

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dated December 20, 2002. *Id.* In addition, Dr. West, who received the x-ray in question for rereading, identified the film as having been taken on December 20, 2002. *See* Employer's Exhibit 1. In any event, whether the x-ray was taken on December 20, 2002 or December 21, 2002, it appears that Drs. Baker and West interpreted the same film. (Dr. West indicated that the x-ray that he received for review was provided by Corbin Medical Associates, Dr. Baker's office. *See* Employer's Exhibit 1.)

[4] Dr. Halbert, a B reader and Board-certified radiologist, interpreted claimant's April 28, 2001 x-ray as negative for pneumoconiosis. Director's Exhibit 15. Dr. West, a B reader and Board-certified radiologist, interpreted claimant's December 20, 2002 x-ray as negative for pneumoconiosis. Employer's Exhibit 1.

There are no other positive x-ray interpretations of record. Dr. Hussain, a physician with no special radiological qualifications, interpreted claimant's August 8, 2001 x-ray as negative for pneumoconiosis. Director's Exhibit 11. Dr. Wiot, a B reader and Board-certified radiologist, and Dr. Dahhan, a B reader, interpreted claimant's August 10, 2001 x-ray as negative for pneumoconiosis. Director's Exhibit 13.

[5] In challenging the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis, claimant asserts that an administrative law judge "need not defer to a doctor with superior qualifications" and that an administrative law judge "need not accept as conclusive the numerical superiority of the x-ray interpretations." Claimant's Brief at 3-4. In this case, the administrative law judge permissibly considered both the quality and the quantity of the x-ray evidence in finding it insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). We further note that claimant has provided no support for his assertion that the administrative law judge "may have 'selectively analyzed' the x-ray evidence." Claimant's Brief at 4.

20 C.F.R. §718.202(a)(1).

Claimant also argues that the administrative law judge erred in finding Dr. Baker's opinion insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). We disagree. The administrative law judge permissibly discredited the diagnosis of coal workers' pneumoconiosis rendered by Dr. Baker in his April 28, 2001 report because the administrative law judge found that it was merely a restatement of an x-ray opinion.[6] *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). The administrative law judge also noted that Dr. Baker checked a box, on Progress Notes dated July 19, 2001 and September 13, 2001, that indicated that claimant suffered from "CWP." *See* Director's Exhibit 14. However, because Dr. Baker provided no basis for these diagnoses, the administrative law judge properly found that the doctor's diagnoses were not sufficiently reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 11.

We reject claimant's contention that the administrative law judge erred in failing to accord greater weight to Dr. Baker's opinion based upon his status as claimant's treating physician. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims.[7] *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). The Sixth Circuit has held that the opinions of treating physicians should be given the deference they deserve based upon their power to persuade. *Id.* The Sixth Circuit explained that the case law and applicable regulatory scheme clearly provide that the administrative law judge must evaluate treating physicians just as they consider other experts. *Id.* As discussed, *supra*, the administrative law judge properly accorded less weight to Dr. Baker's opinions that claimant suffered from pneumoconiosis because he found that his diagnoses were not sufficiently reasoned. *Worhach*, *supra*; *Lucostic*, *supra*; Decision and Order at 11.

[6] Dr. Baker also diagnosed chronic obstructive pulmonary disease and chronic bronchitis. However, because Dr. Baker failed to provide an etiology for these diagnoses, these conditions do not satisfy the definition of legal pneumoconiosis. 20 C.F.R. §718.201(a)(2); Director's Exhibit 12.

[7] Revised Section 718.104(d) provides that an adjudicator must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. 20 C.F.R. §718.104(d). The Sixth Circuit has recognized that this provision codifies judicial precedent and does not work a substantive change in the law. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002).

Because it is based upon substantial evidence,[8] the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) is affirmed.

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm his denial of benefits under 20 C.F.R. Part 718. *See 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*). Consequently, we need not address claimant's contentions regarding the administrative law judge's finding that the evidence is insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[8] The administrative law judge noted that Drs. Hussain and Dahhan, the only other physicians to address whether claimant suffered from pneumoconiosis, opined that claimant did not suffer from the disease. Decision and Order at 11. In a report dated August 8, 2001, Dr. Hussain opined that claimant did not have an occupational lung disease caused by his coal mine employment. Director's Exhibit 11. In a report dated August 24, 2001, Dr. Dahhan opined that there was insufficient evidence to justify a diagnosis of coal workers' pneumoconiosis. Director's Exhibit 13. Dr. Dahhan further opined that claimant's respiratory impairment was not caused by, contributed to, or aggravated by the inhalation of coal dust. *Id.*

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge