BRB No. 04-0879 BLA

JACKIE LEE STEPHENS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAIN CLAY, INCORPORATED	)	DATE ISSUED: 06/27/2005
	)	
and	)	
	)	
JAMES RIVER COAL COMPANY	)	
	)	
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 Jeffrey Tureck, 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.

Jeffrey S. Goldberg (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2003-BLA-5413) of Administrative Law Judge Jeffrey Tureck 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 found that the instant claim was timely pursuant to 20 C.F.R. §725.308, that the evidence of record established fourteen and one-half years of qualifying coal mine employment, and that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 2-7. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in concluding that the evidence of record did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4). Claimant further argues that the Director, Office of Workers' Compensation Programs, (the Director) failed to fulfill his statutory obligation to provide claimant with a complete and 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 has filed a letter brief challenging claimant's assertion that he failed to fulfill his statutory obligation to provide claimant with a complete pulmonary examination. The Director argues that claimant is not entitled to a new examination because Dr. Simpao's examination of claimant satisfies the Director's statutory obligation.[2]

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[1] Claimant initially filed a claim for benefits on December 29, 1987. Director's Exhibit 1. Subsequently, claimant requested that the claim be withdrawn, but the district director determined the claim was abandoned because claimant failed to show cause as to why the claim should not be denied. Director's Exhibit 1. Claimant filed the instant claim on April 12, 2001. Director's Exhibit 3. After denial by the district director on September 14, 2002, claimant requested a hearing. Director's Exhibits 38, 39. After the July 24, 2003 hearing, the administrative law judge, on July 23, 2004 issued the Decision and Order denying benefits from which claimant now appeals. In the Decision and Order, the administrative law judge found that while a claim filed subsequent to a previously abandoned claim is generally regarded as a duplicate claim pursuant to 20 C.F.R. §725.309(c); in the instant case, because claimant's request to withdraw his initial claim was not considered, the instant claim should be treated as an initial claim. Decision and Order at 2. No challenge to this determination has been made.

[2] The administrative law judge's determination that the instant claim constituted an initial claim, as well as his length of coal mine employment determination and his finding that claimant has not established the existence of pneumoconiosis pursuant to Section 718.202(a)(2) and (a)(3) are affirmed as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Claimant argues that the administrative law judge erred in his analysis of the x-ray evidence at Section 718.202(a)(1). Claimant first argues that the administrative law judge erred in relying upon the qualifications of the physicians rendering negative interpretations and also erred in relying upon the numerical superiority of the negative interpretations in determining that the x-ray evidence did not support a finding of the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Claimant's Brief at 3. Second, claimant asserts that in considering the physicians' credentials, the administrative law judge accorded greater weight to the negative interpretations of the B-readers and board-certified radiologists,[3] Drs. Wiot and Rosenberg, Employer's Exhibits 4, 7, while ignoring the fact that Dr. Alexander, who rendered a positive x-ray interpretation, Claimant's Exhibit 2, possessed the same B-reader and board-certified radiologist credentials. Thus, claimant asserts, the administrative law judge "may" have impermissibly "selectively analyzed" the x-ray evidence of record. Claimant's Brief at 3-4.

In considering the x-ray evidence pursuant to Section 718.202(a)(1), the administrative law judge considered the entirety of the x-ray evidence of record, and concluded that the weight of the x-ray evidence failed to affirmatively support a finding of the existence of pneumoconiosis. Contrary to claimant's assertion, however, 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. *See* 20

[3] 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).

