BRB No. 05-0867 BLA

JERRY W. FRANCE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	DATE ISSUED: 06/29/2006
	)	
and	)	
	)	
JAMES RIVER COAL 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 – Denying Benefits of Joseph E. Kane, 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.

Barry H. Joyner (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 – Denying Benefits (03-BLA-6340) of Administrative Law Judge Joseph E. Kane rendered 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] After crediting claimant with fifteen years of coal mine employment as stipulated by the parties, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4), and that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate the claim, as required by the Act. Claimant also argues that the administrative law judge erred in finding that claimant is not totally disabled pursuant to 20 C.F.R. §718.204(b). Employer responds in support of the administrative law judge's denial of benefits. The Director has filed a limited response, arguing that the Board should reject claimant's request that the case be remanded to provide claimant with a complete, credible pulmonary evaluation.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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 first contends that the administrative law judge erred in finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[2] The relevant evidence consists of interpretations of four x-rays taken on September 18, 2003; October 31, 2001; October 9, 2001; and September 12, 2001.[3]

[1] The instant case is governed by the new regulations, found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002), as it was filed on June 15, 2001. Decision and Order at 2; Director's Exhibit 2.

[2] Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 4; Employer's Brief at 10.

[3] Dr. Rosenberg, a B reader, interpreted claimant's September 18, 2003 x-ray as negative for pneumoconiosis. Employer's Exhibit 8. Although Dr. Hussain, with no radiological qualifications, interpreted claimant's October 31, 2001 x-ray as positive for

Director's Exhibits 12-15; Employer's Exhibits 1, 8. In considering the x-ray evidence, the administrative law judge acted within his discretion in crediting Dr. Wiot's negative interpretation of the October 31, 2001 x-ray over Dr. Hussain's positive interpretation of this film, based upon Dr. Wiot's dual qualifications as a Board-certified radiologist and B reader. *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); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 4. Similarly, the administrative law judge acted within his discretion in crediting Dr. Wiot's negative interpretation of the September 12, 2001 x-ray over Dr. Baker's positive interpretation, based upon Dr. Wiot's dual qualifications. *Id*. The only other x-ray interpretations of record are negative for pneumoconiosis. Based on his consideration of the number of positive and negative interpretations of each x-ray and the qualifications of the x-ray readers, the administrative law judge rationally found that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Consequently, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).[4]

Claimant also contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Specifically, claimant argues that the administrative law judge erred in finding that Dr. Baker's opinion of pneumoconiosis was not reasoned because it was based only on his x-ray interpretation. Claimant asserts that an administrative law judge may not discredit a medical opinion because it is based on a positive chest x-ray interpretation that is contrary to the administrative law judge's findings and because the record contains subsequent negative x-rays. In a report dated September 12, 2001, Dr. Baker diagnosed coal workers' pneumoconiosis, 1/0, based on an abnormal x-ray and significant history of dust exposure. Director's Exhibit 13 (Dr. Baker's report at 2). Dr. Baker recorded a twenty year coal mine employment history, reported that claimant smoked one-half to one pack per day for four to five years, quitting fifteen or sixteen years ago, and obtained normal

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pneumoconiosis, Director's Exhibit 12, Dr. Wiot, a Board-certified radiologist and B reader, interpreted this x-ray as negative for the disease. Director's Exhibit 15. Dr. Broudy, a B reader, interpreted claimant's October 9, 2001 x-ray as negative for pneumoconiosis. Employer's Exhibit 1. Although Dr. Baker, who has no radiological qualifications, interpreted claimant's September 12, 2001 x-ray as positive for pneumoconiosis, Director's Exhibit 13, Dr. Wiot, a Board-certified radiologist and B reader, interpreted this x-ray as negative for the disease. Director's Exhibit 14.

[4] We reject claimant's assertion that the administrative law judge "may have selectively analyzed the x-ray evidence" as claimant has provided no support for his assertion. Claimant's Brief at 3.

pulmonary function and blood gas studies.

Contrary to claimant's contention, the administrative law judge rationally found that Dr. Baker's diagnosis of pneumoconiosis was outweighed by the contrary opinions of Drs. Broudy and Rosenberg, because the latter opinions were better supported by the objective evidence, including the more probative negative x-ray reports, the negative chest CT scan, and the pulmonary testing.[5] *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 6; Director's Exhibit 13; Employer's Exhibits 1, 8, 9. Thus, we reject claimant's assertion that the administrative law judge discredited Dr. Baker's opinion because it was based on a positive chest x-ray interpretation that was contrary to the administrative law judge's findings, and because the record contains subsequent negative x-rays. As claimant raises no other argument at Section 718.202(a)(4), the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis thereunder is affirmed.

Claimant further contends that the Director failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required under Section 413(b) of the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*). Claimant argues that the Director failed to provide him with a credible pulmonary evaluation in view of the fact that the administrative law judge found Dr. Hussain's report outweighed by the opinions of Drs. Broudy and Rosenberg with respect to Section 718.202(a)(4). In the instant case, claimant selected Dr. Hussain to perform his Department of Labor-sponsored pulmonary evaluation. Director's Exhibit 11. In a report dated October 31, 2001, Dr. Hussain diagnosed pneumoconiosis, and performed a chest x-ray, pulmonary function and blood gas studies, and recorded claimant's smoking history. Director's Exhibit 12. In his analysis of the medical opinion evidence pursuant to Section 718.202(a)(4), the administrative law judge rationally found that Dr. Hussain's diagnosis of pneumoconiosis was outweighed by the contrary opinions of Drs. Broudy and Rosenberg because the latter opinions were better supported by the objective evidence, including the more probative negative x-ray reports, the negative

[5] The pulmonary function and blood gas studies of record are all nonqualifying. Director's Exhibits 12, 13; Employer's Exhibits 1, 8. While objective studies, in and of themselves, are not diagnostic of the non-existence of pneumoconiosis, *see Lambert v. Itmann Coal Co.*, 6 BLR 1-256 (1983), they can indicate the absence of any disease process, and, by implication, the absence of any disease arising out of coal mine employment, *i.e.*, pneumoconiosis. *Morgan v. Bethlehem Steel Corp.*, 7 BLR 1-226 (1984).

chest CT scan, and the pulmonary testing.[6] *See Wetzel, supra*; Decision and Order at 6; Director's Exhibit 12; Employer's Exhibits 1, 8, 9. As the Director correctly asserts, the administrative law judge's finding that Dr. Hussain's diagnosis of pneumoconiosis was outweighed by the contrary opinions of Drs. Broudy and Rosenberg does not render Dr. Hussain's opinion incomplete or incredible, since the Director is not required to provide claimant with a dispositive medical evaluation. *See Newman, supra.* Consequently, we reject claimant's contention that the Director failed to provide him with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate the claim.

In light of our affirmance of 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), we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Consequently, we need not address claimant's remaining contentions regarding the administrative law judge's finding that the evidence is insufficient to establish total disability at Section 718.204(b). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH

[6] *See* n. 5, *supra*.

Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge