BRB No. 07-0297 BLA

B.P.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JACKSON & JACKSON COAL COMPANY, INCORPORATED	)	DATE ISSUED: 12/19/2007
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE GROUP	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Francesca L. Maggard (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

Jeffrey S. Goldberg (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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 (04-BLA-6089) of Administrative Law Judge Joseph E. Kane 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). Claimant filed his claim for benefits on June 17, 2002. Director's Exhibit 2. The administrative law judge credited claimant with ten years of coal mine employment.[1] Decision and Order at 3. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that claimant did not establish the existence of pneumoconiosis or that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4),[2] and total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete and credible pulmonary evaluation sufficient to substantiate his claim. Employer responds, urging affirmance of the denial of benefits. The Director responds, asserting that the Board should reject claimant's argument that the case must be remanded to the district director for a complete pulmonary evaluation.

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising

---

[1] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 4. 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, 1-202 (1989) (*en banc*).

[2] Because claimant does not challenge the administrative law judge's findings that the existence of pneumoconiosis was not established at 20 C.F.R. §718.202(a)(2), (3), we affirm them. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered seven readings of four x-rays. The administrative law judge noted that Dr. Baker, a B reader, read the July 13, 2002 x-ray as positive for pneumoconiosis, while Dr. Wheeler, a B reader and Board-certified radiologist, read the same x-ray as negative for pneumoconiosis. Director's Exhibits 13, 15. Based on Dr. Wheeler's superior qualifications, the administrative law judge found the July 13, 2002 x-ray negative for pneumoconiosis. The administrative law judge also noted that Dr. Simpao, a physician with no special radiological qualifications, read the August 14, 2002 x-ray as positive for pneumoconiosis, while Dr. Wheeler, a B reader and Board-certified radiologist, read the same x-ray as negative for pneumoconiosis.[3] Director's Exhibits 11, 18. Based on Dr. Wheeler's superior qualifications, the administrative law judge found the August 14, 2002 x-ray negative for pneumoconiosis. The administrative law judge additionally considered that Dr. Broudy, a B reader, read the March 3, 2003 x-ray as negative for pneumoconiosis, while Dr. Alexander, a B reader and Board-certified radiologist, read the same x-ray as positive for pneumoconiosis. Director's Exhibits 14, 17. Based on Dr. Alexander's superior qualifications, the administrative law judge found the March 3, 2003 x-ray positive for pneumoconiosis. Finally, the administrative law judge noted that Dr. Dahhan, a B reader, read the April 29, 2005 x-ray as negative for pneumoconiosis. Employer's Exhibit 1. Since there was no contrary reading of this x-ray, the administrative law judge found the x-ray negative for pneumoconiosis. Having determined that three x-rays were negative and one was positive, the administrative law judge found that "the preponderance of the negative readings outweigh the positive readings. Therefore, pneumoconiosis has not been established under §718.202(a)(1)." Decision and Order at 8.

The administrative law judge based his finding on a proper qualitative analysis of the x-ray evidence. *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, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). Consequently, 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, lack merit. Claimant's Brief at 3. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

[3] Dr. Barrett read the August 14, 2002 x-ray for quality purposes only. Director's Exhibit 12.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered four medical opinions. Drs. Simpao and Baker diagnosed pneumoconiosis, while Drs. Broudy and Dahhan concluded that claimant does not have pneumoconiosis. Director's Exhibits 11, 13, 14; Employer's Exhibit 1. The administrative law judge found that Dr. Simpao's diagnosis of pneumoconiosis was well reasoned and documented, as it was based on an x-ray, coal dust exposure history, blood gas studies, symptomatology and physical findings. Decision and Order at 9. The administrative law judge explained that he discounted Dr. Baker's diagnosis of clinical coal workers' pneumoconiosis, as it was based on Dr. Baker's own x-ray reading and a reference to claimant's coal dust exposure history, and Dr. Baker failed to otherwise explain how the results of other objective tests supported his diagnosis of pneumoconiosis. *Id.* at 9-10. The administrative law judge found that Dr. Baker based his diagnosis of bronchitis on claimant's history and failed to opine that claimant's bronchitis was chronic. The administrative law judge also noted that Dr. Baker failed to provide any objective tests or findings to support his diagnosis of bronchitis, and he thus gave Dr. Baker's opinion "little weight." *Id.* at 10. By contrast, the administrative law judge found that the opinions of Drs. Broudy and Dahhan, that claimant did not have clinical or legal pneumoconiosis, were better reasoned and documented. He therefore found that the opinions of Drs. Broudy and Dahhan outweighed those of Drs. Baker and Simpao.

