BRB No. 05-0835 BLA

J.T. FERGUSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PITTSBURG AND MIDWAY MINING	)	
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	DATE ISSUED: 03/30/2006
	)	
Employer/Carrier- Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Ronald K. Bruce, Madisonville, Kentucky, for claimant.

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

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-5279) of Administrative Law Judge Daniel J. Roketenetz denying benefits 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). Pursuant to the parties' stipulations, the administrative law judge

credited claimant with twenty-three years of coal mine employment[1] and found that employer was the responsible operator. Decision and Order at 2, 4; Hearing Transcript at 18. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] Decision and Order at 4. The administrative law judge found that although claimant established that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), he did not establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 5-14. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1), (4) and in failing to find that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a substantive response in this appeal.[3]

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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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[1] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibits 3, 6, 7. 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 (1989)(*en banc*).

[2] Claimant filed his claim for benefits on December 6, 2001. Director's Exhibit 2.

[3] The administrative law judge's length of coal mine employment and responsible operator determinations, as well as his findings pursuant to 20 C.F.R. §§718.202(a)(2), (3) and 718.204(b)(2)(i)-(iv), are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to 20 C.F.R. §718.202(a)(1), claimant contends that the administrative law judge erred in failing to find that the preponderance of the x-ray evidence established the existence of pneumoconiosis. Claimant's Brief at 8-9. We disagree. The administrative law judge considered nine readings of three x-rays in light of the readers' radiological credentials.[4] The administrative law judge considered that the February 7, 2002, x-ray was read as positive by Dr. Simpao, who lacks radiological credentials, and was reread as negative by Dr. Wiot and as positive by Dr. Brandon, both of whom are Board-certified radiologists and B-readers. Because the February 7, 2002 x-ray was read as both positive and negative "by the highest qualified physicians," the administrative law judge found it to be "in equipoise" for the existence of pneumoconiosis. Decision and Order at 6. Claimant argues that the readings of the February 7, 2002 x-ray "are not in equipoise" because "[t]here was only one negative reading." Claimant's Brief at 8-9. This contention lacks merit. The administrative law judge properly considered not only the quantity but also the quality of the conflicting x-ray readings to find the "highest qualified" readings in equipoise. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993).

Similarly, the administrative law judge permissibly found that because the March 29, 2002 x-ray was interpreted as both positive and negative for pneumoconiosis by Drs. Wiot and Brandon, "the highest qualified physicians" of the four who had read the x-ray, it too was in equipoise for the existence of pneumoconiosis.[5] Decision and Order at 6; *Staton*, 65 F.3d at 59, 19 BLR at 2-279-80; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87. Claimant does not challenge this finding. It is therefore affirmed.

Finally, the administrative law judge considered that the January 25, 2005 x-ray was interpreted as negative by Dr. Repsher, a B-reader, and was classified as unreadable by Dr. Baker, a B-reader. Although the administrative law judge found the January 25, 2005 x-ray negative for pneumoconiosis based on Dr. Repsher's reading, claimant contends that the x-ray "must be found in equipoise" because "Dr. Baker found this x-ray to be unreadable . . . ." Claimant's Brief at 9. We reject claimant's contention. A chest x-ray need only be of suitable quality for the proper classification of pneumoconiosis; it need not be of optimal quality. 20 C.F.R. §718.102(a); *Preston v. Director, OWCP*, 6 BLR 1-1229, 1-1233 (1984). Since Dr. Repsher was equally qualified and was able to read the x-ray, the administrative law judge did not err in finding the January 25, 2005 x-

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[4] The administrative law judge noted that Dr. Sargent evaluated the February 7, 2002 x-ray for its film quality only. Director's Exhibit 11.

[5] The other two physicians were Drs. Broudy and Baker, both B-readers, who read the March 29, 2002 x-ray as negative and positive, respectively.

ray negative for pneumoconiosis. Consequently, the administrative law judge permissibly found that with two x-rays in equipoise and one negative for pneumoconiosis, claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Staton*, 65 F.3d at 59, 19 BLR at 2-279-80; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87. We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), claimant asserts that the administrative law judge erred in failing to find the existence of pneumoconiosis established based upon the medical opinion evidence. Again, we disagree. The administrative law judge considered four medical opinions. Drs. Baker and Simpao diagnosed claimant with pneumoconiosis, while Drs. Broudy and Rosenberg concluded that he does not have pneumoconiosis but suffers from a restrictive impairment due to past lung surgery, rib fractures, an elevated diaphragm, and obesity. The administrative law judge found that Dr. Baker's report was not well-reasoned. Claimant contends that the administrative law judge erred because Dr. Baker conducted an examination and testing, and his "report and opinions are [therefore] both well documented and well reasoned." Claimant's Brief at 10. Claimant essentially asks the Board to reweigh the evidence, which we cannot do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1988). The administrative law judge permissibly discounted "Dr. Baker's diagnosis of clinical pneumoconiosis" because Dr. Baker "expressly relied" only on his own reading of a chest x-ray and claimant's history of coal dust exposure. Decision and Order at 10; *see Eastover Mining Co. v. Williams,* 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003). Substantial evidence supports this finding. Additionally, the administrative law judge found that although Dr. Baker also diagnosed claimant with a "restrictive ventilatory defect," the diagnosis did not constitute a diagnosis of legal pneumoconiosis because Dr. Baker did not indicate that the restrictive defect was a "chronic" lung disease or impairment. Decision and Order at 11; *see* 20 C.F.R. §718.201(a)(2)(requiring a "chronic lung disease or impairment . . . arising out of coal mine employment" to be considered legal pneumoconiosis).

The administrative law judge found that although Dr. Simpao's opinion diagnosing pneumoconiosis was well-reasoned and documented, it was outweighed by the contrary opinions of Broudy and Rosenberg, which were also found well-reasoned and documented, and supported by two negative CT-scans. Claimant argues that this was error because Dr. Rosenberg's opinion was "not well-reasoned or well-documented." Claimant's Brief at 11. Whether an opinion is reasoned and documented is for the administrative law judge to determine. *Rowe*, 710 F.2d 255, 5 BLR 2-103. Because substantial evidence supports the administrative law judge's finding, and the Board is not empowered to reweigh the evidence, *Anderson*, 12 BLR at 1-113, we reject claimant's contention. We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(4).

Because claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement in a miner's claim pursuant to 20 C.F.R. Part 718, we affirm the denial of benefits. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Therefore, we need not address claimant's other arguments regarding the administrative law judge's findings pursuant to Section 718.204(c).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge