BRB Nos. 07-0871 BLA
and 07-0871 BLA-A

J. N.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 06/12/2008
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
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 Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., for employer.

Sarah M. Hurley (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order – Denial of Benefits (06-BLA-5234) of Administrative Law Judge Larry S. Merck rendered on a claim filed on October 3, 2001, 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 accepted the parties' stipulation that claimant worked for eighteen years in coal mine employment,[1] and found that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total respiratory disability at 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Additionally, claimant contends that, because the administrative law judge rejected Dr. Hussain's diagnosis of pneumoconiosis, the Director, Office of Workers' Compensation Programs (the Director), failed to provide claimant with a complete, credible pulmonary evaluation as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §725.406(a). Employer responds, urging affirmance of the denial of benefits. In its cross-appeal, employer contends that the administrative law judge erred in failing to consider medical evidence from claimant's previously withdrawn claim, and that the administrative law judge improperly discounted the opinions of Drs. Dahhan and Broudy. The Director responds to both claimant's appeal and employer's cross-appeal, asserting that Dr. Hussain provided claimant with a complete, credible pulmonary evaluation, and that the administrative law judge properly excluded from consideration the medical evidence from claimant's withdrawn claim.[2] Employer has filed a reply brief reiterating its contentions on cross-appeal.

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).

[1] The law of the United States Court of Appeals for the Sixth Circuit is applicable as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc).*

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established eighteen years of coal mine employment, but did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal* Co., 6 BLR 1-710 (1983).

To establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must prove the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that he or she is totally disabled due to pneumoconiosis. 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 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 the administrative law judge erred in his evaluation of the x-ray evidence at 20 C.F.R. §718.202(a)(1). Claimant's Brief at 3. Claimant contends that the administrative law judge erred in relying "almost solely on the qualifications of the physicians providing the x-ray interpretations. . . . [and in placing] substantial weight on the numerical superiority of the x-ray interpretations." *Id*. Claimant further asserts that "[the administrative law judge] may have 'selectively analyzed' the x-ray evidence." *Id*. We disagree.

The administrative law judge considered five interpretations of three x-rays. The January 29, 2004 x-ray was interpreted as negative for pneumoconiosis by Dr. Broudy, a B reader, and the October 3, 2002 x-ray was interpreted as negative for pneumoconiosis by Dr. Dahhan, a B reader. Director's Exhibit 32. Dr. Hussain, a physician with no radiological qualifications, interpreted the December 14, 2001 x-ray as positive for pneumoconiosis.[3] Director's Exhibit 8. However, because Dr. Scott, a Board-certified radiologist and B reader, interpreted the same x-ray as negative for pneumoconiosis, Director's Exhibit 23, the administrative law judge permissibly afforded his negative reading greater weight. 20 C.F.R. §718.202(a)(1); *Roberts v. Bethlehem Mines Corp*., 8 BLR 1-211, 1-213 (1985). Because the remaining x-ray readings were negative, the administrative law judge rationally found that the x-ray evidence, as a whole, did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *See White v. New White Coal Co*., 23 BLR 1-1, 1-4 (2004). We reject claimant's comment that the administrative law judge "may have selectively analyzed" the x-ray evidence. *White*, 23 BLR at 1-5. Claimant has not provided any support for that assertion, nor does a review of the evidence and the administrative law judge's Decision and Order reveal selective analysis of the x-ray evidence. We, therefore, affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1), as it is supported by substantial evidence.

Claimant further argues that, because the administrative law judge determined that Dr. Hussain's diagnosis of clinical pneumoconiosis was based on an erroneous x-ray interpretation, he erred in not remanding this case to the district director for a complete

[3] Dr. Sargent, a Board-certified radiologist and B reader, reviewed the December 14, 2001 x-ray for its film quality only. Director's Exhibit 8.

pulmonary evaluation. The Director responds that it is his obligation to provide a complete and credible pulmonary evaluation, but not necessarily the dispositive evidence that resolves the case. Director's Brief at 3. The Director contends that Dr. Hussain's evaluation fulfilled this obligation. *Id*.

Pursuant to Section 413(b) of the Act, "[e]ach miner who files a claim for benefits under this subchapter shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). The regulation at 20 C.F.R. §725.406(a) provides that "[a] complete pulmonary evaluation includes a report of physical examination, a pulmonary function study, a chest roentgenogram and, unless medically contraindicated, a blood gas study." 20 C.F.R. §725.406(a). The record reflects that Dr. Hussain conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. Director's Exhibit 8.

We agree with the position taken by the Director, whose duty it is to ensure the proper enforcement and lawful administration of the Act, *Hodges*, 18 BLR at 1-87, that a remand of the case is not warranted based on the facts of this case. The administrative law judge discounted Dr. Hussain's opinion because the doctor stated that he based his diagnosis of pneumoconiosis on claimant's x-ray and a history of coal dust exposure. As the Director correctly argues, Dr. Hussain's positive x-ray reading was not found to lack credibility, but was merely found outweighed by the negative reading of the same x-ray by Dr. Scott, whose radiological qualifications are superior to those of Dr. Hussain. Because the Director is required to provide claimant with a complete pulmonary evaluation, not a dispositive one, Dr. Hussain's report fulfills the Director's statutory obligation. *See Hodges*, 18 BLR at 1-89-90. Therefore, we decline to remand this case to the district director for another pulmonary evaluation.[4]

Because we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(4), an essential element of entitlement, we affirm the denial of benefits. Therefore, we need not consider claimant's argument regarding total disability at Section 718.204(b)(2)(iv). *Anderson*, 12 BLR at 1-114; *Trent*, 11 BLR at 1-27. Additionally, because we affirm the denial of benefits, we need not reach employer's arguments on cross-appeal.

[4] Moreover, as the Director notes, a remand to the district director for Dr. Hussain to further explain his diagnosis of pneumoconiosis would be futile, since the administrative law judge credited Dr. Hussain's opinion that claimant is not totally disabled. Decision and Order at 18; Director's Brief at 3 n.1.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge