BRB No. 05-0909 BLA

BETTY M. BEGLEY (Widow of BOBBY L. BEGLEY) Claimant-Petitioner v. CHRIS MAGGARD TRUCKING, INCOPORATED and EMPLOYERS INSURANCE OF WAUSAU Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/30/2006 DECISION and ORDER

Appeal of the Decision and Order of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

Francesca L. Maggard (Lewis and Lewis Law Office), Hazard, Kentucky, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (04-BLA-0039) of Administrative Law Judge Rudolf L. Jansen denying benefits on a survivor's 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). The administrative law judge credited the miner with forty years of coal mine employment, based on the parties' stipulation, 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)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Claimant 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 five interpretations of five x-rays, dated June 23, 1994, February 8, 2000, October 18, 2000, March 25, 2001 and May 18, 2001. Of the five x-ray interpretations of record, two readings are positive for pneumoconiosis, Director's Exhibits 22, 23, and three readings are negative for pneumoconiosis, Director's Exhibits 19, 21; Employer's Exhibit 3. Dr. Powell, a B reader, read the June 23, 1994 x-ray as positive for pneumoconiosis.[3] Director's Exhibit 22.

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[1]Claimant is the widow of the miner, Bobby L. Begley, who died on May 20, 2001. Director's Exhibits 3, 12. Claimant filed a survivor's claim on August 27, 2001. Director's Exhibit 3.

[2]Since the administrative law judge's findings that the existence of pneumoconiosis is not established pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

[3]Contrary to claimant's characterization of Dr. Powell as a dually qualified B reader

Similarly, Dr. Alexander, a B reader and a Board-certified radiologist, read the October 18, 2002 x-ray as positive for pneumoconiosis. Director's Exhibit 23. In contrast, Dr. Wheeler, a B reader and a Board-certified radiologist, read the February 8, 2000, March 25, 2001 and May 18, 2001 x-rays as negative for pneumoconiosis. Director's Exhibits 19, 21; Employer's Exhibit 3. After considering the quantitative and qualitative nature of the conflicting x-rays, 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, has held that an administrative law judge must consider the quantity of the evidence in light of the difference in 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 preponderance of 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 that "…the negative readings constitute the majority of interpretations and are verified by a highly qualified physician." Decision and Order at 12. Thus, since the administrative law judge reasonably considered the quantitative nature and the qualitative nature of the conflicting x-ray readings, we reject claimant's assertion of error on the part of the administrative law judge at 20 C.F.R. §718.202(a)(1).[4] *Staton*, 65 F.3d at 59, 19 BLR at 2-280; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87. Further, since 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).[5]

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and Board-certified radiologist, Claimant's Brief at 3, Dr. Powell's x-ray report indicates that Dr. Powell is only a B reader, Director's Exhibit 22. The record does not otherwise indicate that Dr. Powell is a Board-certified radiologist.

[4]Claimant generally suggests that the administrative law judge may have selectively analyzed the x-ray evidence. Claimant provides no support for her 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 10. Thus, we reject claimant's suggestion.

[5]The administrative law judge noted that Dr. Wheeler read three x-rays, dated October 18, 2000, March 25, 2001 and May 18, 2001, as negative for pneumoconiosis. Decision and Order at 5. Contrary to the administrative law judge's finding, while the record contains Dr. Wheeler's negative readings of two x-rays, dated March 25, 2001 and May 18, 2001, there is no negative reading by Dr. Wheeler of an x-ray dated October 18, 2000 in the record.

Claimant next contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the death certificate signed by Dr. Koura and the reports of Drs. Lane, Ghazal, Jarboe and Fino. In the death certificate, Dr. Koura listed chronic obstructive lung disease as a cause of the miner's death. Director's Exhibit 12. However, Dr. Koura did not render an opinion with respect to the cause of this disease. *Id.* Dr. Lane opined, in a report dated July 1, 1993, that the miner suffered from coal workers' pneumoconiosis, category 1/1, and mild chronic obstructive pulmonary disease. Director's Exhibit 22. While Dr. Lane checked a box to indicate that the miner had an occupational lung disease caused by his coal mine employment based upon a positive x-ray reading, the doctor did not render an opinion that the miner's chronic obstructive pulmonary disease was caused by coal dust exposure. *Id*.

