BRB No. 03-0762 BLA

JERRY RICHARD PACE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HN TRUCKING COMPANY, INCORPORATED	)	DATE ISSUED: 06/22/2004
	)	
and	)	
	)	
AMERICAN RESOURCES INSURANCE 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 – Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (02-BLA-5246) of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge) 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 administrative law judge credited claimant with 3.41 years of coal mine employment. Considering all the evidence of record on the merits of the claim, the administrative law judge found that the evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4) or total respiratory or pulmonary disability at 20 C.F.R. §718.204(b). Accordingly, benefits were denied. On appeal, claimant asserts that the administrative law judge may have selectively analyzed the x-ray evidence and substituted his medical opinion for that of a medical expert, namely Dr. Baker. Claimant's Brief at 3, 5. Claimant also asserts that Dr. Baker's opinion is reasoned, and that the administrative law judge "failed to consider the relevance of Dr. Baker's multiple examinations of claimant." Claimant's Brief at 7. With regard to the administrative law judge's finding that the evidence failed to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b), claimant contends that the administrative law judge "made no mention of the claimant's usual coal mine work in conjunction with Dr. Baker's opinion of disability" and "made no mention of the claimant's age, education or work experience in conjunction with his assessment that the claimant was not totally disabled." Claimant's Brief at 8. Employer responds in support of the decision below. The Director, Office of Workers' Compensation Programs, has not filed a brief in the appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act 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, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that he is totally disabled due to a respiratory or pulmonary impairment arising out of coal mine employment. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to establish any element of entitlement will preclude a finding of entitlement to benefits.

Claimant asserts, without further elaboration, that the administrative law judge may have selectively analyzed the x-ray evidence. Claimant's Brief at 3. Claimant's contention

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

lacks merit. The administrative law judge correctly noted that the only x-ray interpretation of record is Dr. Baker's negative for pneumoconiosis reading of the x-ray dated August 10, 2001.[2] Director's Exhibit 8. The administrative law judge properly found that the x-ray evidence thus failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Because claimant raises no other challenge to the administrative law judge's finding at 20 C.F.R. §718.202(a)(1), we affirm that finding.

Claimant next asserts that the administrative law judge substituted his opinion for that of a medical expert, namely Dr. Baker. The only relevant medical opinions of record were rendered by Dr. Baker. Director's Exhibit 8; Claimant's Exhibit 1. In his August 10, 2001 report, Dr. Baker diagnosed, *inter alia*, chronic bronchitis and hypoxemia and attributed both to coal dust exposure and cigarette smoking. Director's Exhibit 8. Dr. Baker further opined that claimant's impairment was "minimal or none with chronic bronchitis and decreased PO2." *Id.* In an attached questionnaire dated August 10, 2001, Dr. Baker checked boxes to indicate that claimant *did not* have an occupational lung disease which was caused by his coal mine employment; that claimant had no impairment; and that claimant had the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. *Id.* In his "Progress Notes" dated January 29, 2002, Dr. Baker checked boxes to indicate that claimant had "CWP" and "CB." Claimant's Exhibit 1. An undated office note, also contained in Claimant's Exhibit 1, indicates "Assessment: CB." *Id.* Claimant asserts that the administrative law judge did not provide a rational basis for discrediting Dr. Baker's opinion at 20 C.F.R. §718.202(a)(4).

Claimant's contentions lack merit. At 20 C.F.R. §718.202(a)(4), the administrative law judge provided several reasons why he accorded less weight to Dr. Baker's diagnoses of chronic bronchitis and hypoxemia related, in part, to claimant's coal mine employment. Decision and Order at 13. Specifically, the administrative law judge noted that while Dr. Baker, in his August 10, 2001 report, diagnosed conditions related, in part, to claimant's coal mine employment, he indicated in an attached questionnaire of the same date that claimant *did not* have an occupational lung disease caused by his coal mine employment. Director's Exhibit 8. The administrative law judge further found that Dr. Baker did not provide any rationale for attributing claimant's chronic bronchitis and hypoxemia to coal mine employment and relied on a twenty-five year coal mine employment history.[3] The administrative law judge thus properly accorded less weight to Dr. Baker's August 10, 2001

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[2] Dr. E.Nicholas Sargent read the August 10, 2001 x-ray for quality purposes only, finding that it was Grade 1. Director's Exhibit 9.

[3] We affirm the administrative law judge's finding of 3.41 years of coal mine employment as it is unchallenged on appeal. *Coen v. Director, OWCP,* 7 BLR 1-30 (1984); *Skrack* v. *Island Creek Coal Co.*, 6 BLR 1-710 (1983).

opinion because it was internally inconsistent, *Hopton v. U.S. Steel Corp.*, 7 BLR 1-12 (1984), and not well reasoned, *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

The administrative law judge likewise offered valid reasons for his decision to accord less weight to Dr. Baker's treatment records at 20 C.F.R. §718.202(a)(4). Specifically, the administrative law judge found as follows:

> Dr. Baker did circle the initials for coal workers' pneumoconiosis and chronic bronchitis in a January 29, 2002 progress note, but there is not any documentation or related rationale to support what I infer as a diagnosis of pneumoconiosis. Moreover, Dr. Baker was provided with a history as a non-smoker and a coal mine employment of 25 years.

Decision and Order at 13. Because substantial evidence in the record supports the administrative law judge's findings, *see* Claimant's Exhibit 1, we hold that he properly determined that Dr. Baker's treatment notes were based on erroneous work and smoking[4] histories, *Mills v. Director, OWCP*, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003); *see also Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and were not reasoned or documented, *Director, OWCP v. Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Claimant further cites to the provisions of 20 C.F.R. §718.104(d) regarding an administrative law judge's consideration of the report of a claimant's treating physician(s), and asserts that the administrative law judge "failed to consider the relevance of Dr. Baker's multiple examinations of claimant." Claimant's Brief at 7. While the administrative law judge did not consider Dr. Baker's 2001 and 2002 reports pursuant to 20 C.F.R. §718.104(d), he recognized Dr. Baker as having examined and treated claimant during 2001 and 2002. Decision and Order at 8, 9-10, 13. Moreover, the administrative law judge provided valid reasons for finding that Dr. Baker's opinions were not reasoned and documented, *see* discussion *supra;* he thereby properly determined that they were not persuasive. *Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).

Based on the foregoing, we reject claimant's assertions that the administrative law judge substituted his opinion for that of Dr. Baker, provided no rationale for according less weight to Dr. Baker's opinions at 20 C.F.R. §718.202(a)(4), and failed to consider Dr. Baker's treatment of claimant. We thus affirm the administrative law judge's finding at 20

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[4] The administrative law judge determined that claimant smoked one pack of cigarettes or less per day from 1964 to 1970, "when he began to smoke a pipe in an undetermined amount for the next twenty-two years." Decision and Order at 10.

C.F.R. §718.202(a)(4).

Because claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202, an essential element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits as a finding of entitlement is precluded in this case. *Trent v. Director, OWCP*, 11 BLR at 1-27. Given our affirmance of the administrative law judge's denial of benefits based on claimant's failure to establish the existence of pneumoconiosis at 20 C.F.R. §718.202, we need not reach claimant's arguments challenging the administrative law judge's findings at 20 C.F.R. §718.204(b).

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

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