BRB No. 04-0959 BLA

DANNY RAY SIZEMORE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 07/26/2005
	)	
and	)	
	)	
SUN COAL COMPANY, INCORPORATED	)	
	)	
Employer/Carrier-Respondent	)	
	)	
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 Thomas F. Phalen, Jr., 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.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order–Denying Benefits (2003-BLA-5619) of Administrative Law Judge Thomas F. Phalen, Jr. 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). The administrative law judge found that claimant established at least fourteen years of qualifying coal mine employment and that the instant claim was timely filed pursuant to 20 C.F.R. §725.308. Decision and Order at 2-3. Considering the evidence, however, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis or a totally disabling respiratory impairment. 20 C.F.R. §§718.202(a), 718.204(b)(2)(i)-(iv), formerly 718.204(c)(1)-(4). Decision and Order at 4-11. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in not finding the existence of pneumoconiosis established by x-ray or medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) and further erred in not finding total disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant also argues that the Director, Office of Workers' Compensation Programs, (the Director) failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation pursuant to 30 U.S.C. §923(b). Employer, in response, urges that the administrative law judge's denial of benefits be affirmed. The Director, responds, urging that the denial of benefits to be affirmed and contending that he did fulfill his statutory obligation of providing claimant with a complete, credible pulmonary examination.[1]

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 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).

[1] The administrative law judge's length of coal mine employment determination and his finding that claimant has not established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3) or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.[2] Claimant's assertion that the administrative law judge erred in failing to find the existence of pneumoconiosis established lacks merit. Contrary to claimant's assertion, the administrative law judge may rely upon the qualifications of the physicians in weighing the x-ray evidence and determining the weight to be assigned the interpretations. 20 C.F.R. §§718.102(c); 718.202(a)(1)(ii)(E); *Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-68 (1985); *Aimone v. Morrison Knudson Co.*, 8 BLR 1-32 (1985). In this case, the administrative law judge considered the entirety of the x-ray evidence of record and rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). The administrative law judge found that the x-ray interpretations of record, Director's Exhibits 11-13, 15, 16; Employer's Exhibit 4, included only one positive interpretation by Dr. Baker, Director's Exhibit 11, and that that x-ray was later re-read negative by Dr. Hayes, a physician with superior qualifications.[3] Director's Exhibit 12; Decision and Order at 4. The administrative law judge also found that the other interpretations addressing the existence of pneumoconiosis were read negative by better qualified physicians. Decision and Order at 4-5, 9-10. The administrative law judge thus permissibly found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) because the preponderance of x-ray readings by physicians with superior qualifications was negative. Decision and Order at 9; *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); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Claimant also contends that the administrative law judge "may" have "selectively

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

[3] The record demonstrates that Dr. Baker has no particular radiological qualifications, Director's Exhibit 11, while Dr. Hayes is a B-reader and board-certified radiologist. A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16 , 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

analyzed" the x-ray evidence. Claimant's Brief at 3-4. Claimant, however, points to no evidence or finding by the administrative law judge which supports this contention. This contention is accordingly rejected. Accordingly, the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) is affirmed.

Claimant further contends that the administrative law judge erred in not finding the existence of pneumoconiosis established based upon the medical opinion of Dr. Baker which was based on examination, history, pulmonary function study, blood gas study, and x-ray. Claimant's Brief at 4-5. We disagree.

In determining whether the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge reviewed all of the medical opinion evidence of record and rationally considered the quality of the evidence in determining whether the opinions were supported by their underlying documentation and were adequately explained. Decision and Order at 7-11; *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Worhach*, 17 BLR at 1-108; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 n.4 (1993) (administrative law judge must consider each report to determine if that report's underlying documentation supports its conclusion); *Clark*, 12 BLR at 1-155; *Kuchwara*, 7 BLR at 1-170. The administrative law judge acted within his discretion, as fact-finder, in concluding that Dr. Baker's opinion was insufficient to support a finding of pneumoconiosis because the physician's diagnosis of pneumoconiosis was based upon claimant's coal mine employment history and the physician's positive x-ray reading of a film, which was later re-read as negative by a better qualified physician. Decision and Order at 10; Director's Exhibits 11, 12; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *see also Jericol Mining , Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 1-62, 1-175 (4th Cir. 2000); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1-1294 (1984)(administrative law judge may find doctor's opinion unreasoned or unpersuasive if other medical evidence calls into question reliability of doctor's own documentation); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984)("the fact that a doctor's x-ray interpretation has been called into question by a negative rereading of that same x-ray,…may be considered by an administrative law judge in assessing the probative value of that physician's report.").

Moreover, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Broudy and Rosenberg, that claimant does not have pneumoconiosis, because he found that they offered well-reasoned and documented opinions that were supported by the objective medical evidence of record and because they had superior qualifications. Decision and Order at 10; Director's Exhibit 13; Employer's Exhibits 2,

3, 9, 10; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Stephens*, 298 F.3d 511, 22 BLR 2-495; *Worhach*, 17 BLR at 1-108; *Trumbo*, 17 BLR at 1-89; *Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1986). We, therefore, affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Claimant further contends that because the administrative law judge accorded less weight to Dr. Hussain's opinion, because he found that it was unclear that the physician had reviewed the miner's coal mine employment history, the Director did not provide him with the complete, credible pulmonary evaluation to which he was entitled under the Act.

The administrative law judge found that Dr. Hussain addressed claimant's smoking history and noted symptoms of daily sputum production, coughing and dyspnea, as well as conducting an x-ray, pulmonary function study, blood gas study and electrocardiogram. The administrative law judge also noted Dr. Hussain's certification in Internal Medicine and Pulmonary Disease. In considering Dr. Hussain's opinion, however, the administrative law judge found that Dr. Hussain did not indicate the length of coal mine employment upon which he relied and, thus, the administrative law judge permissibly found Dr. Hussain's opinion entitled to less weight than the opinions of Drs. Broudy and Rosenberg, who reached the same diagnoses of no pneumoconiosis and no total disability, but specifically considered claimant's length of coal mine employment. Decision and Order at 7; *see Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Stephens*, 298 F.3d 511, 22 BLR 2-495; *Worhach*, 17 BLR at 1-108; *Trumbo*, 17 BLR at 1-89; *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR 1-19; *Wetzel*, 8 BLR 1-139. Moreover, in considering the issue of total disability, the administrative law judge specifically concluded that Dr. Hussain provided an opinion consistent with the evidence of record. Thus, contrary to claimant's assertion, the administrative law judge did provide claimant with a complete, credible evaluation, even though the evaluation was found not to be as probative on the issue of the existence of pneumoconiosis as other evaluations of record. Remand of this case for claimant to be provided a complete, credible pulmonary evaluation is not, therefore, necessary. 30 U.S.C. §923(b); *see Barnes v. ICO Corp.*, 31 F.3d 673, 18 BLR 2-319, 2-327 (8th Cir. 1994); *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, 7 BLR 2-25, 2-31 (8th Cir. 1984).

Because claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement, entitlement is precluded and we need not address the administrative law judge's additional findings at 20 C.F.R. §718.204(b)(2)(iv). *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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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JUDITH S. BOGGS
Administrative Appeals Judge