

BRB No. 04-0677 BLA

GEORGIE WHITAKER )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 IKERD BANDY COMPANY, )  
 INCORPORATED )  
 )  
 and )  
 ) DATE ISSUED: 02/28/2005  
 ZURICH AMERICAN INSURANCE )  
 )  
 Employer/Carrier- )  
 Respondent )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

Appeal of Appeal of the Decision and Order – Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, PSC), Hyden, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (03-BLA-5731) of Administrative Law Judge Thomas F. Phalen, Jr. 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). In a Decision and Order dated April 27, 2004, the administrative law judge credited the miner with twenty-five years of coal mine employment,<sup>1</sup> and found that the evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202 and failed to establish total disability at 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (4), and erred in his evaluation of the medical opinion evidence relevant to the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv). 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.<sup>2</sup>

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'Keefe 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).

Claimant initially contends the administrative law judge erred in evaluating the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). We disagree. In finding the x-ray

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<sup>1</sup> The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 3. 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*).

<sup>2</sup> The administrative law judge's finding of twenty-five years of coal mine employment and his finding that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) or (3), and further failed to establish the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

evidence insufficient to establish the existence of pneumoconiosis, the administrative law judge properly noted that the relevant x-ray evidence of record consists of four readings of two x-rays.<sup>3</sup> Decision and Order at 4-5, 8.

A January 23, 2002 x-ray was read once as positive by Dr. Baker, a physician with no specialized qualifications for the reading of x-rays, and twice as negative by Drs. West and Poulos, both dually qualified B-readers and Board-certified radiologists. Director's Exhibit 10; Employer's Exhibits 1, 2; Decision and Order at 5, 8. In addition, a January 29, 2002 x-ray was read once as negative by Dr. Broudy, a B-reader. Employer's Exhibit 3; Decision and Order at 5, 8. Contrary to claimant's arguments, the administrative law judge properly considered both the quantity and the quality of the x-ray readings of record, and permissibly accorded less weight to the sole positive x-ray reading by Dr. Baker based on the fact that he possesses lesser qualifications than the other readers of record. *Staton v. Norfolk & Western Railway Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6<sup>th</sup> Cir. 1995); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc on recon.*); Decision and Order at 7. In addition, while, as claimant asserts, the administrative law judge did err in allowing employer to submit into the record an extra rebuttal reading of the January 23, 2002 x-ray, *see* 725.414(a)(3)(ii), this error is harmless as the inclusion of the extra rebuttal reading does not affect the disposition of the case. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Even excluding the extra rebuttal reading from consideration, the administrative law judge's determination to accord greater probative weight to the more numerous negative interpretations rendered by the more highly qualified physicians is still supported by substantial evidence in the record. Consequently, we reject claimant's contention that the administrative law judge committed reversible error in weighing the x-ray evidence of record, and affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Claimant also challenges the administrative law judge's evaluation of the medical opinion evidence on the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), specifically asserting that the administrative law judge erred in failing to accord greater weight to the opinion of Dr. Baker. We disagree.

In considering the medical opinion evidence, the administrative law judge properly found that Dr. Baker was the only physician of record to find the existence of pneumoconiosis. Decision and Order at 6, 9-10. The administrative law judge permissibly accorded little weight to Dr. Baker's opinion that claimant suffers from clinical pneumoconiosis, however, as it was based in part on a positive x-ray which was subsequently re-read as negative by a more highly qualified reader, and because the

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<sup>3</sup> The January 23, 2002 x-ray was also read for quality only (Quality 1) by Dr. Sargent, a Board-certified radiologist and B-reader. Director's Exhibit 10.

physician failed to explain how the underlying documentation supported his conclusion. The determination of whether an opinion is reasoned and documented requires the fact finder to examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical conclusion is based. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Decision and Order at 9. Further, an administrative law judge may accord less weight to a medical opinion because a doctor did not explain how the underlying documentation supported his diagnosis. *Hopton v. United States Steel Corp.*, 7 BLR 1-12 (1984). In addition, the administrative law judge permissibly accorded less weight to Dr. Baker's diagnosis of chronic bronchitis due to smoking and coal dust exposure, or legal pneumoconiosis, because Dr. Baker based his diagnosis solely on claimant's stated history of cough, sputum production and wheezing and did not identify any clinical observations or findings to support his conclusion. *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *McMath*, 12 BLR at 1-6; *Hopton*, 7 BLR at 1-12; Decision and Order at 10. Finally, contrary to claimant's arguments, the administrative law judge was not required to accord controlling weight to the opinion of Dr. Baker on the grounds that he treated claimant. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Rather, "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Williams*, 338 F.3d at 513, 22 BLR at 2-647.

It is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6<sup>th</sup> Cir. 1989). 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 the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000). Consequently, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a).

Because we affirm herein the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a), we need not address claimant's challenge to the administrative law judge's findings in determining that the evidence fails to establish the existence of a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(iv). A finding of entitlement to benefits is precluded in this case. *See Trent*, 11 BLR at 1-27.

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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BETTY JEAN HALL  
Administrative Appeals Judge