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). The administrative law judge found that, of the eight x-ray readings of evidence, three were positive for the existence of pneumoconiosis, Director's Exhibits 9, 11; Claimant's Exhibit 2, and five were negative for the existence of the disease, Director's Exhibits 35, 36; Employer's Exhibit 4. The administrative law judge found that all five of the negative readings were by physicians who were at least B-readers, Drs. Broudy, Rosenberg and Wiot,[4] while only Dr. Alexander possessed the B-reader qualification of those rendering positive interpretations. While claimant correctly argues that the administrative law erred in failing to consider that Dr. Alexander was also a board-certified radiologist, in addition to a B-reader, we hold that such error is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1985), as the administrative law judge permissibly found that the weight of the x-ray interpretations by physicians with superior qualifications was negative for the existence of pneumoconiosis, notwithstanding the mischaracterization of Dr. Alexander's credentials, and thus claimant was unable to establish the existence of the disease pursuant to Section 718.202(a)(1). *See 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*, 17 BLR 1-105; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990).[5]

Claimant next argues that the administrative law judge erred in not finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(4) based on the medical opinion of Drs. Baker. Director's Exhibit 9. Claimant asserts that Dr. Baker provided a well-reasoned opinion supporting the existence of pneumoconiosis and that the administrative law judge improperly substituted his own medical opinion for that of the physician in rejecting the opinion. Claimant's Brief at 4. 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 4-7; *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

[4] Dr. Wiot possesses board-certified radiologist qualifications as well. Employer's Exhibit 6.

[5] 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.

(1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 155 (1989)(*en banc*); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). 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 only upon claimant's history of coal mine dust exposure, and upon a positive x-ray reading, which was re-read as negative by Dr. Wiot, a B-reader and board-certified radiologist.[6] *See 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); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); Decision and Order at 5; Director's Exhibits 9, 35.

Moreover, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Broudy and Rosenberg, Director's Exhibit 36; Employer's Exhibits 4,8, that claimant does not have pneumoconiosis because he found that those physicians offered thorough, well-reasoned and documented opinions that were supported by the objective medical evidence of record, and because of those physicians' superior qualifications. *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); Decision and Order at 6-7; Director's Exhibit 36; Employer's Exhibits 4, 8. 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).

Lastly, claimant argues that in finding that Dr. Simpao's opinion, that claimant suffered from pneumoconiosis, was not probative, Director's Exhibit 11; Decision and Order at 5, the administrative law judge was finding that Dr. Simpao, "a physician under contract with the Department of Labor," Claimant's Brief at 6, did not provide claimant with the complete credible pulmonary evaluation required of the Director. Claimant argues that remand of the case is necessary for the Director to provide claimant with such an evaluation. We reject this assertion.

The administrative law judge found that Dr. Simpao addressed claimant's coal mine employment history, family and medical history, pulmonary function and blood gas studies and the history of daily sputum production, coughing and dyspnea. In considering the opinion, however, the administrative law judge found that the physician provided no support, other than a positive x-ray interpretation, for his diagnosis of

[6] The record establishes only B-reader credentials for Dr. Baker. Director's Exhibit 15.

pneumoconiosis. The administrative law judge also noted that, in an attachment to his report, Dr. Simpao found that a secondary basis for his diagnosis of pneumoconiosis was the fact that claimant suffered from frequent colds and wheezing. Director's Exhibit 11. The administrative law judge found, however, that Dr. Simpao failed to explain how such a finding led to a diagnosis of pneumoconiosis, and thus his opinion was not a probative opinion of the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Additionally, the administrative law judge permissibly found Dr. Simpao's to be outweighed by the better-explained opinions of Drs. Broudy and Rosenberg, Decision and Order at 7, physicians who possessed superior qualifications to those of Dr. Simpao. This was a proper exercise of the administrative law judge's discretion. *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. Thus, Dr. Simpao did provide claimant with a complete, credible evaluation. The administrative law judge, however, permissibly found that the opinion was not as probative on the issue of the existence of pneumoconiosis as the other opinions of record. We, therefore, reject claimant's assertion that remand of this case for a complete, credible pulmonary evaluation is necessary. 30 U.S.C. §923(b); *see Barnes v. ICO Corp.*, 31 F.3d 673, 18 BLR 2-319 (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).

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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BETTY JEAN HALL
Administrative Appeals Judge