BRB No. 07-0395 BLA

G.M.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STANSBURY & COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 01/17/2008
and	)	
	)	
TRANSCO ENERGY COMPANY	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Jeffrey S. Goldberg (Gregory F. Jacob, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (05-BLA-5891) of Administrative Law Judge Joseph E. Kane 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 July 26, 2004. After crediting claimant with eight 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). 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). Further, claimant 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, arguing that the Board should 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, 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 four interpretations of three 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 August 9, 2004, November 15, 2004, and July 20, 2006. Although Dr. Simpao, who has no special radiological qualifications, interpreted claimant's August 9, 2004 x-ray as positive for pneumoconiosis, Director's Exhibit 9, Dr. Wiot, a Board-certified radiologist and B reader, interpreted this x-ray as negative for the disease.[2] Director's Exhibit 31. The administrative law judge acted within his discretion in crediting Dr. Wiot's negative interpretation over Dr. Simpao's positive interpretation, based upon Dr. Wiot's superior qualifications. *See* 20 C.F.R. §718.202(a)(1); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 8.

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

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

In light of our affirmance of the administrative law judge's findings that the evidence does 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

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§718.202(a)(2)-(4), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] Dr. Barrett, a B reader and Board-certified radiologist, interpreted claimant's August 9, 2004 x-ray for quality purposes only. Director's Exhibit 10.

[3] Dr. Broudy, a B reader, interpreted claimant's November 15, 2004 x-ray as negative for pneumoconiosis. Employer's Exhibit 1. Dr. Dahhan, a B reader, interpreted claimant's July 20, 2006 x-ray as negative for pneumoconiosis. 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.

evidence does 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).

Finally, claimant contends that because the administrative law judge did not credit a diagnosis of pneumoconiosis contained in Dr. Simpao's August 9, 2004 medical report provided by the Department of Labor (DOL), "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 4. The Director responds that he "is required to provide miners with a complete evaluation, not a dispositive one," and he states that the administrative law judge permissibly found Dr. Simpao's opinion outweighed. Director's Brief at 2. The Director, therefore, contends that he met his statutory obligation in this case.

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; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84 (1994). 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 DOL 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 9. 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. Additionally, the administrative law judge found that the opinions of Drs. Broudy and Dahhan, that claimant does not have pneumoconiosis, were well reasoned and supported by the objective medical evidence. Decision and Order at 9-10; Employer's Exhibits 1, 2. The administrative law judge, therefore, found that the opinions of Drs. Broudy and Dahhan outweighed Dr. Simpao's opinion. Decision and Order at 10; *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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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