BRB No. 04-0878 BLA

THOMAS BISHOP	)	
	)	
Claimant-Petitioner	)	
v.	)	
	)	
LEECO, INCORPORATED	)	DATE ISSUED: 05/20/2005
	)	
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 - Denying Claim of Daniel F. Solomon, 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.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor, Donald S. Shire, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Claim (2003-BLA-06048) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) 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).[1] The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied the claim.

On appeal, claimant contends that the administrative law judge erred in finding that the x-ray and the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (4). Claimant also contends that the administrative law judge erred when he found that the medical opinion evidence of record failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv).[2] Employer responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, (the Director) also responds urging affirmance of the administrative law judge's award of benefits.

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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.201, 718.202, 718.203, 718.204. Failure to establish any 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*).

Claimant initially contends that the administrative law judge erred in failing to find that the x-ray interpretation evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Claimant asserts that the administrative law judge improperly relied

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[1] Claimant filed this claim with the Department of Labor on May 21, 2002. Director's Exhibit 2.

[2] Because claimant does not challenge the administrative law judge's findings that the evidence fails to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3), those findings are affirmed. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

upon the interpretations by physicians with superior credentials and improperly relied on the numerical superiority of the negative x-ray readings to find that the existence of pneumoconiosis was not established by x-ray evidence. Claimant contends that the Board has held that the administrative law judge is not required to defer to doctors with superior qualifications, nor is he required to accept as conclusive the numerical superiority of the x-ray interpretations. Claimant's Brief at 2-3.

In this case, the administrative law judge considered the seven interpretations of three x-rays in conjunction with the readers' radiological qualifications and found that there were five negative interpretations, one positive interpretation, and one interpretation that addressed only the quality of an x-ray film.[3] Decision and Order at 11-12. Additionally, the administrative law judge found that of the five negative x-ray readings, two were by Dr. Wiot, a B-reader. *Id*; Director's Exhibits 11, 17, 18, 29; Employer's Exhibit 2. The administrative law judge found that the record contained only one positive reading, by Dr. Baker, who possessed no special radiological qualifications. Decision and Order at 11; Director's Exhibit 22. Accordingly, in weighing the conflicting x-ray evidence, the administrative law judge permissibly exercised his discretion, as trier-of-fact, in giving greater weight to the interpretations by the physicians who possessed superior radiological qualifications than to the interpretations by physicians who possessed no special radiological qualifications.[4] Further, the administrative law judge properly conducted both a qualitative and quantative analysis of the x-ray interpretation evidence. 20 C.F.R. §718.202(a)(4); *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994),

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[3] Dr. Sargent reread Dr. Hussain's August 17, 2001 x-ray, noting only that the film quality was "2", "overexposed", without commenting on whether the film was positive or negative for the existence of pneumoconiosis. Director's Exhibit 12.

[4] The administrative law judge also stated that the most recent x-ray interpretations were not sufficient to establish the existence of pneumoconiosis, although the administrative law judge stated that he was not relying "entirely" on recency to render his finding at Section 718.202(a)(1). Decision and Order at 11-12. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that recency can only be utilized as a rationale where subsequent x-rays show more, not less, evidence of pneumoconiosis, which is a progressive disease. *See Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986). Any error committed by the administrative law judge in using this rationale as a factor in weighing the x-ray evidence is harmless, however, as he provided valid, alternative bases for his findings pursuant to Section 718.202(a)(1). *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-381 n.4 (1983).

aff'g sub nom. Greenwich Collieries v. Director, OWCP, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Staton v. Norfolk and 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). Decision and Order at 11-12.

In addition, we reject claimant's contention that the administrative law judge "may" have "selectively analyzed" the x-ray evidence. Claimant's Brief at 3. Claimant cites to nothing in the administrative law judge's decision or in the record to support his speculation and a review of the evidence, together with the administrative law judge's Decision and Order, does not reflect selective analysis of the x-ray evidence. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1988). Accordingly, we affirm the administrative law judge's finding that the x-ray evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(1).

Claimant next challenges the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Claimant asserts that Dr. Baker's opinion, diagnosing the existence of coal workers' pneumoconiosis which was based on physical examination, medical and work histories, pulmonary function study, arterial blood gas study, and chest x-ray is sufficient to establish the existence of pneumoconiosis. Claimant's Brief at 4-5.

In considering Dr. Baker's opinion, however, the administrative law judge found it unreasoned because it was based on a positive x-ray which was subsequently read negative and claimant's exposure history. Specifically, the administrative law judge stated:

> [a]side from the negative rereading of the x-ray upon which he relies and the appeal to exposure history, Dr. Baker saw no clubbing, cyanosis or edema in the extremities and his examination of the [c]laimant's lungs found that they were clear, with no rales or wheezes.

Decision and Order at 12. Instead, the administrative law judge credited the opinion of Drs. Hussain, Rosenberg and Vuskovich, who opined that claimant did not have pneumoconiosis, based on their overall documentation and the consistency of the negative x-ray interpretations. Decision and Order at 12-13; Director's Exhibits 8, 22; Employer's Exhibits 2, 4, 5. This was proper. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Eastover Mining Co. v. Williams*, 338 F. 2d 501, 22 BLR 2-625 (6th Cir. 2003); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*), *aff'd sub*

nom. Director, OWCP v. Cargo Mining Co., Nos.88-3531, 88-3578 (6th Cir. May 11, 1989) (unpub.); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Cooper v. Director, OWCP*, 11 BLR 1-95 (1988)(Ramsey, CJ, concurring); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (9185); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); *see also Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1989). We, therefore, reject claimant's contention pursuant to Section 718.202(a)(4) and we affirm the administrative law judge's finding that the evidence fails to establish the existence of pneumoconiosis thereunder. Because we affirm the administrative law judge's finding that the evidence failed to establish the existence of pneumoconiosis, an essential element of entitlement, we must affirm the denial of benefits, *Trent*, 11 BLR at 1-28; *Perry*, 9 BLR 1-1, and we need not address claimant's arguments with respect to total respiratory disability pursuant to Section 718.204(b)(2). *See Trent*, 11 BLR 1-28; *Perry*, 9 BLR 1-1; *Wetzel*, 8 BLR 1-139.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge