BRB No. 06-0759 BLA

WARREN COLLETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 02/28/2007
and	)	
	)	
SUN COAL COMPANY, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Michelle S. Gerdano (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-5303) of Administrative Law Judge Rudolf L. Jansen 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). This case involves a claim filed on November 26, 2001. After crediting claimant with twelve years of coal mine employment, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and total disability pursuant to 20 C.F.R. §718.204(b). Accordingly the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also argues that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim. Employer responds in support of the administrative law judge's denial of benefits. The Director has filed a limited response, requesting that the Board reject claimant's request that the case be remanded, based upon the Director's alleged failure to provide claimant with a complete, credible pulmonary evaluation.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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 under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *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*).

Claimant contends that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[1] The x-ray evidence consists of six interpretations of four x-rays taken

[1] Because no party challenges the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R.

on November 28, 2001, January 8, 2002, June 27, 2002, and February 18, 2004. Although Dr. Baker, who has no special radiological qualifications, interpreted claimant's November 28, 2001 x-ray as positive for pneumoconiosis, Director's Exhibit 17, Dr. Wheeler, a Board-certified radiologist and B reader, interpreted this x-ray as negative for the disease. Director's Exhibit 28. The administrative law judge acted within his discretion in crediting Dr. Wheeler's negative interpretation of claimant's November 28, 2001 x-ray, over Dr. Baker's positive interpretation, based upon Dr. Wheeler's superior qualifications. 20 C.F.R. §718.202(a)(1); *see Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 11-12.

Similarly, Dr. Simpao, who has no special radiological qualifications, interpreted claimant's January 8, 2002 x-ray as positive for pneumoconiosis, Director's Exhibit 9, and Dr. Hayes, a Board-certified radiologist and B reader, interpreted this x-ray as negative for the disease.[2] Director's Exhibit 23. The administrative law judge acted within his discretion in crediting Dr. Hayes's negative interpretation of claimant's January 8, 2002 x-ray, over Dr. Simpao's positive interpretation, based upon Dr. Hayes's superior qualifications. *See Sheckler*, 7 BLR at 1-131; Decision and Order at 11-12.

The remaining x-ray interpretations of record were negative for pneumoconiosis.[3] Therefore, the administrative law judge found that claimant did not establish the existence of pneumoconiosis by the x-ray evidence.

The administrative law judge based his finding on a proper qualitative analysis of the x-ray evidence. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, merely counted the negative readings, and that he "may have 'selectively analyzed"' the readings, lack merit.[4] Claimant's Brief at 3. We therefore

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§718.202(a)(2) and (a)(3), those findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] Dr. Sargent, a Board-certified radiologist and B reader, reviewed claimant's January 8, 2002 x-ray for its film quality only. Director's Exhibit 10.

[3] Dr. Dahhan, a B reader, interpreted claimant's June 27, 2002 x-ray as negative for pneumoconiosis, Director's Exhibit 24, and Dr. Broudy, a B reader, interpreted claimant's February 18, 20034 x-ray as negative for the disease. Employer's Exhibit 2.

[4] Claimant has provided no support for his assertion that the administrative law judge "may have 'selectively analyzed' the x-ray evidence." Claimant's Brief at 3.

affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Claimant also contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant specifically contends that the administrative law judge erred in discounting Dr. Baker's diagnoses of pneumoconiosis category 1/0 and chronic bronchitis[5] as "based on a positive x-ray interpretation which is contrary to the [administrative law judge's] findings." Claimant's Brief at 4. We disagree. The administrative law judge permissibly discredited the diagnosis of coal workers' pneumoconiosis rendered by Dr. Baker in his November 28, 2001 report, because the administrative law judge found that it was merely a restatement of Dr. Baker's x-ray interpretation. *See Cornett v. Benham Coal Co.*, 277 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); Decision and Order at 12-13; Director's Exhibit 17.

Additionally, the administrative law judge did not rely on any x-ray readings or interpret medical data in discounting Dr. Baker's diagnosis of chronic bronchitis. Rather, he noted that Dr. Baker's chronic bronchitis diagnosis was based on claimant's self-reported history, that Dr. Baker did not provide an objective basis for his diagnosis, and that he did not explain how the underlying documentation supported that diagnosis. This was permissible. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §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 Trent*, 11 BLR at 1-27; *Gee*, 9 BLR at 1-5; *Perry*, 9 BLR at 1-2. Consequently, we need not address claimant's contentions regarding the administrative law judge's finding that the medical opinion

[5] In a report dated November 28, 2001, Dr. Baker diagnosed "Coal Workers' Pneumoconiosis, Category 1/0, on the basis of 1980 ILO Classification – based on abnormal x-ray and significant history of coal dust exposure." Director's Exhibit 17. Dr. Baker also diagnosed chronic obstructive airways disease and chronic bronchitis. Director's Exhibit 17. The administrative law judge found that Dr. Baker's diagnoses of chronic obstructive airway disease and chronic bronchitis did not support a finding of "legal" pneumoconiosis because Dr. Baker did not "discuss the etiologies of" the chronic obstructive airway disease and chronic bronchitis. 20 C.F.R. §718.201(a)(2); Decision and Order at 13. The administrative law judge also found that Dr. Baker's diagnosis of chronic bronchitis was poorly documented.

evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant contends that because the administrative law judge did not credit a diagnosis of pneumoconiosis contained in Dr. Simpao's January 8, 2002 medical report provided by the Department of Labor, "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 5. The Director responds that he is required to provide claimant "with the opportunity to undergo a complete pulmonary evaluation," and states that he met his statutory obligation in this case. Director's Brief at 2.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

The record reflects that Dr. Simpao conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. Director's Exhibit 9; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). On the issue of the existence of pneumoconiosis, the administrative law judge found that Dr. Simpao's diagnosis of "CWP 1/1" was based on a positive x-ray reading that the administrative law judge found outweighed by the negative reading of a physician with superior radiological credentials, and that Dr. Simpao did not otherwise explain the basis for the diagnosis. Decision and Order at 12-13. This was the sole cardiopulmonary diagnosis listed in Dr. Simpao's report, and the administrative law judge merely found the specific medical data for Dr. Simpao's diagnosis to be outweighed. Director's Exhibit 9 at 4. Additionally, the administrative law judge chose to give "greater weight" to the "well-documented and reasoned" opinion of Dr. Broudy, that claimant does not have pneumoconiosis. Decision and Order at 14; *see Gray v. SLC Coal Co*., 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999)(explaining that administrative law judges "may evaluate the relative merits of conflicting physicians' opinions and choose to credit one . . . over the other"). Because the administrative law judge merely found Dr. Simpao's opinion outweighed on the issue of pneumoconiosis,

there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. *Cf. Hodges*, 18 BLR at 1-93.

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). *Gallaher* involved essentially identical facts to those presented in the instant case and the United States Court of Appeals for the Sixth Circuit held 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