In a report dated September 10, 2002, Dr. Ghazal diagnosed black lung and chronic obstructive pulmonary disease. Director's Exhibit 24. Dr. Ghazal also checked a box marked "Yes" to indicate that the miner suffered from a pulmonary disease caused, at least in part, by coal dust exposure, and noted that this diagnosis was based on chest x-ray findings and CT scan. *Id*. Further, in a note dated September 10, 2002, Dr. Ghazal opined that coal mining and smoking contributed to the miner's lung cancer and worsened his clinical problem. *Id*.

In contrast, Dr. Jarboe opined that the miner did not suffer from either clinical or legal pneumoconiosis. Employer's Exhibit 1. Lastly, Dr. Fino opined that the miner did not have clinical pneumoconiosis. Employer's Exhibit 2.

The administrative law judge found that Dr. Jarboe's opinion outweighed the contrary opinions of Drs. Lane and Ghazal on the grounds that Dr. Jarboe's opinion is better reasoned and supported by Dr. Fino's opinion.

Claimant asserts that the administrative law judge erred in discounting the opinion of Dr. Lane. Dr. Lane's opinion that the miner suffered from coal workers' pneumoconiosis was based on a positive x-ray and a coal mine employment history. Director's Exhibit 18. The administrative law judge properly discounted Dr. Lane's opinion that the miner suffered from pneumoconiosis in the context of Section 718.202(a)(4) because it is based only on an

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Rather, the record contains Dr. Wheeler's negative reading of an x-ray dated February 8, 2000. Employer's Exhibit 3. Thus, the administrative law judge erred in characterizing the date of one of the three x-rays that Dr. Wheeler read as negative for pneumoconiosis. However, since Dr. Wheeler read all three of the x-rays in the record as negative for pneumoconiosis, we hold that the administrative law judge's error in mischaracterizing the date of Dr. Wheeler's February 8, 2000 x-ray is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

x-ray reading and a history of coal dust exposure. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Thus, we reject claimant's assertion that the administrative law judge erred in discounting Dr. Lane's opinion.

In addition, claimant asserts that the administrative law judge erred in discounting Dr. Ghazal's opinion. The administrative law judge properly found that Dr. Ghazal's opinion is not reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). The administrative law judge stated that "it is unclear from Dr. Ghazal's report as to what *specific* evidence in the record he relied upon to diagnose the [m]iner with black lung or COPD." Decision and Order at 13 (emphasis added). Thus, we reject claimant's assertion that the administrative law judge erred in discounting Dr. Ghazal's opinion.

We also reject claimant's assertion that the administrative law judge erred in failing to accord greater weight to Dr. Ghazal's opinion based upon his status as claimant's treating physician. Section 718.104(d) requires the officer adjudicating the claim to "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).[6] Specifically, the pertinent regulation provides that the adjudication officer shall take into consideration the nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). While the treatment relationship may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight in appropriate cases, the weight accorded shall also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5). In the instant case, the administrative law judge properly discounted Dr. Ghazal's opinion because it is not reasoned. *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Fuller*, 6 BLR at 1-1294. Thus, we reject claimant's assertion that the administrative law judge erred in failing to accord greater weight to Dr. Ghazal's opinion based upon his status as claimant's treating physician. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Furthermore, since the administrative law judge properly discounted the only medical opinions of record that could support a finding of the existence of pneumoconiosis, we affirm 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)(4).

In light of our affirmance of the administrative law judge's finding that the evidence is

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[6]The United States Court of Appeals for 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).

insufficient to establish the existence of pneumoconiosis pursuant to 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. *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