BRB No. 06-0643 BLA

DANNY HOLLAND	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LESLIE RESOURCES, INCORPORATED	)	DATE ISSUED: 02/28/2007
	)	
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

Denise M. Davidson (Barret, Haynes, May, Carter & Davidson, P.S.C.), Hazard, Kentucky, for employer.

Helen H. Cox (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: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Claimant appeals the Decision and Order (04-BLA-6236) of Administrative Law Judge Daniel F. Solomon denying benefits on a claim filed on July 24, 2002 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 credited claimant with at least twelve years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and insufficient to establish total disability pursuant to 20 C.F.R. 718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and that it is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Further, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director filed a limited response in a letter brief, urging the Board to reject claimant's contention that he failed to provide claimant with a complete and credible pulmonary evaluation.[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 supported by substantial evidence, is rational, and is in accordance with applicable 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish 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 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 that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Specifically, claimant asserts that the administrative law judge

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[1] The administrative law judge stated that "it was determined [at the hearing] that the prior [1999] claim was withdrawn and that the instant claim would be treated as an initial filing." Decision and Order at 3 n.3; Hearing Transcript at 30-31.

[2] The administrative law judge's length of coal mine employment finding and his findings of no pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

improperly relied on the qualifications of the physicians submitting negative x-ray readings, and the numerical superiority of the negative x-ray readings. The record consists of four interpretations of two x-rays, dated October 8, 2002 and November 11, 2002.[3] Of the four x-ray interpretations, one reading is positive for pneumoconiosis, Director's Exhibit 12, and three readings are negative for pneumoconiosis, Director's Exhibits 12, 14; Employer's Exhibit 1. Dr. Simpao, who is not a B reader or a Board-certified radiologist, read the October 8, 2002 x-ray as positive for pneumoconiosis. Director's Exhibit 12. In contrast, Dr. Sison, who is not a B reader or a Board-certified radiologist, and Dr. Wheeler, who is a B reader and a Board-certified radiologist, read the October 8, 2002 x-ray as negative for pneumoconiosis. Director's Exhibit 12; Employer's Exhibit 1. Similarly, Dr. Jarboe, a B reader, read the November 11, 2002 x-ray as negative for pneumoconiosis. Director's Exhibit 14. After considering the quantitative and qualitative nature of the conflicting interpretations, the administrative law judge found the x-ray evidence insufficient to establish the existence of pneumoconiosis.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises,[4] has held that an administrative law judge must consider the quantity of the evidence in light of the differences in qualifications of the readers. *Staton v. Norfolk & Western Railroad 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). In this case, the administrative law judge properly accorded greater weight to the x-ray readings by physicians who are qualified as B readers and/or Board-certified radiologists. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). The administrative law judge specifically stated that his finding of no pneumoconiosis was "[b]ased upon the negative readings by the more qualified physicians."[5] Decision and Order at 8. Thus, since the administrative law judge

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[3] Dr. Barrett, a B reader and Board-certified radiologist, read the October 8, 2002 x-ray for quality only. Director's Exhibit 13.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment occurred in Kentucky. Director's Exhibit 3; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[5] The administrative law judge did not consider Dr. Sison's negative reading of the October 8, 2002 x-ray in his weighing the conflicting x-ray evidence at 20 C.F.R. 718.202(a)(1). Nonetheless, because Dr. Sison's negative x-ray reading supports the administrative law judge's finding of no pneumoconiosis at Section 718.202(a)(1), we hold that any error by the administrative law judge in this regard is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

reasonably considered the quantitative nature and the qualitative nature of the conflicting x-ray readings, we reject claimant's assertion that the administrative law judge improperly relied on the qualifications of the physicians submitting negative x-ray readings, and the numerical superiority of the negative x-ray readings. *Staton*, 65 F.3d at 59, 19 BLR at 2-280; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87. Further, since it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).[6]

Next, claimant contends that the Director failed to provide him with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). Specifically, claimant argues that "the ALJ concluded that Dr. Simpao's report was based merely upon an erroneous x-ray interpretation, and that as such his opinion was outweighed by the other physicians of record." Claimant's Brief at 4. The Director, in the instant case, maintains that the statutory obligation to provide claimant with a complete pulmonary evaluation has been fulfilled.

