BRB No. 05-0979 BLA

CHARLES A. MORGAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY	)	DATE ISSUED: 03/29/2006
	)	
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 – Rejection of Claim of Edward Terhune Miller, 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.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Rejection of Claim (2003-BLA-6375) of Administrative Law Judge Edward Terhune Miller 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 employer conceded a coal mine employment history of at least twenty-five years, but that

the evidence 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 pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 4-12. 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 and medical opinion evidence and 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 and that the fact that the administrative law judge declined to rely on Dr. Simpao's diagnosis of pneumoconiosis and instead credited Dr. Rosenberg'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), (3) or total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii). *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] Contrary to claimant's assertion, the administrative law judge may rely upon the qualifications of the physicians in weighing the x-ray evidence and determining the weight to be assigned the interpretations and may consider the numerical superiority, in this case, of the negative x-ray evidence. In this case, the administrative law judge considered the entirety of the x-ray evidence of record and rationally accorded little weight to the positive x-ray readings of Drs. Baker and Simpao, Director's Exhibits 10, 11; Claimant's Exhibit 4, because these physicians "lack[ed] any special pertinent qualifications" for interpreting x-rays. Decision and Order at 9. The administrative law judge further accorded little weight to the positive readings of Dr. Alexander, Claimant's Exhibits 1, 2, because even though Dr. Alexander was both a B-reader and a board-certified radiologist,[3] his positive readings were contradicted by the negative readings of Dr. Poulos, who was equally qualified, and Dr. Rosenberg, a B-reader. Decision and Order at 9-10. Likewise, the administrative law judge found that Dr. Poulos, a B-reader and board-certified reader, interpreted the x-ray read by Dr. Baker, who had no special qualifications, as negative. Decision and Order at 10. Moreover, the administrative law judge found that the most recent x-ray of record was read negative by Dr. Rosenberg, a B-reader and board-certified physician. The administrative law judge thus permissibly found that the x-ray evidence was "at best in equipoise" and that ultimately claimant was unable to affirmatively establish the existence of pneumoconiosis because the preponderance of x-ray readings by physicians with superior qualifications was negative. Decision and Order at 9-10; 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

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

[3] A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16 , 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

judge "may have selectively analyzed" the x-ray evidence is rejected as claimant points to no evidence or finding by the administrative law judge which 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.

In addition, claimant's assertion that the administrative law judge erred in not finding the existence of pneumoconiosis established based upon the medical opinion of Dr. Baker is rejected. Claimant's Brief at 4-5. In determining that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge reviewed all of the medical opinion evidence of record and properly considered the quality of the evidence in determining whether the opinions were supported by their underlying documentation and were adequately explained. The administrative law judge found the opinion of Dr. Rosenberg, who opined that claimant did not have coal workers' pneumoconiosis or chronic obstructive pulmonary disease, to be the most convincing opinion of record as Dr. Rosenberg was the best qualified physician of record and his opinion was the most extensively reasoned and explained of record. This was proper. Decision and Order at 10-11; *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. Contrary to claimant's assertion that Dr. Baker based his opinion on a thorough review of the evidence, the administrative law judge acted within his discretion, as fact-finder, in concluding that Dr. Baker's opinion was insufficient to support a finding of pneumoconiosis because Dr. Baker's diagnosis of coal worker's pneumoconiosis and pulmonary impairment due, in part to coal mine employment, was based solely upon claimant's long history of coal mine employment, minimal smoking history, and a positive x-ray reading which was subsequently read negative by a better qualified physician. Decision and Order at 10-11; Director's Exhibit 11; 20 C.F.R. §718.104(d)(1)-(5); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *see also Jericol Mining , Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 1-62, 1-175 (4th Cir. 2000); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Moreover, the administrative law judge permissibly accorded greatest weight to the opinion of Drs. Rosenberg, that claimant does not have pneumoconiosis, because he found that the physician offered the "most extensively reasoned and explained" opinion of record and he was the most qualified physician of record, *i.e.*, he was board-certified in internal medicine, pulmonary disease and occupational medicine. Decision and Order at

10; Employer's Exhibits 1, 2; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Stephens*, 298 F.3d 511, 22 BLR 2-495; *Worhach*, 17 BLR at 1-108; *Trumbo*, 17 BLR at 1-89; *Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1986). We, thus, affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis based on medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4).

Further, contrary to claimant's contention, the Director did not fail to provide claimant with a complete pulmonary evaluation because the administrative law judge found that Dr. Simpao's opinion was not persuasively explained and was outweighed by Dr. Rosenberg's better reasoned and better supported opinion. *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 fails to establish the existence of pneumoconiosis and because the evidence fails 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 1-111; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge