BRB No. 04-0631 BLA

ERNIE R. BOWLING	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SILVERADO TRUCKING, INCORPORATED	)	
	)	
	)	DATE ISSUED: 02/28/2005
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Claim of Daniel P. Solomon, Administrative Law Judge, United States Deparment of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Sherri P. Brown (Ferreri & Fogle), Lexington, Kentucky, for employer.

Rita A. Roppolo (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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 Claim (03-BLA-5958) of Administrative Law Judge Daniel P. Solomon 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).[1] The administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in admitting x-ray evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414. Claimant also contends that the administrative law judge erred in his consideration of the evidence pursuant to 20 C.F.R. §718.202(a)(1) and (4). In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has submitted a limited response, arguing that employer's submission of two re-readings of the December 15, 2001 x-ray and the October 11, 2002 x-ray does not violate the regulatory requirements of 20 C.F.R. §725.414(a) as one re-reading constitutes rebuttal evidence, and the second re-reading may be counted towards the limit of employer's affirmative evidence.[2]

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish 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 a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1980); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The parties do not challenge the administrative law judge's finding of twenty-eight years of coal mine employment, his findings pursuant to 20 C.F.R. §§718.202(a)(2), (3), or the weighing of Dr. Burki's opinion at 20 C.F.R. §718.202(a)(4). These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant contends that in submitting two x-ray re-readings each for the December 15, 2001 and October 11, 2002 x-ray, employer exceeded the evidentiary limitations set forth in Section 725.414 and that the administrative law judge erroneously failed to strike one of the re-readings from the record for each x-ray. Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties may submit into the record. 20 C.F.R. §§725.414, 725.456(b)(1). The applicable provision in this case permits employer to "submit, in rebuttal of the case presented by claimant, no more than one physician's interpretation of each chest x-ray…." 20 C.F.R. §725.414(a)(3)(ii). The regulations also state that employer "shall be entitled to obtain and submit, in support of its affirmative case, no more than two chest x-ray interpretations…." 20 C.F.R. §725.414(a)(3)(i).

The administrative law judge correctly noted that the first film, dated December 15, 2001 was unanimously interpreted as negative by Dr. Baker, a B reader, and Drs. Wiot and Spitz, dually qualified board-certified radiologists and B-readers. Decision and Order at 6; Director's Exhibits 11, 23, 25.[3] Regarding the second x-ray, dated October 11, 2002, while noting the presence of a positive x-ray interpretation by Dr. Simpao, the administrative law judge, nonetheless, reasonably found that this interpretation was outweighed by the negative interpretations by Drs. Wiot and Spitz who are better qualified than Dr. Simpao, who is neither a B-reader nor board-certified radiologist. Decision and Order at 6; Claimant's Exhibit 1; Employer's Exhibits 2, 3. In considering the evidence, the administrative law judge reasonably exercised his discretion, as trier-of-fact, in relying upon the interpretations by better qualified physicians and determining that the x-ray evidence is negative for the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1); Decision and Order at 5 - 6; *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. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). As substantial evidence supports the administrative law judge's finding, any error, if any, that the administrative law judge may have committed in considering evidence in excess of the regulatory limitation at Section 725.414 is harmless. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Staton*, 65 F.3d 55, 19 BLR 2-271; *Woodward*, 991 F.2d 314, 17 BLR 2-77; *Edmiston*, 14 BLR 1-65. In addition, we reject claimant's general contention that the administrative law judge "may have selectively analyzed" the x-ray evidence. Claimant's Brief at 4. Claimant has not provided any support for this assertion, nor does a review of the evidence and the administrative law judge's Decision and Order reveal a selective analysis of the x-ray evidence.

[3] The record contains a fourth interpretation, by Dr. Sargent, which was re-read for quality only. Director's Exhibit 12.

Claimant next challenges the administrative law judge's consideration of the medical opinions pursuant to Section 718.202(a)(4). Claimant first contends that the administrative law judge erred by failing to recognize that Dr. Baker diagnosed claimant with legal pneumoconiosis. We disagree. The administrative law judge properly noted that Dr. Baker's medical report indicates that he diagnosed claimant with coal workers' pneumoconiosis, category 0/1, COPD and chronic bronchitis, and attributed the etiology of the respiratory disease, at least in part, to coal dust exposure. Decision and Order at 7. The administrative law judge also found, however, that Dr. Baker completed an additional form which indicates that claimant does not have pneumoconiosis.[4] *Id* at 7. Thus, the administrative law judge properly found that based on this conflicting evidence, Dr. Baker's opinion was insufficient to establish pneumoconiosis. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *see also Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Hopton v. United States Steel Corp.*, 7 BLR 1-12 (1984).

Claimant next contends that the administrative law judge erred in discrediting Dr. Simpao's opinion of pneumoconiosis because it was based on a positive x-ray. We disagree. The administrative law judge permissibly accorded diminished weight to Dr. Simpao's opinion because the physician relied upon his positive x-ray finding to diagnose claimant with pneumoconiosis and provided no other reason for his opinion.[5] S*ee Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). The administrative law judge also found that Dr. Simpao reported claimant's weight to be two hundred and thirty nine pounds, whereas Dr. Burki reported a weight of three hundred

[4] Dr. Baker checked "no" to the question of whether based upon his examination of claimant, claimant suffers from an occupational lung disease which was caused by coal mine employment. Dr. Baker indicated on the same form that claimant has a mild pulmonary impairment, possibly related to asthma and coal dust exposure and retains the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment. Director's Exhibit 8.

[5] Dr. Simpao stated that the bases of his diagnosis are "findings on chest x-ray, arterial blood gas and pulmonary function test along with physical findings and symptomatology." Director's Exhibit 31. The administrative law judge found that the objective tests are insufficient to establish the presence of pneumoconiosis, and that the symptoms reported by Dr. Simpao were not corroborated by claimant's testimony or Dr. Burki. Decision and Order at 8.

and twenty pounds[6] and claimant testified that he is three hundred and fifty pounds. The administrative law judge rationally found that this discrepancy bears significance and provides less credence to Dr. Simpao's other findings. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985).

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Ondecko*, 512 U.S. 267, 18 BLR 2A-1; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). 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 its own inferences on appeal. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). In this case, claimant is doing no more than requesting that we reweigh the evidence, which we cannot do. *Anderson*, 12 BLR at 1-113. Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis as it is supported by substantial evidence and is in accordance with law. *See Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 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 Hill*, 123 F.3d 412, 21 BLR 2-192; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

[6] Dr. Burki reviewed progress notes by Dr. Alam, which formed the basis of his opinion that claimant does not suffer from pneumoconiosis, and an x-ray report by Dr. Spitz. Director's Exhibits 26, 32.

Accordingly, the administrative law judge's Decision and Order Denying Claim 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