BRB No. 06-0935 BLA

T.F.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PERRY COUNTY COAL CORPORATION	)	DATE ISSUED: 06/27/2007
	)	
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–Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington D.C., for employer.

Barry H. Joyner (Jonathan L. Snare, Acting 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 (2004-BLA-6642) of Administrative Law Judge Thomas F. Phalen, Jr., 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 found that the

record supported employer's stipulation of 16.84 years of coal mine employment, but failed to establish the existence of coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or the presence of a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Decision and Order at 4-9. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in not finding the existence of pneumoconiosis established based on x-ray evidence and also erred in not finding total respiratory disability established based on medical opinion evidence. In addition, claimant contends that because the administrative law judge found Dr. Simpao's opinion to be unreasoned, the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation pursuant to 30 U.S.C. §923(b). Employer responds, urging that the denial of benefits be affirmed. The Director responds, asserting that the Board should reject claimant's argument that the Director failed to provide him with a complete pulmonary evaluation. The Director contends that he is only required to provide claimant with a complete and credible examination, not a dispositive one. The Director contends that the fact that the administrative law judge declined to rely on Dr. Simpao's diagnosis of pneumoconiosis, and instead credited Dr. Jarboe's opinion as more credible and persuasive, does not mean that the administrative law judge accorded no weight to Dr. Simpao's opinion, or that he found Dr. Simpao's opinion to be incredible.[1]

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 elements of entitlement precludes an award of benefits. *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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

[1] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination and the finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.[2] 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 evidence failed to affirmatively support a finding of the existence of pneumoconiosis. Contrary to claimant's assertion, the administrative law judge may rely upon the qualifications of the physicians in determining the weight to be assigned the interpretations. *See* 20 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).

In this case, the administrative law judge found the x-ray evidence consisted of three readings of two x-rays.[3] The administrative law judge found that the May 23, 2003 x-ray was read as positive for pneumoconiosis by Dr. Simpao, a physician with no specialized radiological qualifications, Director's Exhibit 12, but was later re-read as negative by Dr. Wiot, a physician who is both a B reader and Board-certified radiologist. Director's Exhibit 14. The administrative law judge found the February 4, 2004 x-ray to be read as negative by Dr. Jarboe, a B reader. Director's Exhibit 15.

The administrative law judge rationally found that the x-ray evidence did not establish the existence of pneumoconiosis because the preponderance of x-ray readings by physicians with superior qualifications was negative. Decision and Order at 7; 20 C.F.R. §§718.102(c), 718.202(a)(1); *Staton v. Norfolk & Western Railway 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 v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Likewise, claimant's contention that the administrative law judge "may have selectively analyzed" the x-ray evidence is rejected as claimant points to no evidence or finding by the administrative law judge that supports this contention. *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). Accordingly, the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) is affirmed.

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[2] 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 Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

[3] In addition to these three readings, Dr. Barrett provided an x-ray interpretation solely as to the quality of the May 23, 2003 film. Director's Exhibit 14.

In addition, in determining that pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge reviewed the medical opinions of Drs. Jarboe and Simpao. The administrative law judge rationally found the medical report of Dr. Jarboe, who opined that claimant did not have coal workers' pneumoconiosis or a chronic dust disease of the lung, Director's Exhibit 15, to be the most convincing opinion of record as Dr. Jarboe explained, in detail, each medical test he performed and how the results did not support a diagnosis of pneumoconiosis. Moreover, the administrative law judge found that the doctor's determination was consistent with the overwhelmingly negative test results.[4] The administrative law judge rationally accorded less weight to the opinion of Dr. Simpao, who diagnosed pneumoconiosis, because it was based on a positive x-ray reading and claimant's history of coal mine employment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). The administrative law judge also permissibly accorded less weight to Dr. Simpao's opinion because Dr. Simpao did not consider any impact claimant's smoking history may have had on claimant's pulmonary condition.[5] Decision and Order at 8; *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *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, 1-89 n.4 (1993) (administrative law judge must consider each report to determine if that report's underlying documentation supports its conclusion); *Clark*, 12 BLR at 1-155; *Dillon v. Director, OWCP*, 11 BLR 1-113, 1-114 (1988); *Kuchwara*, 7 BLR at 1-170. Accordingly, the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) is affirmed.

Further, contrary to claimant's contention, the Director did not fail to provide claimant with a complete, credible pulmonary evaluation because the administrative law judge found that Dr. Simpao's opinion was not as persuasive as Dr. Jarboe's opinion. As

[4] In addition to a 2004 examination, Dr. Jarboe took claimant's work and medical histories, noted claimant's symptoms, and conducted clinical testing. He noted that claimant's x-ray was negative for pneumoconiosis and that claimant's normal pulmonary function study and blood gas study showed no significant respiratory impairment. He noted that claimant's chronic bronchitis based on his history of cough and sputum production was most likely caused by his smoking habit and that some of the "s" opacities seen on claimant's x-ray might be associated with emphysema, but were not typical of pneumoconiosis. Director's Exhibit 15.

[5] Dr. Simpao examined claimant in 2003, reading claimant's x-ray as positive and noting claimant's lengthy coal mine employment history. Dr. Simpao also found that claimant's blood gas study was normal, and that further pulmonary function studies were needed to evaluate lung disease. Claimant's Exhibit 1.

the Director contends, he is not required to provide claimant with a dispositive opinion. The mere fact that the administrative law judge may find other reports more persuasive does not mean that the Director failed to satisfy his statutory obligation. *See* 30 U.S.C. §923(b); 20 C.F.R. §725.405, 406; *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).

We, therefore, affirm the administrative law judge's finding that the evidence failed to establish the existence of pneumoconiosis. Because the evidence failed to establish the existence of pneumoconiosis, an essential element of entitlement, we need not consider claimant's argument concerning total respiratory disability. *Anderson*, 12 BLR at 1-113; *Trent*, 11 BLR 1-27; *Perry*, 9 BLR 1-2.

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