BRB No. 08-0112 BLA

G. H. Claimant-Petitioner v. IKERD BANDY COMPANY, INCORPORATED and LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/21/2008 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of John M. Vittone, Chief Administrative Law Judge, United States Department of Labor.

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

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer.

Barry H. Joyner (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (06-BLA-5798) of Chief Administrative Law Judge John M. Vittone (the administrative law judge) on a 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). The administrative law judge found, as the parties stipulated, that the miner had seventeen years of qualifying coal mine employment. Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that the evidence of record failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that the existence of pneumoconiosis was not established by x-ray and medical opinion evidence under Section 718.202(a)(1), (4), and in finding that total respiratory disability was not established under Section 718.204(b)(2)(iv).[2] Claimant additionally contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide claimant with a complete and credible pulmonary evaluation as required by Section 413(b) of the Act, 30 U.S.C. §923(b), because the administrative law judge discredited the medical opinion of Dr. Simpao on the issue of pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director responds, arguing that he is only required to provide claimant with a complete, credible pulmonary evaluation, not a dispositive one. Thus, the Director contends that the mere fact that an administrative law judge finds other reports more persuasive on an issue does not mean that the Director failed to satisfy his statutory obligation.

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 the applicable law,[3] they are binding upon this Board and

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[1] Claimant filed an application for benefits on August 4, 2003. Director's Exhibit 2.

[2] The administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. § 718.202(a)(2), (3), and total disability pursuant to 20 C.F.R. § 718.204(b)(2) (i)-(iii), are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

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 and 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 prove 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. 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*).

In challenging the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1), claimant argues that the administrative law judge erred by placing substantial weight on the numerical superiority of the negative x-ray interpretations and by relying exclusively on the qualifications of the physicians providing those x-ray interpretations. Claimant contends that the administrative law judge is not required either to defer to a physician with superior qualifications or to accept as conclusive the numerical weight of the x-ray interpretations. Claimant further contends that the administrative law judge "may have selectively analyzed" the x-ray evidence.

Contrary to claimant's argument, where x-ray evidence is in conflict, consideration *shall* be given to the readers' radiological qualifications. 20 C.F.R. §718.202(a)(1). The administrative law judge properly found that the positive reading of the July 9, 2003 x-ray by Dr. Baker, a B reader, was outweighed by the negative reading of the same x-ray by Dr. Wheeler, a B-reader and a Board-certified radiologist. Decision and Order at 4; Director's Exhibits 13, 15. Likewise, the administrative law judge found that the positive reading of the August 19, 2003 x-ray by Dr. Simpao, who had no specialized qualifications, was outweighed by Dr. Wheeler's negative rereading of that x-ray. Decision and Order at 4; Director's Exhibits 11, 16. Additionally, the administrative law judge noted that the x-rays taken on October 14, 2003 and October 28, 2003 were read as negative by Drs. Broudy and Dahhan, B-readers. Director's Exhibits 14, 17. In conclusion, the administrative law judge properly found that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) based on the weight of the negative x-ray readings by better qualified physicians. *See 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. 1994).

Claimant's contention, that the administrative law judge "may have selectively analyzed" the x-ray evidence, is also rejected. Claimant has not provided any support for the assertion, nor does a review of the evidence and the administrative law judge's Decision and Order reveal that he engaged in a selective analysis of the x-ray evidence. *See White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-4 (2004). Accordingly, we affirm

the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Claimant next argues that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to Section 718.204(a)(4), based on Dr. Baker's documented and reasoned opinion. Claimant contends that the administrative law judge erroneously discredited Dr. Baker's opinion as based solely on a positive x-ray. In considering Dr. Baker's opinion, the administrative law judge found that Dr. Baker diagnosed coal workers' pneumoconiosis based on an x-ray and claimant's history of coal dust exposure, and diagnosed chronic bronchitis due to coal mine employment and smoking. The administrative law judge properly accorded little weight to Dr. Baker's opinion, as his diagnosis of coal workers' pneumoconiosis was merely based on an x-ray and claimant's history of coal dust exposure. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Further, the administrative law judge properly accorded little weight to Dr. Baker's opinion of chronic bronchitis due to both coal mine employment and smoking, as it was based on an inaccurate smoking history. *See Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Accordingly, we reject claimant's argument, and affirm the administrative law judge's accordance of little weight to the opinion of Dr. Baker on pneumoconiosis for the reasons given.

Claimant has made no other allegations of error regarding the administrative law judge's evaluation of the medical opinion evidence at Section 718.202(a)(4). We therefore affirm the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(4). Because we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established at Section 718.202(a)(4), an essential element of entitlement, we need not address claimant's argument regarding total disability at Section 718.204(b)(2)(iv). *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Claimant also contends that he was not provided with a complete, credible pulmonary evaluation on the issue of pneumoconiosis because the administrative law judge accorded less weight to Dr. Simpao's opinion diagnosing coal workers' pneumoconiosis. We disagree. As the Director contends, Dr. Simpao diagnosed pneumoconiosis, but the administrative law judge properly accorded that opinion less weight because Dr. Simpao's qualifications were outweighed by the qualifications of Drs. Dahhan and Broudy, who found that claimant did not have clinical or legal pneumoconiosis. *See Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25 (8th Cir. 1984). Accordingly, claimant's argument is rejected.

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