With regard to Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Simpao and Jarboe. In a report dated October 8, 2002, Dr. Simpao diagnosed coal workers' pneumoconiosis[7] 1/1 based on an x-ray reading and history of coal dust exposure.[8] Director's Exhibit 12. In contrast, Dr. Jarboe, in a report dated November 11, 2002, opined that claimant does not have coal workers' pneumoconiosis or

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[6] Claimant generally suggests that the administrative law judge may have selectively analyzed the x-ray evidence. Claimant provides no support for his contention, however, and the Decision and Order reflects that the administrative law judge properly considered all of the x-ray evidence, as discussed *supra*, without engaging in a selective analysis. Decision and Order at 7-8. Thus, we reject claimant's suggestion.

[7] A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

[8] The Director stated that "[t]he ALJ permissibly credited Dr. Wiot's negative interpretation of [the October 8, 2002] x-ray because Dr. Wiot has greater expertise at interpreting chest x-rays for pneumoconiosis than Dr. Simpao has." Director's Letter Brief at 2.

any lung disease caused by the inhalation of coal mine dust.[9] Director's Exhibit 14. The administrative law judge reasonably found that Dr. Simpao's opinion is not well reasoned, based on Dr. Simpao's failure to provide any other reasons for his diagnosis of pneumoconiosis aside from a chest x-ray and coal dust exposure history.[10] *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *cf. Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000) (recognizing that a physician's opinion is not well reasoned where his diagnosis of pneumoconiosis is based *only* on a chest x-ray and coal dust exposure history). Consequently, the administrative law judge concluded that claimant failed to satisfy his burden of proof on the issue of the existence of pneumoconiosis at Section 718.202(a)(4).

In response to claimant's assertion that the Director failed to provide him with a complete, credible pulmonary evaluation, the Director contends that "[claimant] has misperceived the Director's obligation under section 413(b)." Director's Letter Brief at 2. Specifically, the Director maintains that "[he] is only required to provide each claimant with a complete and credible examination, not a dispositive one." *Id*. The Director asserts that "the mere fact that the ALJ found Dr. Simpao's opinion on the presence of pneumoconiosis outweighed by Dr. Wiot's x-ray interpretation and Dr. Jarboe's diagnosis of no pneumoconiosis does not mean that the Director failed to satisfy his statutory obligation." *Id*. The Director therefore asserts that he has satisfied his statutory obligation under Section 413(b) of the Act of providing claimant with a complete and credible pulmonary evaluation with regard to the issue of the existence of pneumoconiosis. *Id*. We agree with the Director that claimant is entitled to a complete pulmonary evaluation, not a dispositive one. *Hodges*, 18 BLR at 1-89-90 (1994); *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989)(*en banc order*). Inasmuch as the administrative law judge permissibly determined that Dr. Simpao's failure to explain the basis for his diagnosis of coal workers' pneumoconiosis beyond citing to his positive chest x-ray and claimant's coal dust exposure history was a failure to present a well reasoned opinion as to the existence of pneumoconiosis, rather than a failure to present a complete medical opinion as to the existence of pneumoconiosis, we hold that there is no need to remand the case for a complete pulmonary evaluation.[11] *See generally Cline v.*

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[9] 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).

[10] The administrative law judge stated that "it is apparent that [Dr. Simpao's] diagnosis of pneumoconiosis is based *mostly* upon his own reading of a chest x-ray and the [c]laimant's history of dust exposure." Decision and Order at 8 (emphasis added).

[11] *Gallaher v. Bellaire Corp.*, 71 Fed.Appx. 528, 2003 WL 21801463 (6th Cir.

Director, OWCP, 972 F.2d 234, 16 BLR 2-137 (8th Cir. 1992).

In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718.[12] *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

I concur.

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JUDITH S. BOGGS
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I concur in the result only, based upon *Gallaher v. Bellaire Corp*., 71 Fed.Appx. 528, 2003 WL 21801463 (6th Cir. Aug. 4, 2003)(unpub.). *Gallaher* involved essentially identical facts to those presented in the instant case and the United States Court of

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Aug. 4, 2003)(unpub.).

[12] In view of our disposition of the case at 20 C.F.R. §718.202(a), we decline to address claimant's contentions at 20 C.F.R. §718.204(b). *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Appeals for the Sixth Circuit held in that case that the Department of Labor had satisfied its obligation of providing a complete, credible pulmonary evaluation.

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REGINA C. McGRANERY
Administrative Appeals Judge