

BRB No. 06-0274 BLA

OLLIE A. COMBS)
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 Claimant-Petitioner)
)
 v.)
)
 LEECO, INCORPORATED) DATE ISSUED: 08/17/2006
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 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 of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Phillip Lewis, Hyden, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-6062) of Administrative Law Judge Robert L. Hillyard 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). The administrative law judge found twenty-seven years of qualifying coal mine employment¹ and that employer conceded that it was the proper

¹ The record indicates that claimant's last coal mine employment occurred in Kentucky. Director's Exhibits 3, 6. Accordingly, this case 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*).

responsible operator. Decision and Order at 2-4; Hearing Transcript at 10. Considering entitlement pursuant to 20 C.F.R. Part 718, the administrative law judge concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).² Decision and Order at 9-16. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to award benefits as he has established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond on the merits of the instant appeal.³

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'Keefe 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 the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and

² Claimant filed his claim for benefits on August 21, 2002, which was denied by the district director on December 23, 2003. Director's Exhibits 2, 27. Claimant subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 28.

³ The administrative law judge's length of coal mine employment and responsible operator determinations as well as his findings pursuant to 20 C.F.R. §§718.202(a)(2), (3) and 718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

contains no reversible error. The administrative law judge acted within his discretion in concluding that the evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (4). *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Pursuant to 20 C.F.R. §718.202(a)(1), claimant contends that the administrative law judge erred in failing to find Dr. Baker's positive x-ray interpretation sufficient to establish the existence of pneumoconiosis. Claimant's Brief at 2. We disagree. The administrative law judge considered the nine readings of the five x-rays of record in light of the readers' radiological qualifications. Decision and Order at 10-11. Three readings were positive for pneumoconiosis, the "1/0" readings of the March 3, 2003 and December 11, 2002 x-rays by Dr. Baker, who is a B-reader, and a "1/1" interpretation by Dr. Vuskovich, a B-reader, of the x-ray dated October 29, 2002. Director's Exhibits 10, 23; Claimant's Exhibits 1, 2. Taking into account that the March 3, 2003 x-ray was read as negative for the existence of pneumoconiosis by Drs. Barrett and Halbert, B-readers and board-certified radiologists, and that the October 29, 2002 x-ray was also interpreted by Dr. Halbert as negative for the existence of pneumoconiosis, the administrative law judge found that the March 3, 2003 and October 29, 2002 x-rays were negative for pneumoconiosis. Director's Exhibits 10, 11, 23, 26, 27; Claimant's Exhibit 2; Employer's Exhibits 7, 8; Decision and Order at 10. The administrative law judge found the December 11, 2002 x-ray reading positive. Claimant's Exhibit 1; Decision and Order at 10. However, because all of the other readings, including the August 20, 2005 reading by Dr. Dahhan, who is a B-reader, and the August 9, 2004 reading by Dr. Rosenberg, who is a B-reader, were negative, the administrative law judge found that claimant did not establish the existence of pneumoconiosis by a preponderance of the x-ray evidence. Employer's Exhibits 1-3, 5; Decision and Order at 11. The administrative law judge conducted a proper qualitative analysis of the conflicting x-ray readings. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Staton v. Norfolk & Western Ry. 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); Director's Exhibits 10, 11, 23, 26, 27; Claimant's Exhibits 1, 2; Employer's Exhibits 1-3, 5, 7-10; Decision and Order at 10-11. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge erred in failing to accord appropriate weight to the opinion of Dr. Baker, as it is sufficient to establish the existence of pneumoconiosis. Claimant's Brief at 3. We disagree. Dr. Baker diagnosed claimant with coal workers' pneumoconiosis, Category 1/0, based on x-ray and coal dust exposure, and COPD based on pulmonary function testing, and bronchitis both due to coal dust exposure and cigarette smoking. Director's Exhibit 10; Claimant's Exhibit 1. The administrative law judge found that Dr. Baker's reports were not well-reasoned or documented. Decision and Order at 12-13.

Claimant contends that the administrative law judge erred because “claimant has established the presence of pneumoconiosis by opinion of a physician exercising sound medical judgment.” Claimant’s Brief at 3. Claimant essentially asks the Board to reweigh the evidence, which we cannot do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1988). The administrative law judge permissibly discounted Dr. Baker’s diagnosis of clinical pneumoconiosis because the physician expressly relied only on his own reading of a chest x-ray and claimant’s history of coal dust exposure. See *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); Decision and Order at 12; Director’s Exhibit 10; Claimant’s Exhibit 1. Substantial evidence supports this finding.

Additionally, the administrative law judge rationally found that although Dr. Baker also diagnosed claimant with COPD and bronchitis due to coal dust exposure, the diagnosis did not constitute a reasoned diagnosis of legal pneumoconiosis because the physician did not explain his diagnosis in light of the non-qualifying objective medical testing or explain how a normal chest evaluation is consistent with this diagnosis. See *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); Decision and Order at 12-13; Director’s Exhibit 10; Claimant’s Exhibit 1. Whether an opinion is reasoned and documented is for the administrative law judge to determine. See *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Because substantial evidence supports the administrative law judge’s finding, and the Board is not empowered to reweigh the evidence, *Anderson*, 12 BLR at 1-113, we reject claimant’s contention. Consequently, as claimant makes no other specific challenge to the administrative law judge’s treatment of Dr. Baker’s opinion or the according of substantial weight to the opinions of Drs. Dahhan and Rosenberg, opining that claimant does not have pneumoconiosis or any condition arising from coal dust exposure, we affirm the administrative law judge’s finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). See *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Because claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement in a miner’s claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded and we need not address claimant’s contentions with respect to the administrative law judge’s additional findings pursuant to 20 C.F.R. §718.204(b)(2). See *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge