BRB No. 09-0465 BLA

JOHN W. TURNER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 01/13/2010
	)	
MOUNTAIN CLAY, INCORPORATED	)	
	)	
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 on Second Remand–Denial of Benefits of Daniel F. Solomon, 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 (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank James, 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 CURIAM:

Claimant appeals the Decision and Order on Second Remand–Denial of Benefits (03-BLA-5994) of Administrative Law Judge Daniel F. Solomon rendered 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). Claimant filed his claim on August 29, 2001. Director's Exhibit 2. It is before the Board for the fourth time.[1]

In a Decision and Order on Remand issued on May 16, 2007, the administrative law judge credited claimant with eighteen years of coal mine employment,[2] and found that he did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal, the Board rejected claimant's allegation of error in the administrative law judge's analysis of the x-ray evidence, and affirmed the finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). However, because the administrative law judge did not consider the medical opinion of Dr. Simpao, the Board vacated the finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *J.T.* [*Turner*] *v. Mountain Clay, Inc.*, BRB Nos. 07-0769 BLA and 07-0769 BLA-A (May 28, 2008)(unpub.). The Board remanded the case for the administrative law judge to consider Dr. Simpao's opinion, that claimant has pneumoconiosis, along with the contrary opinions of Drs. Broudy and Repsher.[3]

On remand, the administrative law judge considered the relevant medical opinions, as instructed, and found that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Because claimant failed to establish the existence of

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[1] The first two decisions by the administrative law judge and the Board addressed only the issue of whether claimant's employment constituted the work of a miner. *Turner v. Mountain Clay, Inc.*, BRB No. 06-0288 BLA (Sept. 26, 2006)(unpub.); *Turner v. Mountain Clay, Inc.*, BRB No. 04-0573 BLA (May 5, 2005)(unpub.). In his third decision, the administrative law judge determined that claimant worked as a miner. The Board affirmed that finding in its third decision, but vacated the denial of benefits on other grounds. *J.T.* [*Turner*] *v. Mountain Clay, Inc.*, BRB Nos. 07-0769 BLA and 07-0769 BLA-A (May 28, 2008)(unpub.). Accordingly, in the current appeal, whether claimant worked as a miner is no longer at issue.

[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 3. 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*).

[3] The Board affirmed, as unchallenged, the administrative law judge's findings that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2),(3). *Turner*, BRB Nos. 07-0769 BLA and 07-0769 BLA-A, slip op. at 3 n.5.

pneumoconiosis, a necessary element of entitlement, the administrative law judge found it unnecessary to address whether claimant established that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the existence of pneumoconiosis was not established by the x-ray evidence pursuant to Section 718.202(a)(1), and that total disability was not established pursuant to Section 718.204(b)(2)(iv).[4] Moreover, 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, urging affirmance of the administrative law judge's denial of benefits. The Director responds that he met his obligation to provide claimant with a complete pulmonary evaluation.

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 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).

Pursuant to Section 718.202(a)(1), claimant renews the argument he made in the last appeal, namely, that the administrative law judge erred in deferring to the numerical superiority of the x-ray readings by the better qualified readers. Claimant's Brief at 2-4. We decline to address claimant's argument. The Board rejected claimant's argument regarding the x-ray evidence and affirmed the administrative law judge's finding at Section 718.202(a)(1) in its last decision. The Board's holding constitutes the law of the case on that issue, and claimant has shown no basis for an exception to the doctrine. *See*

[4] Claimant does not challenge the administrative law judge's finding, on remand, that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). That finding is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Further, contrary to claimant's characterization of the decision below, the administrative law judge did not reach the issue of total disability.

Brinkley v. Peabody Coal Co., 14 BLR 1-147, 1-150-51 (1990); *Turner*, BRB Nos. 07-0769 BLA and 07-0769 BLA-A, slip op. at 4-5.

As noted *supra*, nn. 3, 4, the Board previously affirmed the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2),(3), and, in the current appeal, claimant does not challenge the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement, we affirm the denial of benefits. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

Claimant argues further that, because the administrative law judge declined to credit, as "not well reasoned" Dr. Simpao's medical report diagnosing pneumoconiosis, the Director failed to provide claimant with a complete, credible pulmonary evaluation, as required under the Act. Claimant's Brief at 4. The Director responds, asserting that Dr. Simpao provided a complete pulmonary evaluation when he examined claimant on behalf of the Department of Labor. The Director argues that the administrative law judge's determination that Dr. Simpao's medical report was not "sufficiently persuasive to constitute the preponderant evidence establishing the existence of pneumoconiosis" does not entitle claimant to a new pulmonary evaluation. Director's Brief at 2. We agree with the Director.

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), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1984). The United States Court of Appeals for the Sixth Circuit recently set forth the standard for determining whether a pulmonary evaluation is complete:

> In the end, DOL's duty to supply a "complete pulmonary evaluation" does not amount to a duty to meet the claimant's burden of proof for him. In some cases, that evaluation will do the trick. In other cases, it will not. But the test of "complete[ness]" is not whether the evaluation presents a winning case. The DOL meets its statutory obligation to provide a "complete pulmonary evaluation" under 30 U.S.C. § 923(b) when it pays for an examining physician who (1) performs all the medical tests required by 20 C.F.R. §§718.101(a) and 725.406(a), and (2) specifically links each conclusion in his or her medical opinion to those medical tests. Together, the completion of these tasks will result in a medical opinion . . . that is both documented, i.e., based on objective medical evidence, and reasoned.

Greene v. King James Coal Mining, Inc., 575 F.3d 628, 641-42, --- BLR --- (6th Cir. 2009). In *Greene*, the court held that while the physician who performed the DOL-sponsored pulmonary evaluation "could have explained his reasoning more carefully," the miner received a complete pulmonary evaluation, given that the physician's report addressed all of the elements of entitlement, "even if lacking in persuasive detail." *Id*.

The record reflects that Dr. Simpao conducted an examination and performed the full range of testing required by the regulations, and he addressed each element of entitlement. 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director's Exhibit 14. The administrative law judge discounted Dr. Simpao's diagnosis of pneumoconiosis because it was based on an x-ray reading that the administrative law judge found did not establish pneumoconiosis, and because Dr. Simpao did not adequately explain his opinion that claimant's mild respiratory impairment is related to coal mine dust exposure. Further, the administrative law judge found that Dr. Simpao relied on an understated smoking history supplied to him by claimant when Dr. Simpao attributed claimant's impairment to coal dust exposure. Contrary to claimant's contention, the administrative law judge's determination to discount Dr. Simpao's opinion because it was not fully supported or explained does not establish a violation of the Director's statutory duty. *See Greene*, 575 F.3d at 641-42, --- BLR at ---; *R.G.B.* [*Blackburn*] *v. Southern Ohio Coal Co.*, --- BLR ---, BRB No. 08-0491 BLA, slip op. at 19 (Aug. 28, 2009)(*en banc*). Because Dr. Simpao performed all of the necessary tests and his report addressed the requisite elements of entitlement, we agree with the Director that claimant received a complete pulmonary evaluation. *Id*. We therefore reject claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation.

Accordingly, the administrative law judge's Decision and Order on Second Remand–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