BRB No. 07-0339 BLA

H.N.H.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTOVER MINING COMPANY	)	
	)	DATE ISSUED: 12/21/2007
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 Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

H.N.H., Bristol, Virginia, *pro se*.

W. Stacy Huff (Huff Law Office), Harlan, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order (04-BLA-6555) of Administrative Law Judge Edward Terhune Miller 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). Claimant's prior application for benefits, filed on August 3, 1994, was finally denied on June 29, 2001,

[1] Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

because claimant failed to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment.[2] [*H.N.H.*] *v. Eastover Mining Co.*, BRB No. 00-1014 BLA (June 29, 2001)(unpub.); Director's Exhibit 3. On June 20, 2003, claimant filed his current application, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 5.

In a Decision and Order – Denying Benefits issued on November 27, 2006, the administrative law judge credited claimant with 6.68 years of coal mine employment,[3] based on the Social Security Administration earnings records,[4] and found that the medical evidence developed since the prior denial of benefits established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant demonstrated a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Reviewing the entire record, the administrative law judge found that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176, 1-177 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational,

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[2] This is claimant's fourth claim for benefits. The complete procedural history of his earlier claims, set forth in the Board's prior decision in [*H.N.H.*] *v. Eastover Mining Co.*, BRB No. 00-1014 BLA (June 29, 2001)(unpub.), is incorporated herein by reference.

[3] The Board will apply the law of the United States Court of Appeals for the Sixth circuit, as claimant was last employed in the coal mine industry in Kentucky. Director's Exhibit 6; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[4] The administrative law judge found that the record contained numerous conflicting statements by claimant regarding his coal mine employment history, and, therefore, permissibly relied on the Social Security Administration earnings records as the best objective documentary evidence. *See Brumley v. Clay Coal Co.*, 6 BLR 1-956 (1984); Decision and Order at 3-4.

and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 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 a finding of 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).

In finding that the x-ray evidence did not establish the existence of pneumoconiosis, the administrative law judge permissibly found that the more probative evidence is that developed in connection with the current claim, and he considered eight readings of four new x-rays.[5] *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Parsons v. Wolf Creel Collieries*, 23 BLR 1-29, 1-35 (2004); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004); Decision and Order at 10 n.3. An August 7, 2003 x-ray was read as positive by Dr. Taylor, a physician with no radiological qualifications, and as negative by Dr. West, who is a dually qualified B reader and Board-certified radiologist. Decision and Order at 5, 10 n.4; Director's Exhibits 13, 26. The administrative law judge permissibly found this x-ray to be negative, based on Dr. West's superior qualifications. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc*). A January 6, 2004 x-ray was read as positive by Dr. Alexander, and as negative by Dr. Halbert, both of whom are dually qualified B readers and Board-certified radiologists. Decision and Order at 5; Claimant's Exhibit 3; Employer's Exhibit 1. In addition, a November 30, 2004 x-ray was read as positive by Dr. Alexander, but was found to be unreadable by Dr. Halbert. Decision and Order at 5; Claimant's Exhibit 1; Employer's Exhibit 3. Finally, a March 14, 2005 x-ray was read as positive by Dr. Cappiello, and as negative by Dr. Halbert, both of whom are dually qualified B readers and Board-certified radiologists. Decision and Order at 5; Claimant's Exhibit 2; Employer's Exhibit 4.

Having considered that the record contains multiple conflicting readings by similarly qualified readers, and noting that the most recent x-ray was read as both positive and negative by equally qualified readers, the administrative law judge permissibly concluded that the x-ray evidence was in equipoise, and thus, was insufficient to support a finding of pneumoconiosis. *See Director, OWCP v. Greenwich*

[5] The record contains an additional reading for quality only (Quality 2), by Dr. Barrett, of the October 24, 2002 x-ray. Director's Exhibit 9.

Collieries [*Ondecko*], 512 U.S. 267, 280-81, 18 BLR 2A-1, 2A-12 (1994); Decision and Order at 5. Because the administrative law judge examined the x-ray evidence in light of both the quantity of evidence and the relevant qualifications of the x-ray readers, *see Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Cranor*, 22 BLR at 1-7; *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993), and explained why he found the x-ray evidence insufficient to establish the existence of pneumoconiosis, we affirm the administrative law judge's finding that claimant failed to meet his burden of proof pursuant to 20 C.F.R. §718.202(a)(1).[6]

The administrative law judge also found, correctly, that the record contains no biopsy or autopsy evidence to be considered pursuant to 20 C.F.R. §718.202(a)(2), and that the presumptions set forth at 20 C.F.R. §§718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306; Decision and Order at 10.

In considering the medical opinion evidence relevant to 20 C.F.R. §718.202(a)(4), the administrative law judge found that the evidence submitted with the prior claim did not establish the existence of pneumoconiosis, and noted that his determination was consistent with the finding of the prior administrative law judge, as affirmed by the Board. Decision and Order at 11 n.5. Turning to the medical opinions and progress notes developed with the current claim, the administrative law judge found that Ms. Kellie Brooks, a nurse practitioner, and Dr. Taylor, who is a Board-certified pulmonary specialist, each opined that claimant suffers from clinical pneumoconiosis, and chronic obstructive pulmonary disease (COPD), but that neither clearly attributed claimant's COPD to coal dust exposure. Decision and Order at 6, 9, 10; Director's Exhibits 13, 14; Claimant's Exhibit 6. By contrast, Drs. Dahhan and. Rosenberg, both Board-certified pulmonary specialists, opined that claimant does not suffer from coal workers' pneumoconiosis or any coal dust-related lung disease. Decision and Order at 7-9; Director's Exhibit 30; Employer's Exhibits 2, 2a.

The administrative law judge permissibly accorded little weight to the opinion of Ms. Brooks, that claimant has clinical pneumoconiosis and COPD, because as a nurse practitioner, her qualifications are inferior to those of Drs. Taylor, Dahhan, and

[6] As employer asserts, the record also contains a negative interpretation of the January 6, 2004 x-ray by Dr. Dahhan, a B reader, submitted by employer, which the administrative law judge did not consider. Employer's Brief at 19; Director's Exhibit 30. As the administrative law judge ultimately found that the x-ray evidence did not establish the existence of pneumoconiosis, his failure to consider this additional negative reading was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Rosenberg, and because she provided no explanation for her conclusions. *See* 20 C.F.R. §718.202(a)(4); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *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 1-149 (1989)(*en banc*).

Regarding the opinion of Dr. Taylor, the administrative law judge properly noted that the physician's diagnosis of clinical pneumoconiosis was "undermined" by his primary reliance on his own reading of a chest x-ray, that was re-read as negative by a more highly qualified reader, and that Dr. Taylor's additional diagnosis of COPD was not clearly linked to coal dust exposure.[7] Decision and Order at 6-7, 10; Director's Exhibits 13, 14. Thus, the administrative law judge permissibly accorded little weight to Dr. Taylor's conclusions, finding them cursory, ambiguous, and lacking supporting rationale. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 6-7, 10-11; Director's Exhibits 13, 14.

By contrast, the administrative law judge permissibly found that the opinions of Drs. Dahhan and Rosenberg, that claimant does not have coal workers' pneumoconiosis or any coal dust-related lung disease, were thorough, reasoned, documented, and more consistent with the credible objective evidence of record. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; Decision and Order at 11; Director's Exhibit 1; Employer's Exhibits 33, 34. It is within the purview of the administrative law judge to weigh the evidence, draw inferences, and determine credibility. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Because the administrative law judge examined each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103, and explained whether the diagnoses contained therein constituted reasoned medical judgments under 20 C.F.R. §718.202(a)(4), we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Therefore, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Because claimant did not establish the existence of pneumoconiosis, an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Anderson*, 12 BLR at 1-113; *Trent*, 11 BLR at 1-27.

[7] The record reflects that Dr. Taylor diagnosed coal workers' pneumoconiosis and chronic obstructive pulmonary disease, and listed coal dust and tobacco as the etiology for his diagnosis, but did not indicate which etiology pertained to which diagnosis. Director's Exhibit 13.

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