BRB No. 06-0557 BLA

BOBBIE SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CUMBERLAND RIVER COAL COMPANY	)	
	)	DATE ISSUED: 12/26/2006
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 Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for claimant.

Denise M. Davidson (Barret, Haynes, May, Carter & Davidson, P.S.C.), Hazard, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-5316) of Administrative Law Judge Rudolf L. Jansen 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). This case involves a claim filed on March 29, 2002. After crediting claimant with twenty-two years of coal mine employment, the administrative law judge found that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Although the administrative law judge found that the evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), he found that the evidence is insufficient to establish that claimant's

total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also argues that the administrative law judge erred in finding that the evidence is insufficient to establish that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[1]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Although Dr. Baker, a B reader, interpreted claimant's March 26, 2005 x-ray as positive for pneumoconiosis, Claimant's Exhibit 3, Dr. Wiot, a B reader and Board-certified radiologist, interpreted this x-ray as negative for the disease. Employer's Exhibit 2. The administrative law judge acted within his discretion in crediting Dr. Wiot's negative interpretation of claimant's March 26, 2005 x-ray over Dr. Baker's positive interpretation of this film, based upon Dr. Wiot's superior qualifications. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 12. The only other x-ray interpretations of record are negative for pneumoconiosis.[2] Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

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[1]Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2]Dr. Pate, a B reader, interpreted claimant's July 1, 2002 x-ray as negative for pneumoconiosis. Director's Exhibit 12. Dr. Barrett interpreted claimant's July 1, 2002 x-ray for quality purposes only. *See* Director's Exhibit 13.

Dr. Jarboe interpreted claimant's July 11, 2002 x-ray as negative for pneumoconiosis. Director's Exhibit 14.

Claimant also contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In ascertaining whether the medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the opinions of Drs. Alam, Abadilla, Baker, Jarboe and Dineen, and the progress notes of Dr. Merced.[3] While Drs. Alam, Abadilla and Baker diagnosed pneumoconiosis, Director's Exhibit 12; Claimant's Exhibits 1, 3, Drs. Jarboe and Dineen opined that claimant does not suffer from the disease. Director's Exhibit 14; Employer's Exhibits 1, 4. The administrative law judge accorded greater weight to the opinions of Drs. Jarboe and Dineen, that claimant does not suffer from pneumoconiosis, because he found that their opinions were better reasoned than the contrary opinions of Drs. Alam, Abadilla and Baker. Decision and Order at 13-14. The administrative law judge also found that the opinions of Drs. Jarboe and Dineen were entitled to the greatest weight based upon their superior qualifications. *Id.*

Claimant argues that the administrative law judge erred in not assigning greater weight to the opinions of Drs. Merced and Abadilla based upon their status as claimant's treating physicians. We disagree. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims.[4] *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). The Sixth Circuit has held that the opinions of treating physicians should be given the deference they deserve based upon their power to persuade. *Id.* The Sixth Circuit explained that the case law and applicable regulatory scheme clearly provide that the administrative law judge must evaluate treating physicians just as they consider other experts. *Id.*

As discussed, *supra*, n.3, the administrative law judge properly found that Dr. Merced's progress notes do not support a finding of pneumoconiosis. The administrative law judge accorded less weight to Dr. Abadilla's opinion, that claimant suffers from pneumoconiosis, because he found that it was not sufficiently reasoned. Decision and

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[3]Dr. Merced's progress notes are dated February 12, 2001 through May 27, 2004. Although Dr. Merced diagnosed chronic obstructive pulmonary disease and bronchitis, he did not address the etiology of these diseases. *See* Claimant's Exhibit 2. Consequently, the administrative law judge properly found that Dr. Merced's notes are not useful in determining whether claimant suffers from pneumoconiosis.

[4]Revised Section 718.104(d) provides that an adjudicator must 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). The Sixth Circuit has recognized 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).

Order at 13; Claimant's Exhibit 1. Whether a medical report is sufficiently reasoned is for the administrative law judge as the fact-finder to decide. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Dr. Abadilla completed a one page "Black Lung Disability Report." Claimant's Exhibit 1. On the report, Dr. Abadilla, *inter alia*, checked a box indicating that claimant had been "diagnosed with coal workers' pneumoconiosis as a result of his coal mine employment based on x-rays and clinical findings."[5] *Id.* Although the "Black Lung Disability Report" form completed by Dr. Abadilla requested that he attach copies of records or reports which supported his findings, the doctor did not do so. Because Dr. Abadilla failed to provide any explanation or documentation in support of his findings, the administrative law judge properly found that Dr. Abadilla provided insufficient reasoning to support his conclusions. Decision and Order at 13.

The administrative law judge also permissibly found that Dr. Abadilla's opinion was entitled to less weight because he did not address why claimant's smoking history could not have caused claimant's lung diseases.[6] *See generally Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985) (An administrative law judge may properly find a physician's opinion less probative where the physician does not adequately address the significance of all possible etiologies). Thus, we find no error in the administrative law judge's refusal to accord greater weight to Abadilla's opinion based on his status as claimant's treating physician.

Claimant also contends that the administrative law judge should have accorded greater weight to Dr. Baker's opinion because it is a "complete report," and that "[n]othing in the record shows that the report of Dr. Jarboe is better reason [sic] than the report of Dr. Baker." Claimant's Brief at 4-5. The administrative law judge, however, permissibly accorded less weight to Dr. Baker's opinion because Dr. Baker relied upon an inaccurate smoking history. *Maypray*, *supra*; Decision and Order at 14. While Dr. Baker relied upon a smoking history of twelve to thirteen pack years, the administrative law judge noted that most of claimant's statements and reports documented a smoking

[5]Dr. Abadilla also diagnosed interstitial fibrosis and chronic obstructive pulmonary disease. Claimant's Exhibit 1. Dr. Abadilla indicated that claimant's chronic obstructive pulmonary disease was caused by his coal mine employment. *Id.* Finally, Dr. Abadilla checked boxes indicating that claimant suffered from pneumoconiosis and that claimant's pneumoconiosis was caused at least in part by exposure to coal mine dust. *Id.*

[6]The administrative law judge noted that Dr. Abadilla failed to mention claimant's smoking history and, therefore, failed to consider it as a possible cause of claimant's lung diseases. Decision and Order at 13.

history of between sixteen and thirty years.[7] The administrative law judge also permissibly credited the opinions of Drs. Jarboe and Dineen, that claimant does not suffer from pneumoconiosis, over Dr. Baker's contrary opinion, based upon the superior qualifications of Drs. Jarboe and Dineen.[8] *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 13-14.

Claimant's remaining statements neither raise any substantive issue nor identify any specific error on the part of the administrative law judge in determining that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §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).

In light of our affirmance of the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See 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*). Consequently, we need not address claimant's contentions regarding the administrative law judge's finding that the evidence is insufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[7]At the hearing claimant testified that he smoked a pack of cigarettes a day for fifteen to sixteen years. Transcript at 19. Dr. Alam noted that claimant had smoked a pack of cigarettes a day for approximately fifteen years. Director's Exhibit 12. Dr. Jarboe recorded a smoking history of a pack of cigarettes a day for thirty years. Director's Exhibit 14.

[8]Drs. Jarboe and Dineen are Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 14; Employer's Exhibit 1. The administrative law judge correctly observed that Dr. Baker's qualifications are not found in the record. Decision and Order at 14.

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

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge