BRB No. 04-0768 BLA

TIMOTHY SALMONS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLEDSOE COAL CORPORATION	)	DATE ISSUED: 06/09/2005
	)	
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 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 & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Helen H. Cox (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: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-6055) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) denying benefits 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 credited claimant with twenty years of coal mine employment and adjudicated this claim pursuant to

the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §§718.204(b)(2)(i)-(iv) and 718.204(b) overall. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends 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. Claimant also challenges 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)(1) and (a)(4). Further, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director responds, urging the Board to reject claimant's contention that he failed to provide claimant with a complete, credible pulmonary evaluation.[1]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable 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).

Initially, claimant contends that the Director failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation. Specifically, claimant asserts that the administrative law judge discredited Dr. Hussain's opinion because he concluded that Dr. Hussain's diagnosis of pneumoconiosis was merely a restatement of an x-ray interpretation. As required by Section 413(b) of the Act, 30 U.S.C. §923(b), the Director has a statutory obligation to provide a complete and credible pulmonary evaluation of the miner. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). Claimant selected Dr. Hussain to perform a pulmonary examination on him. Dr. Hussain diagnosed pneumoconiosis and opined that claimant suffers from a moderate impairment. Director's Exhibit 15. Dr. Hussain also opined that claimant has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. *Id*. The administrative law judge gave less weight to Dr. Hussain's diagnosis of pneumoconiosis because Dr. Hussain's diagnosis is based, in part, on a positive x-ray reading that was reread as negative for pneumoconiosis by better qualified physicians. *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). In addition, the administrative law judge gave less weight to

[1]Since the administrative law judge's length of coal mine employment finding and his findings at 20 C.F.R. §§718.202(a)(2), (a)(3) and 718.204(b)(2)(i)-(iii) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Dr. Hussain's diagnosis of pneumoconiosis because it is 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 2-107 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). However, the administrative law judge did not discredit Dr. Hussain's opinion as devoid of any weight at all with respect to the issue of pneumoconiosis. *See generally Cline v. Director, OWCP*, 972 F.2d 234, 16 BLR 2-137 (8th Cir. 1992). Moreover, the administrative law judge credited Dr. Hussain's opinion with respect to the issue of total disability. The Director's obligation to provide claimant with a complete and credible pulmonary evaluation does not require him to provide claimant with the most persuasive medical opinion in the record. *See generally Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984). Thus, since the administrative law judge did not find that Dr. Hussain's opinion lacks credibility, we reject claimant's assertion that the Director failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation.

Next, 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] Specifically, claimant asserts that the administrative law judge improperly relied on the qualifications of the physicians submitting negative x-ray readings, and the numerical superiority of the negative x-ray readings. The record consists of seven interpretations of four x-rays, dated June 20, 2001, October 2, 2001, November 2, 2001, and December 16, 2003. Dr. Baker read the June 20, 2001 x-ray as positive for pneumoconiosis, Director's Exhibit 14, while Dr. Wheeler, a B reader and a Board-certified radiologist, reread this x-ray as negative for pneumoconiosis, Director's Exhibits 34. Dr. Hussain read the November 2, 2001 x-ray as positive for pneumoconiosis. Director's Exhibit 18. Although Dr. Wheeler reread the November 2, 2001 x-ray as negative for pneumoconiosis, Director's Exhibit 34, Dr. Alexander, also a B reader and a Board-certified radiologist, reread this x-ray as positive for pneumoconiosis, Claimant's Exhibit 1. Dr. Broudy, a B reader, read the October 2, 2001 x-ray as negative for pneumoconiosis. Employer's Exhibit 2. Similarly, Dr. Dahhan, a B reader, read the December 16, 2003 x-ray as negative for pneumoconiosis. Employer's Exhibit 7. After considering the quantitative and qualitative nature of the conflicting x-ray evidence, as well as the interpretation of the most recent x-ray in the record, the administrative law judge found the x-ray evidence insufficient to establish the existence of pneumoconiosis. Decision and Order at 9.

[2]Claimant generally suggests that the administrative law judge may have selectively analyzed the x-ray evidence. Claimant provides no support for his contention, however, and the Decision and Order reflects that the administrative law judge properly considered all of the x-ray evidence, as discussed *infra*, without engaging in a selective analysis. Decision and Order at 9. Thus, we reject claimant's suggestion.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge must consider the quantity of the evidence in light of the difference in qualifications of the readers. *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). In this case, the administrative law judge properly accorded greater weight to the x-ray readings by physicians who are B readers and/or Board-certified radiologists. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). In weighing the conflicting x-ray readings, the administrative law judge stated:

> In summary, there are three positive and four negative readings. Of the [three] positive readings, one is by a B reader and one is by a dually certified reader. Of the [four] negative readings, two are by B-readers and two are by dually certified readers.

