BRB No. 05-0805 BLA

DONALD MOSLEY Claimant-Petitioner v. JASPER & JASPER COAL COMPANY, INCORPORATED and AMERICAN RESOURCES INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/28/2006 DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

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

Timothy J. Walker (Ferreri & Fogle), Lexington, Kentucky, for employer.

Michelle S. Gerdano (Howard M. Radzely, 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 – Denial of Benefits (04-BLA-5630) of Administrative Law Judge Robert L. Hillyard 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).[1] The parties stipulated to, and the administrative law judge found that the miner had twenty-five years of coal mine employment. Decision and Order at 3. Based on the date of filing, the claim was adjudicated pursuant to 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1)-(4) and 718.203(b). The administrative law judge further found the evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4), and total disability at 20 C.F.R. §718.204(b)(2). Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a credible pulmonary evaluation, as required pursuant to Section 413(b) of the Act and its implementing regulation at 20 C.F.R. §725.406(a). Employer responds, urging affirmance of the denial of benefits. The Director responds, contending that he satisfied his obligation to provide claimant with a complete pulmonary evaluation by virtue of Dr. Baker's assessment of claimant.

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).

Claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).[2] Claimant argues that the administrative law judge erroneously "relied almost solely on the qualifications of the physicians providing the x-ray interpretations,"

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[1]Claimant filed his claim for benefits on December 10, 2002, which was denied by the district director in a Proposed Decision and Order on October 7, 2003. Director's Exhibits 2, 19. A formal hearing was held on February 23, 2005. Director's Exhibit 23.

[2]As claimant does not challenge the administrative law judge's findings of no pneumoconiosis at 20 C.F.R. §718.202(a)(2) and (3), we affirm them. *Coen v. Director, OWCP,* 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

placed "substantial weight on the numerical superiority of x-ray interpretations," and "may have 'selectively analyzed' the x-ray evidence." Claimant's Brief at 3-4.

Claimant's contentions lack merit. There are four readings of two x-rays dated February 5, 2003[3], and May 28, 2003. With regard to the May 28, 2003 x-ray, the administrative law judge rationally found it to be positive for pneumoconiosis because, while it was read as negative by Dr. Broudy, a B reader, it was read as positive by Dr. Alexander, a dually qualified physician. *Staton v. Norfolk & Western Ry. 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); *Cranor v. Peabody Coal Co.,* 22 BLR 1-1 (1999) (*en banc);* Director's Exhibit 16; Claimant's Exhibit 1. Likewise, the administrative law judge rationally found the x-ray dated February 5, 2003, to be negative for pneumoconiosis because, while it was read as positive by Dr. Baker, a B reader, it was read as negative by Dr. Poulos, a dually qualified physician. Director's Exhibits 9, 15. The administrative law judge may accord greater weight to an x-ray reading by a dually qualified physician. *See White v. New White Coal Co.,* 23 BLR 1-1 (2004). Thus, contrary to claimant's assertions, the administrative law judge properly considered both the qualitative and quantitative nature of the x-ray evidence in determining that pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1). *Staton*, 65 F.3d at 55, 19 BLR at 2-271; *Woodward,* 991 F.2d at 314, 17 BLR at 2-77. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); Decision and Order at 7-8. Further, claimant provides no support for his contention that the administrative law judge may have selectively analyzed the x-ray evidence, nor does a review of the evidence and the administrative law judge's Decision and Order reveal any such analysis. *White,* 23 BLR at 1-1, 1-5. We therefore affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), as it is supported by substantial evidence.

Claimant also alleges error in the administrative law judge's finding that the medical opinions are insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). By report dated February 5, 2003, Dr. Baker diagnosed 1) coal workers' pneumoconiosis, category 1/0: abnormal chest x-ray and coal dust exposure due to coal dust exposure. Director's Exhibit 9. Dr. Baker also diagnosed 2) hypoxemia: PO2, due to coal dust exposure and cigarette smoking, 3) chronic bronchitis: history of cough, sputum production and wheezing due to coal dust exposure and cigarette smoking, 4) chronic obstructive pulmonary disease with moderate obstructive defect: PFTS due to coal dust exposure and cigarette smoking, and 5) S/P resection of lung cancer left lung by

[3]The February 5, 2005 x-ray was also read by Dr. Barrett for quality only. Director's Exhibit 9.

history due to ? cigarette smoking. *Id.* Dr. Baker diagnosed a moderate impairment with decreased FEV1, chronic bronchitis, decreased PO2 and coal workers' pneumoconiosis 1/0. *Id.*

By report dated May 28, 2003, Dr. Broudy diagnosed mild to moderate chronic obstructive airways disease due to cigarette smoking, and found no evidence of coal workers' pneumoconiosis, silicosis or "any chronic lung disease caused by inhalation of coal mine dust." Director's Exhibit 16. Dr. Broudy also diagnosed lung cancer due to cigarette smoking. Dr. Broudy noted dyspnea on exertion, that the pulmonary function study revealed a mixed defect with mild obstruction and restriction, and the blood gas study showed mild resting arterial hypoxemia. Dr. Broudy based his opinion on a negative x-ray, normal chest evaluation, and pulmonary function test which he stated showed mild obstruction and restriction. Director's Exhibit 16; Employer's Exhibit 2.

The administrative law judge found Dr. Baker's diagnosis of coal workers' pneumoconiosis "neither well reasoned nor well documented" as "Dr. Baker fails to state any reason for his diagnosis of pneumoconiosis beyond the x-ray and exposure history." Decision and Order at 9. The administrative law judge specifically found that,

> Dr. Baker relied in part on a positive x-ray interpretation, but a more highly qualified physician refuted his x-ray reading. I find that Dr. Baker's diagnosis of mild hypoxemia and COPD is supported by objective evidence, namely the arterial blood gas and pulmonary function studies. I find his coal dust etiology to be not well reasoned, however, and I am more persuaded by the documented reasoning of Dr. Broudy regarding the etiology of the Miner's pulmonary conditions. I find that Dr. Baker's diagnosis of hypoxemia and COPD due to coal dust exposure is not adequately supported and that it does not support a finding of legal pneumoconiosis.

Decision and Order at 10. The administrative law judge also found that,

> Dr. Baker diagnosed chronic bronchitis, caused in part by coal dust exposure, based on a reported history of cough, sputum production, and wheezing. Symptoms self-reported by the Miner represent subjective and not objective evidence. Dr. Baker's examination of the chest and lungs was normal. He does not explain how coal dust contributed to the diagnosed condition. I find that Dr. Baker's diagnosis of chronic bronchitis is not supported by objective evidence and that he does not explain how coal dust exposure contributed to the Miner's diagnosed condition. I find that Dr. Baker's diagnosis of chronic bronchitis does not support a finding of legal pneumoconiosis.

Id.

The administrative law judge found that Dr. Broudy did not diagnose either clinical or legal pneumoconiosis. Decision and Order at 9. The administrative law judge specifically found that,

> Dr. Broudy noted that the Miner's x-ray was negative for coal workers' pneumoconiosis and that his lungs were clear on examination. He opined that smoking was the most common cause of lung cancer and that the type of lung cancer diagnosed in the Miner is "tightly associated" with cigarette smoking. The most logical conclusion, therefore, was that the Miner's abnormal pulmonary function results were due to the prior left lung lobectomy and due to COPD caused by cigarette smoking. Dr. Broudy's opinion is based on objective testing and he documents which readings support his diagnosis. He explained how he reached his smoking etiology for the Miner's COPD. Noting Dr. Broudy's superior credentials, I give his opinion substantial weight.

Decision and Order at 9. The administrative law judge therefore concluded that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).[4]

Claimant argues that the administrative law judge erred in rejecting Dr. Baker's opinion. This contention lacks merit. As discussed, *supra*, Dr. Baker diagnosed clinical pneumoconiosis[5] based on a positive x-ray reading and claimant's coal dust exposure. Director's Exhibit 9. The administrative law judge rationally found Dr. Baker's opinion not well reasoned or documented because it was based only on an x-ray reading and a history of coal dust exposure. *Cornett v. Benham Coal, Inc.,* 227 F.3d 569, 22 BLR 2-10 (6th Cir. 2000); *Worhach v. Director, OWCP,* 17 BLR 1-105 (1993). Further, the administrative law judge found that Dr. Baker's positive x-ray interpretation was refuted by a more highly qualified reader. *Winters*, 6 BLR 1-881 n.4.

Moreover, the administrative law judge rationally found that although Dr. Baker's diagnosis of mild hypoxemia and chronic obstructive pulmonary disease is supported by

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[4]Further, as the administrative law judge found, the treatment notes do not support a finding of pneumoconiosis. Director's Exhibit 9; Decision and Order at 10.

[5]A finding of either "clinical" pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or "legal" pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

the pulmonary function and blood gas studies, a finding of legal pneumoconiosis[6] is not supported, as Dr. Baker failed to explain his finding that the etiology of the miner's diagnosis is a combination of cigarette smoking and coal dust exposure. *Director, OWCP v. Rowe,* 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983) (in making credibility determinations, the administrative law judge must examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical opinion is based); *Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.,* 10 BLR 1-19 (1987).

Claimant also summarily asserts that the administrative law judge "appears to have" substituted his own opinion for that of a medical expert. Claimant's Brief at 5. We reject claimant's assertion that the administrative law judge substituted his own opinion for that of a medical expert at 20 C.F.R. §718.202(a)(4) in the absence of any supporting evidence.

Claimant next asserts,

> As stated herein, the ALJ discredited Dr. Baker's opinion in part due to the fact that the x-ray upon which said physician relied was interpreted as negative by a better qualified physician. It should be noted, however, that the ALJ failed to apply the same standards to the opinion of Dr. Broudy, which the ALJ gave full credit to. The x-ray upon which Dr. Broudy relied was reread as positive by Dr. Michael Alexander, who is a Board-Certified B-Reader. Dr. Broudy is only a B reader. As such, the opinion of Dr. Broudy should have been afforded the same weight as that of Dr. Baker.

Claimant's Brief at 5-6. Error, if any, is harmless: The administrative law judge properly found Dr. Baker's opinions of both clinical and legal pneumoconiosis to be inadequately supported and not well reasoned. *Cornett*, *supra*; *Rowe, supra*; *Riley v. National Mines Corp.,* 852 F.2d 197, 199, 11 BLR 2-182, 184 (6th Cir. 1988); *Clark, supra*; *Fields, supra*. As the administrative law judge properly declined to credit Dr. Baker's opinion, the only opinion that supports claimant's burden at 20 C.F.R. §718.202(a)(4), any error in the administrative law judge's treatment of Dr. Broudy's opinion is harmless. *Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.,* 6 BLR 1-378 (1983). Thus, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

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[6] "Legal" pneumoconiosis includes any chronic lug disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

Based on the foregoing, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a).

Claimant also contends that, given the administrative law judge's treatment of Dr. Baker's opinion at 20 C.F.R. §718.202(a)(4), the Director failed to provide claimant with a complete, credible pulmonary evaluation, as required under the Act. The Director and employer argue that the Director has fulfilled his statutory obligation based on Dr. Baker's assessment of claimant.

Pursuant, to Section 413(b) of the Act, "Each miner who files a claim for benefits under this subchapter shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994). The regulation at Section 725.406(a) provides that "[a] complete pulmonary evaluation includes a report of physical examination, a pulmonary function study, a chest roentgenogram and, unless medically contraindicated, a blood gas study." 20 C.F.R. §725.406(a).

There is no merit in claimant's contention that the Director failed to provide claimant with a credible pulmonary evaluation as required under the Act. The administrative law judge simply found Dr. Broudy's opinion better reasoned than Dr. Baker's opinion. *Cornett, supra*; *Rowe, supra; Worhach, supra*; *Clark, supra*; *Fields, supra.* The administrative law judge thereby did not discredit Dr. Baker's opinion, but rather provided a rational basis for finding it to be less credible than Dr. Broudy's opinion. Accordingly, we agree with the Director's argument that he fulfilled his statutory duty to provide claimant with a credible pulmonary evaluation by virtue of Dr. Baker's assessment of claimant, and reject claimant's argument to the contrary. *See generally Newman v. Director, OWCP,* 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984).

As the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement, we need not address claimant's argument regarding total disability at 20 C.F.R. §718.204(b)(2).

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge