BRB No. 07-0792 BLA

H.T.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MILLER MINING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 06/26/2008
	)	
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 Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts (William Lawrence Roberts, P.S.C.), Pikeville, Kentucky, for claimant.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

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

Claimant appeals the Decision and Order Denying Benefits (04-BLA-5178) of Administrative Law Judge Janice K. Bullard 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). In a Decision and Order dated May 31, 2007, the administrative law judge credited the miner with at least twenty years of coal mine

employment,[1] as stipulated by the parties and supported by the record, and found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge further found that while the evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), since claimant did not establish the existence of pneumoconiosis, it was unnecessary to address whether his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in her analysis of the x-ray and medical opinion evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[2]

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).

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 asserts that, in evaluating the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge failed to acknowledge that Dr. Baker is a B reader, and that, therefore, the administrative law judge's denial of benefits must be

[1] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibits 3, 6. 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*).

[2] The administrative law judge's finding of at least twenty years of coal mine employment and her findings that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) or (a)(3), 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).

vacated and the case remanded for further consideration. Claimant's Brief at 2, 4, 5, 15. Claimant also asserts that the administrative law judge erred in failing to consider Dr. Broudy's July 10, 2002 positive x-ray reading. Claimant's Brief at 14. We disagree.

In finding that the x-ray evidence did not establish the existence of pneumoconiosis, the administrative law judge considered the x-ray readings from Drs. Baker, Forehand, Jarboe, and Wheeler.[3] Decision and Order at 6-7. The administrative law judge stated that Dr. Baker possesses no radiological qualifications, that Drs. Forehand and Jarboe are B readers, and that Dr. Wheeler is both a B reader and a Board-certified radiologist. Decision and Order at 6. According greater weight to the readings by the more highly qualified readers, the administrative law judge resolved the conflicting interpretations of each x-ray film to find that the record contains four negative x-rays and one positive x-ray. Thus, the administrative law judge concluded that claimant failed to establish the existence of pneumoconiosis by a preponderance of the x-ray evidence at 20 C.F.R. §718.202(a)(1). Decision and Order at 6-7.

As claimant correctly asserts, the administrative law judge erred in finding that Dr. Baker possesses no radiological qualifications. The record reflects that Dr. Baker is a B reader.[4] Director's Exhibit 22 at 4; Claimant's Exhibits 5, 10. However, the administrative law judge's consideration of Dr. Baker's readings of the x-rays dated February 26, 2002 and July 27, 2006, reveals no prejudice to claimant. The administrative law judge initially found that Dr. Baker's two positive readings of the February 26, 2002 x-ray were not rebutted, and that, therefore, the x-ray was positive for the existence of pneumoconiosis. Decision and Order at 6; Director's Exhibit 11; Claimant's Exhibit 10. Regarding the July 27, 2006 x-ray, while the administrative law judge found Dr. Baker's positive reading outweighed by Dr. Jarboe's negative B reading, based on the mistaken premise that Dr. Jarboe's radiological qualifications are superior, rather than equal, to those of Dr. Baker, this error is harmless. If the administrative law judge had properly accorded equal weight to the readings of the July 27, 2006 x-ray by Drs. Baker and Jarboe, based on their equal radiological qualifications, those readings

[3] The administrative law judge also considered Dr. Sargent's additional reading for quality only (Quality 1), of the February 26, 2002 x-ray. Decision and Order at 6; Director's Exhibit 11.

[4] Dr. Baker's did not indicate his B reader status on the ILO classification form for his initial February 26, 2002 x-ray reading. Director's Exhibit 11. However, in his February 26, 2002 deposition, Dr. Baker testified that he had recently been recertified as a B reader. Director's Exhibit 22 at 4. In addition, Dr. Baker indicated that he was a B reader on the ILO classification forms for his remaining x-ray readings. Claimant's Exhibits 5, 10.

would, at best, be in equipoise. As the administrative law judge correctly noted, an x-ray with interpretations in equipoise would not constitute probative evidence of either the presence or absence of pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 272-76, 18 BLR 2A-1, 2A-6-9 (1994); Decision and Order at 7. Nor, under the facts of this case, would a determination that the July 27, 2006 x-ray readings were in equipoise alter the administrative law judge's ultimate determination that the preponderance of the x-rays is negative for the existence of pneumoconiosis.[5] Thus, the administrative law judge's failure to consider Dr. Baker's radiological qualifications is harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

In addition, there is no merit to claimant's contention that the administrative law judge erred in declining to consider the July 10, 2002 positive x-ray reading by Dr. Broudy. Contrary to claimant's contention, the administrative law judge specifically noted that claimant identified Dr. Broudy's July 10, 2002 x-ray reading as one of his affirmative case x-rays. However, in light of the fact that claimant had also submitted two additional readings from Dr. Forehand of x-rays that were both more recent, and were the basis for Dr. Forehand's medical reports, the administrative law judge reasonably considered these later readings to constitute claimant's two affirmative case x-ray interpretations pursuant to 20 C.F.R. §725.414(a)(2)(i). *See* 725.414(a)(2)(i); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-241 (2007)(*en banc*); Decision and Order at 6 n.5. As claimant does not assert that the administrative law judge erred in considering Dr. Forehand's March 14, 2005 and August 28, 2006 x-ray interpretations to be claimant's affirmative case evidence, and does not argue that he established good cause for the admission of the additional x-ray reading by Dr. Broudy, we find that the administrative law judge acted within her discretion in declining to consider Dr. Broudy's July 10, 2007 x-ray reading. Consequently, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish the

[5] Specifically, the administrative law judge found that the x-rays dated March 14, 2005 and August 28, 2006 were read as positive by Dr. Forehand, a B reader, but were read as negative by Dr. Wheeler, who is a B reader and Board-certified radiologist. The administrative law judge permissibly found these x-rays to be negative, based on Dr. Wheeler's superior qualifications. *See Staton v. Norfolk & Western Ry. 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; Claimant's Exhibits 3, 6, 11; Employer's Exhibits 4, 8. The administrative law judge also found that a June 20, 2002 negative x-ray reading by Dr. Wheeler was not rebutted. Decision and Order at 6-7; Employer's Exhibit 4. Thus, even taking into consideration Dr. Baker's B reader status, the record would still reflect three negative x-rays, one positive x-ray, and one inconclusive x-ray.

existence of pneumoconiosis by a preponderance of the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). *See Staton v. Norfolk & Western Ry. 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.*); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); Decision and Order at 7.

Claimant next contends that the administrative law judge erred in her analysis of the medical opinion evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), because she did not accord "proper weight" to Dr. Forehand, as one of claimant's "family and treating physicians." Claimant's Brief at 5. Claimant's argument lacks merit.

In considering the medical opinion evidence relevant to 20 C.F.R. §718.202(a)(4), the administrative law judge found that Drs. Baker and Forehand each opined that claimant suffers from pneumoconiosis, while, by contrast, Drs. Dahhan and Jarboe opined that claimant does not suffer from coal workers' pneumoconiosis or any coal dust-related lung disease, and attributed claimant's respiratory impairment to smoking and obesity. Decision and Order at 8-12; Director's Exhibits 11, 20, 22; Claimant's Exhibits 1, 3, 4, 7; Employer's Exhibits 5-7.

Weighing the medical opinions, the administrative law judge initially found Dr. Baker's opinion to be "conclusory." Decision and Order at 13. Considering Dr. Forehand's opinion, the administrative law judge specifically acknowledged claimant's testimony that in addition to being treated by his family physician, Dr. Maynard,[6] claimant also consults with Dr. Forehand for his breathing problem, but she found Dr. Forehand's opinions "not internally consistent." Decision and Order at 13; Hearing Tr. at 22-23. Thus, the administrative law judge permissibly found the opinions of Drs. Baker and Forehand to be entitled to diminished weight. *See* 20 C.F.R. §718.104(d)(5); *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *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, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Contrary to claimant's argument, an administrative law judge is not required to accord greater weight to the opinion of a treating physician based on that status alone. Rather, "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).

[6] The record does not contain any treatment notes or medical reports from Dr. Maynard.

Finally, we reject claimant's contention that the administrative law judge failed to consider the medical report of Dr. Broudy, which was originally developed and proffered by employer as one of its affirmative medical opinions. The record reflects that employer subsequently withdrew Dr. Broudy's report in favor of the opinions of Drs. Dahhan and Jarboe. Hearing Tr. At 13, 15. As claimant neither asserts that the administrative law judge erred in considering the opinions of Drs. Baker and Forehand to be claimant's affirmative evidence, nor argues that he established good cause for the admission of the additional medical report by Dr. Broudy, we hold that the administrative law judge properly declined to consider Dr. Broudy's July 10, 2007 medical report. 20 C.F.R. §§725.414(a)(2)(i), 725.456(b)(1).

It is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. 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 claimant 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). Because claimant did not establish the existence of pneumoconiosis, an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Anderson*, 12 BLR at 1-113; *Trent*, 11 BLR at 1-27.

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
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge