BRB No. 05-0156 BLA

HENRY FUGATE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KEM COAL COMPANY	)	DATE ISSUED: 06/27/2005
	)	
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 – Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, PSC), Hyden, Kentucky, for claimant.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order – Denial of Benefits (03-BLA-6031) of Administrative Law Judge Daniel J. Roketenetz 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). In a Decision and Order dated September 22, 2004, the administrative law judge credited the miner with nineteen years of coal mine employment,[1] and found that the evidence failed to establish the existence of

[1] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

pneumoconiosis at 20 C.F.R. §718.202 and failed to establish total disability at 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (4), and erred in his evaluation of the medical opinion evidence relevant to the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv). Claimant further asserts the Director failed to provide him with a credible pulmonary evaluation as required by 20 C.F.R. §725.406(a). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, contends that claimant received a complete pulmonary evaluation as contemplated by Section 725.406(a) and urges affirmance of the administrative law judge's findings at 20 C.F.R. §718.202(a).[2]

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 one 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 initially contends that the administrative law judge erred in evaluating the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). We disagree. In finding the x-ray evidence insufficient to establish the existence of pneumoconiosis, the administrative law judge properly noted that the relevant x-ray evidence of record consists of seven readings of three x-rays.[3] Decision and Order at 7.

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[2] The administrative law judge's finding of nineteen years of coal mine employment and his finding that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) or (3), and further failed to establish the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] The October 17, 2001 x-ray was also read for quality only (Quality 1) by Dr. Sargent, a Board-certified radiologist and B-reader. Director's Exhibit 10.

A June 16, 2001 x-ray was read once as positive by Dr. Alexander, a dually qualified B-reader and Board-certified radiologist, and was twice read as negative by Drs. Halbert and Baker, physicians with no special qualifications for the reading of x-rays. Claimant's Exhibits 1, 3; Employer's Exhibit 16; Decision and Order at 6. An October 17, 2001 x-ray was read once as positive by Dr. Hussain, a physician with no special qualifications for the reading of x-rays, and was read once as negative by Dr. Wiot, a dually qualified B-reader and Board-certified radiologist. Claimant's Exhibit 2; Director's Exhibit 12. The administrative law judge permissibly found this x-ray to be negative based on Dr. Wiot's superior qualifications. *Staton v. Norfolk & Western Railway Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc on recon.*); Decision and Order at 6-7. Finally, a November 9, 2001 x-ray was read twice as negative by Dr. Rosenberg, a B-reader, and Dr. Poulos, a dually qualified B-reader and Board-certified radiologist. Employer's Exhibits 9, 11. Thus the administrative law judge also considered this x-ray to be negative. Decision and Order at 7. Contrary to claimant's arguments, the administrative law judge properly considered both the quantity and the quality of the x-ray readings of record, and permissibly accorded greater probative weight to the "preponderance of negative readings by the best qualified physicians." *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Cranor*, 22 BLR at 1-7; Decision and Order at 7. Consequently, we reject claimant's contention that the administrative law judge committed reversible error in weighing the x-ray evidence of record, and affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Claimant also challenges the administrative law judge's evaluation of the medical opinion evidence on the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), specifically asserting that the administrative law judge erred in failing to accord greater weight to the opinion of Dr. Baker. We disagree.

In considering the medical opinion evidence, the administrative law judge properly noted that Dr. Baker diagnosed "possible" chronic obstructive airways disease, based on pulmonary function study results, and chronic bronchitis based on history, but stated that claimant's lung disease was not due to coal dust exposure as claimant's x-ray showed only minimal changes. Claimant's Exhibit 1; Decision and Order at 8-9. While Dr. Baker also opined that the pulmonary function studies indicated "possible" obstructive airways disease, and stated that any impairment therefrom would be due in significant part to coal dust exposure, the administrative law judge permissibly concluded that because Dr. Baker felt that obstructive airways disease due to coal dust was only a possibility, it did not constitute a definitive finding and, thus, was entitled to less weight. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882 (6th Cir. 2000); *Griffith v. Director, OWCP*, 49 F.3d 184, 186-7 (6th Cir. 1995). The determination of whether an opinion is reasoned and documented requires the fact finder to examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective

indications upon which the medical conclusion is based. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Decision and Order at 9.

Additionally, we reject claimant's assertion that, insofar as the administrative law judge characterized Dr. Hussain's opinion as "neither well-reasoned nor well-documented" he is entitled to have the denial of benefits vacated, and the case remanded for the Director to provide him with a new pulmonary evaluation pursuant to 20 C.F.R. §725.406.[4] Rather, the administrative law judge properly declined to credit Dr. Hussain's diagnosis of clinical pneumoconiosis at Section 718.202(a)(4) because he found the physician's diagnosis of clinical pneumoconiosis at 718.202(a)(1) outweighed by the more highly qualified opinion of Dr. Wiot. Decision and Order at 6; *Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 649 (6th Cir. 2003). Thus, there is no merit to claimant's argument that the administrative law judge rejected Dr. Hussain's opinion as not credible. 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, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

It is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). Because the administrative law judge examined each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103, and explained whether the diagnoses contained therein constituted reasoned medical judgments under 20 C.F.R. §718.202(a)(4), we affirm the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000). Consequently, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a).

Because we affirm herein the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a), we need not address claimant's challenge to the administrative law judge's findings in determining

[4] The Department of Labor has a statutory duty to provide a miner with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate the claim. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 184 (1994).

that the evidence fails to establish the existence of a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(iv). A finding of entitlement to benefits is precluded in this case. *See Trent*, 11 BLR at 1-27.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

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ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I would hold that claimant is entitled to have the denial of benefits vacated, and the case remanded for the Director to provide him with a new pulmonary evaluation pursuant to 20 C.F.R. §725.406. In order to provide claimant with a complete pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim as required by the Act and regulations, *see* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*), the Director must provide a credible medical opinion that addresses all of the elements of entitlement. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994).

In the instant case, because the administrative law judge determined, as was within his discretion, *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983), that Dr. Hussain's opinion regarding the existence of pneumoconiosis was "neither well-reasoned nor well-documented," this opinion does not constitute a complete, credible pulmonary evaluation. *Newman*, 745 F.2d at 1166, 7 BLR 2-31; *Hodges*, 18 BLR at 1-88, n.3; *Pettry*, 14 BLR 1-100. Moreover, on the issue of whether claimant has established the existence of a totally disabling respiratory impairment, a

requisite element of entitlement, the Director has conceded that Dr. Hussian's opinion, which is based in part on an invalid pulmonary function study, is insufficient to meet the Director's statutory duty of providing claimant with an opportunity to substantiate his claim. *Hodges*, 18 BLR at 1-93.

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BETTY JEAN HALL
Administrative Appeals Judge