BRB No. 07-0396 BLA

A.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLEDSOE COAL CORPORATION	)	
	)	
and	)	DATE ISSUED: 01/17/2008
	)	
JAMES RIVER COAL 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 Denying Benefits of Adele Higgins Odegard, 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.

Sarah M. Hurley (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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (05-BLA-5899) of Administrative Law Judge Adele Higgins Odegard 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 December 27, 2006, the administrative law judge credited the miner with ten years of coal mine employment,[1] as stipulated by the parties and supported by the record, and found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in her analysis of the x-ray and medical opinion evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), and erred in her evaluation of the medical opinion evidence relevant to the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv). Claimant further asserts that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, 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 has submitted a response, asserting that a remand is not necessary for claimant to receive a new 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 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).

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

[1] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibits 3, 21. 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 findings of ten years of coal mine employment, and that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), (3), 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).

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 asserts that the administrative law judge erred in relying almost solely on the qualifications of the interpreting physicians and the numerical superiority of the x-ray interpretations in evaluating the evidence pursuant to 20 C.F.R. §718.202(a)(1). Claimant's Brief at 3-4. Claimant's assertion lacks merit. In finding that the x-ray evidence was not sufficient to establish the existence of pneumoconiosis, the administrative law judge properly noted that the relevant evidence of record consists of six readings of four x-rays.[3] Decision and Order at 6-7. The administrative law judge permissibly found that the only two positive readings of record, that of a November 6, 2001 x-ray by Dr. Simpao, a physician with no radiological qualifications, and that of a September 14, 2002 x-ray by Dr. Baker, a B reader, were outweighed by negative readings of the same x-rays by Dr. Wiot, who is a dually qualified B reader and Board-certified radiologist, and who thus possesses superior radiological qualifications. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc*); Decision and Order at 7; Director's Exhibits 7, 18, 21; Employer's Exhibit 9.

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 found that the preponderance of negative readings, including those by the most highly qualified reader, outweighed the two positive readings by lesser qualified physicians. *See Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Cranor*, 22 BLR at 1-7; Decision and Order at 14. In addition, we reject claimant's assertion that the administrative law judge "may have selectively analyzed" the x-ray evidence. Claimant's Brief at 4. Claimant has not provided any support for that assertion, nor does a review of the evidence and the administrative law judge's Decision and Order reveal a selective analysis of the x-ray evidence. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-5 (2004). Consequently, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1), as it is supported by substantial evidence.

Claimant also challenges the administrative law judge's finding that the existence of pneumoconiosis was not established by medical opinion evidence at 20 C.F.R. §718.202(a)(4), asserting that the administrative law judge improperly accorded

[3] The record contains an additional reading for quality only (Quality 1), by Dr. Sargent, of the November 6, 2001 x-ray. Director's Exhibit 8.

diminished weight to Dr. Baker's opinion. Claimant's Brief at 4-5. Claimant's argument is without merit.

In considering the medical opinion evidence relevant to the existence of pneumoconiosis, the administrative law judge properly noted that the record contains medical opinions from Drs. Simpao, Baker, Broudy, and Repsher. In his November 6, 2001 report, and January 28, 2005 supplemental report, Dr. Simpao diagnosed coal workers' pneumoconiosis and a mild respiratory impairment, and opined that both conditions were due primarily to coal dust exposure. Decision and Order at 9-10; Director's Exhibits 7, 28. Dr. Baker, in a September 14, 2002 report, diagnosed coal workers' pneumoconiosis, chronic bronchitis, and mild hypoxemia, and stated that claimant's lung disease, as well as any pulmonary impairment, was due at least in part to coal dust exposure. Director's Exhibit 18. In addition, Dr. Baker stated that claimant had a Class I impairment, also caused, at least in part, by his coal dust exposure, and that he should avoid all further dust exposure. Decision and Order at 10-11; Director's Exhibit 18. By contrast, Dr. Broudy and Dr. Repsher each opined that claimant does not suffer from coal workers' pneumoconiosis or any coal dust-related lung disease. Employer's Exhibits 1-3, 5, 6.

Contrary to claimant's argument, the administrative law judge permissibly accorded little weight to Dr. Baker's opinion as not well-reasoned, because the physician did not provide any rationale for his diagnosis of clinical pneumoconiosis, beyond his own positive x-ray reading that was reread as negative by a more highly qualified reader, and did not explain the relationship, if any, between his additional diagnoses of chronic bronchitis and mild resting hypoxemia, and claimant's coal dust exposure. *See* 20 C.F.R. §718.202(a)(4); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 15-18; Director's Exhibit 18; Claimant's Brief at 4-5. In considering the remaining opinions of Drs. Simpao, Broudy, and Repsher, the administrative law judge acted within her discretion in finding that, although all three physicians gave reasons for their opinions, Drs. Broudy and Repsher offered more complete, comprehensive explanations for their conclusions that claimant does not have coal workers' pneumoconiosis or any coal dust-related lung disease, and that thus, their opinions were entitled to greater weight than that of Dr. Simpao. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; Decision and Order at 16-17; Employer's Exhibits 1-3, 5, 6.

It is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. 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 the administrative law judge's finding that the existence of pneumoconiosis, a necessary element of entitlement, was not established pursuant to 20 C.F.R. §718.202(a), we affirm the denial of benefits. Therefore, we need not address claimant's challenge to the administrative law judge's finding that the evidence also failed to establish 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.

Finally, we reject claimant's assertion that the administrative law judge discredited the opinion of Dr. Simpao, and that, therefore, claimant is entitled to have the case remanded to the district director for the Director to provide him with a new pulmonary evaluation pursuant to 20 C.F.R. §725.406. The Department of Labor has a statutory duty to, upon request, provide a miner with a complete pulmonary evaluation 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 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 Department of Labor examination form. 20 C.F.R. §§718.101(a); 718.104; 725.406(a); Director's Exhibits 7, 28. While, as claimant asserts, the administrative law judge noted that Dr. Simpao's conclusions were based on a somewhat overstated coal mine employment history, and a somewhat understated smoking history, the administrative law judge nonetheless credited Dr. Simpao's diagnosis of clinical pneumoconiosis as well-reasoned, but found his opinion outweighed by the more comprehensive and better explained opinions of Drs. Broudy and Repsher, who are highly qualified pulmonary specialists. Decision and Order at 15, 17. The fact that the administrative law judge found Dr. Simpao's opinion outweighed by more persuasive evidence does not indicate a failure by the Director to fulfill his statutory obligation to claimant. *Cf. Hodges*, 18 BLR at 1-88-89; Director's Brief at 3. Therefore, there is no merit to claimant's argument that he is entitled to a new pulmonary evaluation pursuant to 20 C.F.R. §725.406.

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

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge