BRB No. 07-0845 BLA

S.C.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LESLIE HAULERS, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 03/31/2008
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE ASSOCIATION	)	
	)	
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 Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

J. Gregory Allen (Riley & Allen, P.S.C.), Prestonburg, Kentucky, for employer.

Helen H. Cox (Gregory F. Jacob, 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 (03-BLA-5901) of Administrative Law Judge Rudolf L. Jansen 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 March 3, 2004, the administrative law judge credited the miner with twenty-three years of coal mine employment,[1] and found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and erred in his evaluation of the medical opinion evidence relevant to the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv). Claimant further asserts that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary evaluation as required by 20 C.F.R. §725.406(a). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director has filed a limited response brief contending that claimant received a complete pulmonary evaluation as contemplated by 20 C.F.R. §725.406(a).[2]

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

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[1] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 3. 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 twenty three years of coal mine employment and his findings that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2)-(4) 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).

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 asserts that the administrative law judge erred in relying almost solely on the qualifications of the interpreting physicians and the numerical superiority of the x-ray interpretations in evaluating the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). Claimant's Brief at 3. Claimant's assertion lacks merit. In finding that the x-ray evidence did not establish the existence of pneumoconiosis, the administrative law judge properly noted that the relevant x-ray evidence consists of three readings of three x-rays.[3] Decision and Order at 5. The administrative law judge permissibly found that the sole positive reading of record, that of an October 17, 2001 x-ray by Dr. Hussain, a physician with no radiological qualifications, was outweighed by the negative readings of the remaining x-rays, dated April 11, 1997 and November 21, 2001, by Dr. Powell, who is a B reader. *See Staton v. Norfolk & Western Railway 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 8-9; Director's Exhibits 11, 17. Contrary to claimant's arguments, the administrative law judge properly considered both the quantity and the quality of the x-ray readings, and permissibly found that the preponderance of negative readings by B readers outweighed the sole positive reading by a lesser qualified physician. *See Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Cranor*, 22 BLR at 1-7; Decision and Order at 8-9.

In addition, we reject claimant's assertion that the administrative law judge "may have 'selectively analyzed'" the x-ray evidence. Claimant's Brief at 3. 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 a selective analysis of the x-ray evidence. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-5 (2004). Consequently, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1), as it is supported by substantial evidence.

In light of our affirmance of the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Anderson*, 12 BLR at 1-112; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*). Consequently, we need not address claimant's contentions regarding the administrative law judge's finding that the medical

[3] The record contains an additional reading for quality only (Quality 3), by Dr. Sargent, of the October 17, 2001 x-ray. Director's Exhibit 9.

opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[4] *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Finally, claimant contends that because the administrative law judge did not credit a diagnosis of pneumoconiosis contained in Dr. Hussain's October 17, 2001 medical report provided by the Department of Labor, the Director has failed to provide him with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act.[5] As the Director correctly contends, in evaluating the evidence relevant to the existence of pneumoconiosis, the administrative law judge did not discredit Dr. Hussain's opinion, but instead found that it was outweighed by the better-reasoned opinion of Dr. Powell. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-123, (6th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*); Decision and Order at 13; Director's Brief at 2. Claimant does not allege any error in regard to the administrative law judge's weighing of the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). Because the administrative law judge merely found Dr. Hussain's opinion outweighed on the issue of pneumoconiosis, there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. *Cf. Hodges*, 18 BLR at 1-93.

[4] The administrative law judge characterized this claim, filed on June 27, 2001, as a petition for modification pursuant to 20 C.F.R. §725.310, because it was filed within one year of the denial of his prior claim. Decision and Order at 7. Thus, in addition to determining that the evidence submitted with the current claim did not establish entitlement, the administrative law judge further found that the claimant had not established either a change in condition or a mistake in a determination of fact. However, as the record reflects that claimant's prior claim was withdrawn on February 16, 2001, the administrative law judge was not required to analyze this case pursuant to the standards set for establishing modification. The regulations provide that withdrawn claims are "considered not to have been filed." 20 C.F.R. §725.306(b). However, as the administrative law judge's additional analysis of this claim pursuant to 20 C.F.R. §725.310 had no impact on its outcome, it is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[5] The Department of Labor has a statutory duty to provide a miner with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate the claim. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994).

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