

BRB No. 07-0951 BLA

M.C.)
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 Claimant-Petitioner)
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 v.) DATE ISSUED: 08/22/2008
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 C & S CONSTRUCTION)
)
 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 - Denying Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

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

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

Richard A. Seid (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (2004-BLA-06091) of Administrative Law Judge Alan L. Bergstrom rendered 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). Based on claimant's April 18, 2002 filing date, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that employer, C & S Construction, is the responsible operator. In addition, he credited claimant with 4.72 years of coal mine employment, based on the evidence of record. Addressing the elements of entitlement, the administrative law judge found that the medical evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established based on the x-ray evidence and in failing to find that he is totally disabled. In addition, claimant contends that because the administrative law judge found that Dr. Simpao did not provide adequate reasoning to support his diagnosis of pneumoconiosis, the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, in a limited response, asserts that the Board should reject claimant's argument that the Director failed to provide him with a complete 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 rational, supported by substantial evidence, and in accordance with applicable law.² 33 U.S.C. §921(b)(3), as incorporated by 30

¹ The parties do not challenge the administrative law judge's decision to credit claimant with 4.72 years of coal mine employment, his finding that employer is the responsible operator, or his finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2)-(3). These findings, therefore, are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

² The Board will apply the law of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment was in Kentucky. *See Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

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 pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to Section 718.202(a)(1), the administrative law judge found that the x-ray evidence of record consists of four interpretations of three x-rays taken on June 20, 2002, October 21, 2003 and March 20, 2006.³ Director’s Exhibit 10; Employer’s Exhibits 1, 3, 4. Dr. Simpao, who possesses no special radiological qualifications, read the June 20, 2002 x-ray as positive for pneumoconiosis; whereas Dr. Kendall, a dually qualified Board-certified radiologist and B reader, read this x-ray as negative. Director’s Exhibit 10; Employer’s Exhibit 4. Dr. Broudy, a B reader, read the October 21, 2003 x-ray as negative for pneumoconiosis, Employer’s Exhibit 3, and Dr. Rosenberg, also a B reader, read the March 20, 2006 x-ray as negative for pneumoconiosis, Employer’s Exhibit 3. Weighing these readings in light of the readers’ radiological qualifications, the administrative law judge found that, based on the preponderance of negative readings by qualified physicians, the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Decision and Order at 27.

We reject claimant’s arguments that the administrative law judge improperly relied on the readers’ credentials, merely counted the negative readings, and may have selectively analyzed the readings.⁴ Claimant’s Brief at 2-4; Decision and Order at 27. The administrative law judge based his finding on a proper qualitative and quantitative analysis of the x-ray evidence. Decision and Order at 27; *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 320, 17 BLR 2-77, 2-87 (6th Cir. 1993); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984). We therefore affirm the administrative law judge’s finding that the evidence is insufficient to establish the existence of

³ An additional reading by Dr. Barrett was obtained solely to assess the quality of the June 20, 2002 x-ray. Director’s Exhibit 11.

⁴ 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 3.

pneumoconiosis pursuant to Section 718.202(a)(1), as supported by substantial evidence.

Pursuant to Section 718.202(a)(4), the administrative law judge considered three medical opinions by Drs. Simpao, Rosenberg and Broudy as to whether claimant had established the existence of pneumoconiosis. Director's Exhibit 10; Employer's Exhibits 1-3. The administrative law judge accorded less weight to Dr. Simpao's opinion, that claimant suffers from pneumoconiosis, because he determined that Dr. Simpao based his diagnosis primarily upon his positive interpretation of an x-ray, which was read as negative by a more qualified Board-certified radiologist and B reader. Decision and Order at 28. In addition, the administrative law judge discounted Dr. Simpao's opinion because the doctor failed to explain how the miner's symptoms, physical findings, and objective test results supported his conclusion. *Id.* In contrast, the administrative law judge determined that the medical opinions of Drs. Rosenberg and Broudy, that claimant does not have pneumoconiosis, are more persuasive because they are better reasoned than Dr. Simpao's opinion, because their opinions are supported by their findings on examination and objective testing. Decision and Order at 28-29. Accordingly, the administrative law judge found that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Because claimant does not specifically challenge the weight that the administrative law judge accorded to the opinions of Drs. Simpao, Rosenberg or Broudy at Section 718.202(a)(4), *see Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987), we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis based on the medical opinion evidence.

Claimant further argues, however, that because the administrative law judge determined that Dr. Simpao failed to provide an adequate rationale for his opinion regarding the existence of pneumoconiosis, claimant did not receive a complete credible pulmonary evaluation sufficient to substantiate the claim as required under the Act. Claimant's Brief at 4. The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b); *see also Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994).

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 (DOL) examination form. Director's Exhibit 10; *see* 20 C.F.R. §§718.101(a), 718.104. The administrative law judge did not find, nor does claimant contend in this appeal, that Dr. Simpao's opinion was incomplete because it failed to address one of the essential elements of entitlement. The Director maintains that "the Director is only required to obtain a complete and credible examination, not the

dispositive evidence that resolves the litigation” and, the fact that the administrative law judge “may find other reports more persuasive does not establish a violation of [30 USC §] 923(b).” Director’s Brief at 3.

As the Director contends, on the issue of the existence of pneumoconiosis, the administrative law judge found that Dr. Simpao’s diagnosis of “CWP 1/1” was based on a positive x-ray reading that the administrative law judge found outweighed by the negative reading of a physician with superior radiological credentials, and that Dr. Simpao did not otherwise explain the basis for the diagnosis. Decision and Order at 28. This was the sole cardiopulmonary diagnosis listed in Dr. Simpao’s report, and the administrative law judge merely found the specific medical data for Dr. Simpao’s diagnosis to be outweighed. Additionally, the administrative law judge found that the opinions of Drs. Rosenberg and Broudy, that claimant does not have pneumoconiosis, were well reasoned and supported by the objective medical evidence. Decision and Order at 28; Employer’s Exhibits 1, 2, 3. The administrative law judge, therefore, rationally found that the opinions of Drs. Rosenberg and Broudy outweighed Dr. Simpao’s opinion. Decision and Order at 28-29; *see Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999) (explaining that administrative law judges “may evaluate the relative merits of conflicting physicians’ opinions and choose to credit one . . . over the other”). Because the administrative law judge merely found Dr. Simpao’s opinion outweighed on the issue of pneumoconiosis, there is no merit to claimant’s argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation.⁵ *Cf. Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-93 (1994).

Because claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), a requisite element of entitlement in a miner’s claim under Part 718, entitlement to benefits is precluded. *Hill*, 123 F3d at 415-16, 21 BLR at 2-196-7; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. We, therefore, need not address claimant’s allegations of error with the administrative law judge’s findings regarding total disability at Section 718.204(b).

⁵ In *Gallaher v. Bellaire Corp.*, No. 03-3066, 71 Fed. Appx. 528, 531, 2003 WL 21801463 (6th Cir. Aug. 4, 2003) (unpub.), the Sixth Circuit held that the Director had discharged his responsibility because the doctor’s report at issue addressed the essential elements of entitlement, even though the administrative law judge had discredited the doctor’s diagnosis of pneumoconiosis as unexplained and based on a questionable x-ray interpretation.

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