Decision and Order at 9. Since the administrative law judge reasonably considered the quantitative and the qualitative nature of the conflicting x-ray readings, we reject claimant's assertion that the administrative law judge improperly relied on the qualifications of the physicians submitting negative x-ray readings, and the numerical superiority of the negative x-ray readings.[3] *Woodward*, 991 F.2d at 321, 17 BLR at 2-87. Furthermore, since it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).[4] *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18

[3]The administrative law judge listed Dr. Baker as a B reader. Decision and Order at 4, 9. However, Dr. Baker noted that he was not a B reader on the June 20, 2001 x-ray form. Director's Exhibit 14. Further, a professional qualifications document states that Dr. Baker's B reader certification expired on January 31, 2001. *Id.* Nonetheless, we hold that the administrative law judge's error in mischaracterizing Dr. Baker's radiological qualifications is harmless because the administrative law judge properly found that the negative reading of the June 20, 2001 x-ray by Wheeler, a dually qualified B reader and Board-certified radiologist, outweighed Dr. Baker's positive reading of the same x-ray. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[4]The administrative law judge also applied the "later evidence" rule in according great weight to the December 16, 2003 x-ray by Dr. Dahhan. Because Dr. Dahhan's negative reading of the December 16, 2003 x-ray suggests an improvement in claimant's condition, rather than a deterioration in his condition, it is impossible to reconcile Dr. Dahhan's negative reading of the December 16, 2003 x-ray with the prior positive x-ray readings. *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Nonetheless, we

BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *see also Staton*, 65 F.3d at 59, 19 BLR at 2-280; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990).

Claimant further contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R §718.202(a)(4). The administrative law judge considered the opinions of Drs. Baker, Broudy, Dahhan, and Hussain. Dr. Baker opined that claimant suffers from coal workers' pneumoconiosis.[5] Director's Exhibit 14. Similarly, Dr. Hussain opined that claimant suffers from pneumoconiosis. Director's Exhibit 15. In contrast, Drs. Broudy and Dahhan opined that claimant does not suffer from coal workers' pneumoconiosis. Employer's Exhibits 2, 7. After considering the conflicting medical opinions, the administrative law judge concluded that the opinions of Drs. Broudy and Dahhan outweigh the contrary opinions of Drs. Baker and Hussain because the former are better reasoned and documented.

Claimant asserts that the administrative law judge erred in discounting Dr. Baker's opinion. Dr. Baker's diagnosis of pneumoconiosis is based, in part, on a positive interpretation of claimant's June 20, 2001 x-ray. The administrative law judge properly discounted the diagnosis of pneumoconiosis by Dr. Baker because the x-ray Dr. Baker relied upon to support his diagnosis was reread by a better qualified physician as negative for pneumoconiosis. *Winters*, 6 BLR at 1-881 n.4. In addition, the administrative law judge properly discounted Dr. Baker's opinion because Dr. Baker failed to explain his conclusion that claimant suffers from coal workers' pneumoconiosis. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Thus, we reject claimant's assertion that the administrative law judge erred in discounting Dr. Baker's opinion.

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hold that the administrative law judge's error in misapplying the "later evidence" rule is harmless, *Larioni*, 6 BLR at 1-1278, because the administrative law judge provided an alternate basis for according greater weight to the negative x-ray readings, *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), namely, he properly accorded greater weight to the x-ray readings by physicians who are B readers and/or Board-certified radiologists, *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

[5]Although Dr. Baker also diagnosed bronchitis based on history, Dr. Baker did not render an opinion that this condition was related to coal dust exposure. Director's Exhibit 14. Thus, Dr. Baker's diagnosis of bronchitis is insufficient to establish the existence of "legal" pneumoconiosis at 20 C.F.R. §718.201(a)(2).

As claimant has not put forth any additional assertions of error by the administrative law judge with respect to 20 C.F.R. §718.202(a)(4) or his weighing of the conflicting medical opinions of record therein, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), as supported by substantial evidence.

Since claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement, we hold that the administrative law judge properly denied benefits under 20 C.F.R. Part 718.[6] *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

[6]In view of our disposition of this case at 20 C.F.R. §718.202(a), we decline to address claimant's contentions at 20 C.F.R. §718.204(b)(2)(iv).