BRB No. 05-0679 BLA

TOMMY CALDWELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHITAKER COAL COMPANY, INCORPORATED	)	DATE ISSUED: 12/30/2005
	)	
	)	
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 – Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order –Denial of Benefits (03-BLA-6456) of Administrative Law Judge Daniel J. Roketenetz 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). Claimant filed for benefits on May 4, 2001.

Director's Exhibit 2. The district director issued a Proposed Decision and Order awarding benefits on February 27, 2003. Director's Exhibit 35. At employer's request, the matter was forwarded to the Office of Administrative Law Judges for a formal hearing, which was held on February 16, 2005. In his Decision and Order, the administrative law judge accepted the parties stipulation that claimant worked twelve years in coal mine employment. The administrative law judge, however, found that a preponderance of the medical evidence failed to establish that claimant had coal workers' pneumoconiosis or that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in weighing the x-ray evidence pursuant to Section 718.202(a)(1). Claimant also argues that the administrative law judge erred in finding that he failed to establish the existence of pneumoconiosis based on the medical opinion evidence at Section 718.202(a)(4). Claimant's Brief at 2-5. Claimant argues that because the administrative law judge rejected the opinion of the Department of Labor (DOL) examining physician, Dr. Baker, that claimant has pneumoconiosis, on the basis that his opinion was unreasoned and undocumented, then the Director, Office of Workers' Compensation Programs (the Director) failed to discharge his duty to provide claimant with a credible and complete pulmonary evaluation as required by Section 413(b) of the Act, 30 U.S.C. §923(b). Claimant's Brief at 5. Employer responds urging affirmance of the denial of benefits. The Director has also filed a brief, arguing that the administrative law judge erred in finding Dr. Baker's diagnosis of clinical pneumoconiosis to be unreasoned because it was based solely on a chest x-ray and a history of coal mine employment. The Director maintains that Dr. Baker's opinion is reasoned and, therefore, that claimant received a complete pulmonary evaluation. Director's Brief at 2-3.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the issues presented on appeal, the briefs of the parties, and the Decision and Order of the administrative law judge, we affirm as supported by substantial evidence the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis. With respect to Section 718.202(a)(1), we reject claimant's contention that the administrative law judge "may have" selectively

analyzed the x-ray evidence, and that he erred in relying on the numerical superiority of the negative readings for pneumoconiosis.[1] Claimant's Brief at 3.

In this case, the administrative law judge considered six readings of three x-rays dated April 8, 2002, August 21, 2002, and January 25, 2005. Director's Exhibits 16, 17, 19; Claimant's Exhibits 1-3; Employer's Exhibits 6, 10, 11. There were one quality reading, two positive, and three negative readings for pneumoconiosis. *Id.* In weighing the conflicting x-ray evidence, the administrative law judge noted that, while Dr. Baker read the April 18, 2002 x-ray as positive, he held no radiological qualifications since his certification as a NIOSH B-reader had lapsed at the time he made his readings. Decision and Order at 6, n.4. The administrative law judge instead found the April 18, 2002 x-ray to be negative for pneumoconiosis based on the negative reading by Dr. Hayes, a Board-certified radiologist and B-reader. Employer's Exhibit 6; Decision and Order 6. The administrative law judge similarly credited Dr. Alexander's positive reading of the August 21, 2002 x-ray over Dr. Dahhan's negative reading of the same film. The administrative law judge noted that Dr. Alexander's credentials were superior to Dr. Dahhan's since Dr. Alexander was dually qualified and Dr. Dahhan was only a B-reader. Director's Exhibit 19; Employer's Exhibit 11; Claimant's Exhibits 2-3; Decision and Order at 6-7. The administrative law judge thus found the August 21, 2002 x-ray was positive for pneumoconiosis. Lastly, the administrative law judge found that the January 25, 2002 x-ray was negative for pneumoconiosis based on the sole negative reading provided by Dr. Rosenberg, a B-reader. Employer's Exhibits 1, 10; Decision and Order at 7. Consequently, because there were two negative x-rays compared to one positive x-ray, the administrative law judge concluded that the preponderance of the x-ray evidence was negative for pneumoconiosis. Decision and Order at 7.

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);

[1] Because there was no biopsy evidence of record, the administrative law judge found that claimant was unable to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2). Decision and Order at 8. He also determined that claimant was unable to avail himself of any of the presumptions for establishing the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3). *Id.* The administrative law judge's findings with respect to Sections 718.202(a)(2), (3) are affirmed as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We further affirm the administrative law's finding that claimant established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) as that finding is unchallenged by the parties. *See Skrack*, 6 BLR at 1-710; Decision and Order at 13-16.

Woodward v. Director, OWCP, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Here, in addition to considering the numerical superiority of the negative x-ray readings, the administrative law judge also considered the qualifications of the various physicians. The administrative law judge properly accorded greater weight to the negative x-ray readings that were provided by physicians who were 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). We, therefore, affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of clinical pneumoconiosis at Section 718.202(a)(1).

Turning to the medical opinion evidence at Section 718.202(a)(4), we reject claimant's contention that the administrative law judge erred in his treatment of Dr. Baker's opinion at Section 718.202(a)(4). The administrative law judge correctly found that there were three relevant medical opinions of record from Drs. Baker, Dahhan and Rosenberg.[2] Director's Exhibits 16, 19, 46; Employer's Exhibits 1, 3, 9, 10. He noted that Dr. Baker opined that claimant suffered coal workers' pneumoconiosis and chronic obstructive pulmonary disease (COPD) due to smoking and coal dust exposure. In contrast, Drs. Dahhan and Rosenberg agreed that claimant did not have coal worker's pneumoconiosis and that his respiratory impairment or COPD was due entirely to smoking. In weighing the medical opinion evidence at Section 718.202(a)(4), the administrative law judge stated with respect to Dr. Baker's opinion:

> Dr. Baker's diagnosis of clinical pneumoconiosis in his April 18, 2002 report is based solely upon his own reading of a chest x-ray and the [c]laimant's history of dust exposure. (DX 16). Furthermore in his supplemental opinion, Dr. Baker explained that his determination would remain unchanged even if [c]laimant's coal mine employment only lasted twelve years, but he failed to state any other factors in his diagnosis. (DX 46).

Decision and Order at 11. Although the administrative law judge acknowledged that Dr. Baker performed physical and objective testing to support his opinion, the administrative law judge discounted Dr. Baker's diagnosis of clinical pneumoconiosis because he found that Dr. Baker offered no explanation for his diagnosis of clinical pneumoconiosis other than "his own reading of a chest x-ray and [claimant's] history of dust exposure." *Id*. Since the underlying basis for Dr. Baker's diagnosis of clinical pneumoconiosis was his own discredited positive x-ray reading, the administrative law judge permissibly found that Dr. Baker's diagnosis of clinical pneumoconiosis was not well-reasoned. *See*

[2] Treatment notes from Dr. Wicker diagnosed claimant with bronchitis, pneumoconiosis and various orthopedic problems. Dr. Wicker did not address the etiology of claimant's bronchitis. Director's Exhibit 13; Decision and Order at 11.

Eastover Mining Co. v. Williams, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984).[3] Contrary to the argument of the Director, the administrative law judge did not err in rejecting Dr. Baker's opinion on clinical pneumoconiosis at Section 718.202(a)(4) as unreasoned because it was based in part on discredited evidence. *Winters*, 6 BLR at 1-881 n.1.

With respect to the issue of legal pneumoconiosis, the administrative also acted within his discretion when he found Dr. Baker's opinion, that claimant's COPD was due to a combination of smoking and coal dust exposure, was reasoned but simply outweighed by the contrary opinions of Drs. Dahhan and Rosenberg, who attributed all of claimant's respiratory impairment to smoking. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute our own inferences for those of the administrative law judge, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). We therefore affirm the administrative law judge finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Finally, we reject claimant's contention that he did not receive a complete pulmonary evaluation. In this case, the DOL examining physician, Dr. Baker, performed a complete pulmonary evaluation that addressed all the requisite elements of entitlement. Even though Dr. Baker's opinion relevant to the issue of clinical pneumoconiosis was found to be unreasoned by the administrative law judge, he specifically determined that Dr. Baker's opinion was reasoned with regard to legal pneumoconiosis. Thus, claimant was not denied a complete and credible opinion on the existence of pneumoconiosis.

Moreover, the Director's obligation to provide claimant with a complete pulmonary evaluation is not tantamount to an obligation to provide him with an examining physician's opinion that is given controlling weight by the administrative law judge. Director's Exhibit 23; Decision and Order at 10. Claimant is not entitled to a new pulmonary examination simply because the administrative law judge found Dr. Baker's opinion, relevant to the existence of legal pneumoconiosis, to be outweighed by the

[3] We note that Dr. Baker performed a physical examination, including objective testing, and therefore that his opinion on the issue of clinical pneumoconiosis was not necessarily undocumented, *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). However, any error committed by the administrative law judge in rejecting Dr. Baker's opinion as undocumented is considered to be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

opinions of Drs. Rosenberg and Fino. Since Dr. Baker performed a complete examination which addressed all of the requisite elements of entitlement, the Director has satisfied his obligation under the Act to provide claimant with a complete pulmonary evaluation. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Cline v. Director, OWCP*, 917 F.2d 9, 14 BLR 2-102 (8th Cir. 1992); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994).

Accordingly, the administrative law judge's Decision and Order – Denial of 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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JUDITH S. BOGGS
Administrative Appeals Judge