BRB No. 06-0113 BLA

DAN BAILEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DAN BAILEY ENTERPRISES, INCORPORATED	)	DATE ISSUED: 02/28/2006
	)	
and	)	
	)	
WAUSAU UNDERWRITERS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondent	)	
	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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, P.S.C.), Hyden, Kentucky, for claimant.

Steven H. Theisen (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 BOGGS, Administrative Appeals Judges.

PER CURIUM:

Claimant appeals the Decision and Order – Denial of Benefits (03-BLA-6588) of Administrative Law Judge Thomas F. Phalen, Jr. 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 August 29, 2005, the administrative law judge credited the miner with twenty-one years of coal mine employment,[1] 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 application of the evidentiary limitations at 20 C.F.R. §725.414. Claimant further 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). Finally, claimant asserts the Director failed to provide him with a credible pulmonary evaluation as required by 20 C.F.R. §725.406(a). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response contending that claimant received a complete pulmonary evaluation as contemplated by Section 725.406(a).[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).

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[1] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 2. 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] The administrative law judge's finding of twenty-one years of coal mine employment and his findings 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).

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 asserts that the administrative law judge erred in allowing employer to submit two rebuttal readings of Dr. Simpao's December 20, 2001 positive x-ray reading. Claimant's Brief at 3-4. We disagree.

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 can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). The regulation specifies, in pertinent part, that claimant and the responsible operator may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations…." 20 C.F.R. §725.414(a)(2)(i),(a)(3)(i). The regulation further provides that, in rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray…" submitted by the opposing party "and by the Director pursuant to §725.406."[3] 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Contrary to claimant's arguments, while employer submitted two re-readings of the December 20, 2001 x-ray, employer specifically designated the re-reading by Dr. Scatarige as part of its affirmative case evidence, and specifically designated the re-reading by Dr. Wheeler as rebuttal to Dr. Simpao's reading. Director's Exhibit 22; Employer's Evidence Summary Form. Thus, as employer was within the evidentiary limitations specified for both affirmative case x-rays and x-ray rebuttal evidence, and as the regulation at 20 C.F.R. §725.414 does not explicitly preclude the submission of x-ray re-readings as part of a party's affirmative case evidence, the administrative law judge did not err in admitting both re-readings of the December 20, 2001 x-ray.

Regarding the merits of entitlement, claimant contends that in analyzing the medical opinion evidence relevant to the issue of total disability, the administrative law judge improperly accorded diminished weight to Dr. Baker's opinion. Claimant's Brief at 6. Claimant asserts that Dr. Baker's opinion did not rely solely on claimant's work history or non-qualifying pulmonary function studies, but instead was well-reasoned and well documented and should not have been rejected by the administrative law judge.

[3] Pursuant to 20 C.F.R. §725.406, the Director provides a complete pulmonary evaluation of the miner, the results of which are "not . . . counted as evidence submitted by the miner under §725.414." 20 C.F.R. §725.406(b).

Claimant's Brief at 7. Claimant also contends that the administrative law judge should have considered Dr. Baker's opinion in conjunction with the exertional requirements of claimant's usual coal mine employment. Claimant's Brief at 8.

In a report dated December 20, 2001, Dr. Baker diagnosed coal workers' pneumoconiosis and chronic bronchitis due to coal dust exposure, and, referring to the pulmonary function study results, opined that "[w]ith the FEV1 and Vital Capacity both being greater than 80% of predicted, patient has a Class I respiratory impairment" as defined by the fifth edition of the *Guides to the Evaluation of Permanent Impairment*. Director's Exhibit 15. Dr. Baker further stated, pursuant to the *Guides*, that claimant "has a second impairment based on the presence of Pneumoconiosis" because "a person who develop pneumoconiosis should limit further exposure to the offending agent. On this basis [claimant] would be 100% disabled for work in the coal mining industry or other dusty environments." Director's Exhibit 15.

In evaluating Dr. Baker's opinion, the administrative law judge permissibly accorded little weight to the physician's conclusion that the pulmonary function studies revealed a Class I respiratory impairment, because this was inconsistent with Dr. Baker's own determination that the pulmonary function studies yielded normal results. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Director's Exhibit 15; Decision and Order at 12. With respect to Dr. Baker's opinion that claimant was also 100% disabled for work in a dusty environment, the administrative law judge permissibly accorded it less weight as being a recommendation against further coal dust exposure and, therefore, insufficient to establish total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); Decision and Order at 12. Further, contrary to claimant's arguments, the administrative law judge did not discredit Dr. Baker's opinion as being based solely on work history or non-qualifying objective studies, nor did the administrative law judge fail to consider the nature of claimant's usual coal mine employment. Decision and Order at 6; *see Hvizdzak v. North American Coal Co.*, 7 BLR 1-469 (1984).[4] Rather, the administrative law judge permissibly concluded, for the reasons discussed above, that Dr. Baker's diagnosis of a totally disabling respiratory impairment was neither well-reasoned nor well-documented.

Finally, claimant asserts that the administrative law judge discredited the opinion of Dr. Simpao, that claimant is totally disabled from a respiratory standpoint, and that,

[4] The administrative law judge found that claimant worked as a roof bolter, jack setter, miner operator, brattice man and general helper, and that his work required lifting fifty pound bags of rock dust, standing, crawling, bending and reaching. Decision and Order at 3.

therefore, claimant is entitled to have the denial of benefits vacated, and the case remanded for the Director to provide him with a new pulmonary evaluation pursuant to 20 C.F.R. §725.406.[5] Contrary to claimant's arguments, the administrative law judge specifically characterized Dr. Simpao's opinion as "documented and reasoned," but found his opinion outweighed by the opinion Dr. Rosenberg, that claimant retains the respiratory capacity for coal mine work, whose conclusions the administrative law judge found better explained and better supported by the uniformly non-qualifying pulmonary function and blood gas studies of record. *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6. Thus, there is no merit to claimant's argument that the administrative law judge rejected Dr. Simpao's opinion as not credible.

Therefore, as the administrative law judge permissibly accorded less weight to the opinions of Drs. Baker and Simpao, the only physicians of record diagnosing the existence of a totally disabling respiratory impairment, and as the administrative law judge further properly weighed the medical opinion evidence together with the pulmonary function and blood gas study results of record, all of which were non-qualifying, we affirm the administrative law judge's determination 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). *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987); *see also Anderson*, 12 BLR 1-111, 1-113.

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

[5] The Department of Labor has a statutory duty to provide a miner with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate the claim. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 184 (1994).

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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JUDITH S. BOGGS
Administrative Appeals Judge