Claimant contends that the administrative law judge erred in discounting Dr. Baker's opinion as based on a positive x-ray reading that was "contrary to the [administrative law judge's] findings." Claimant's Brief at 4. Contrary to claimant's contention, the administrative law judge reasonably discounted Dr. Baker's diagnosis of "Coal Workers Pneumoconiosis, category 1/0," since it was based only on Dr. Baker's own x-ray reading and claimant's coal dust exposure history. Decision and Order at 10; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-10 (6th Cir. 2000). The administrative law judge also found that Dr. Baker failed to otherwise explain how the documentation underlying his report supported his diagnosis. *Id.*; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR at 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Moreover, the administrative law judge went on to consider Dr. Baker's diagnosis of bronchitis, finding it insufficient to establish legal pneumoconiosis,[4] as Dr. Baker failed to opine that the bronchitis was chronic, based the diagnosis only on claimant's history, and failed to explain how the documentation supported his diagnosis. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Claimant additionally contends that Dr. Baker's

[4] "Legal" pneumoconiosis includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

opinion was reasoned and documented and should not have been discredited. Claimant's Brief at 5. Claimant essentially requests a reweighing of the evidence, which the Board is not authorized to do. *Anderson*, 12 BLR at 1-113. Substantial evidence supports the administrative law judge's permissible determination that the opinion of Dr. Baker was not as well-reasoned as the contrary opinions of Drs. Broudy and Dahhan. Consequently, 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).

Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a miner's claim under Part 718, we affirm the administrative judge's denial of benefits. *Anderson*, 12 BLR at 1-112; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*). Consequently, we need not address claimant's arguments concerning the administrative law judge's finding that claimant did not establish that he is totally disabled.

Claimant also contends that he is entitled to a remand of the case to the district director for the Director to provide him with a complete and credible pulmonary evaluation, because the administrative law judge found that "Dr. Simpao's report was not well reasoned concerning the issue of total disability." Claimant's Brief at 5. The Director responds that the administrative law judge's finding that Dr. Simpao's opinion on the presence of pneumoconiosis and total disability was outweighed by the contrary opinions of Drs. Broudy and Dahhan, does not mean that the Director failed to satisfy his statutory obligation to provide a complete pulmonary evaluation.

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), as implemented by 20 C.F.R. §§718.101(a), 725.406; *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (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 examination form. Director's Exhibit 11; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). As discussed above, the administrative law judge found Dr. Simpao's diagnosis of pneumoconiosis well-reasoned and documented, but outweighed. On the issue of total disability, Dr. Simpao opined that claimant had a mild pulmonary impairment that prevents him from performing coal mine work. Director's Exhibit 11. The administrative law judge found that Dr. Simpao's total disability opinion was "less-reasoned," because Dr. Simpao failed to explain why claimant's mild impairment caused a totally disabling condition and how the non-qualifying[5] objective test results supported

[5] A "qualifying" objective study yields values that are equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C for establishing total disability. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

his disability finding. Decision and Order at 13. Additionally, the administrative law judge chose to give greater weight to the better reasoned and better documented opinions of Drs. Dahhan and Broudy. *Id.; 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"). In sum, we agree with the Director that the administrative law judge found Dr. Simpao's opinion outweighed, and that this finding does not indicate a failure by the Director to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation. *Cf. Hodges*, 18 BLR at 1-93.

Accordingly, the administrative law judge's Decision and Order-Denying Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge