BRB No. 05-0117 BLA

RALPH BAKER	)	
	)	
Claimant-Petitioner	)	
v.	)	
	)	
BLUE DIAMOND COAL CORPORATION	)	DATE ISSUED: 05/25/2005
	)	
and	)	
	)	
JAMES RIVER COAL COMPANY	)	
	)	
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.

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

Helen H. Cox (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (03-BLA-6174) of Administrative Law Judge Rudolf L. Jansen (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). 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)(1)-(4) and total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits on the claim.

On appeal, claimant contends that the administrative law judge erred in finding that the x-ray evidence 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 failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). Additionally, claimant contends that the Department of Labor (DOL) failed to provide claimant with a complete and credible pulmonary evaluation sufficient to substantiate his claim as required pursuant to Section 413(b) of the Act. 30 U.S.C. §923(b) Employer responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, (the Director) responds, asserting that Dr. Hussain's medical report satisfied his obligation to provide claimant with a complete and credible pulmonary evaluation pursuant to Section 413(b).[1]

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 on a miner's claim 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

[1] No party challenges 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) and (3) or that the evidence fails to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). These findings are, therefore, affirmed. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1(1986)(*en banc*).

Claimant contends that the administrative law judge erred in failing to find that the x-ray evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Claimant asserts that the administrative law judge improperly relied upon the interpretations by physicians with superior credentials and the numerical superiority of the negative x-ray readings, noting that the Board has held that the administrative law judge is not required to defer to doctors with superior qualifications, nor to accept, as conclusive, the numerical superiority of x-ray interpretations. Claimant's Brief at 2-3.[2]

In this case, the administrative law judge considered the interpretations of five x-rays in conjunction with the readers' radiological qualifications and noted that there were six negative interpretations and two positive interpretations.[3] Decision and Order at 8. The administrative law judge found that of the six negative x-ray readings, three were by physicians who were both Board-certified radiologists and B-readers, two were by B-readers, and one was by a reader who possessed neither qualification. *Id*; Director's Exhibits 10, 29, 32; Employer's Exhibits 2, 6, 10. The administrative law judge found that the record contained only two positive readings, one by a physician who was a B-reader, and one by a physician who possessed no special radiological qualifications. Decision and Order at 8; Director's Exhibits 9, 10. When weighing the conflicting evidence, the administrative law judge permissibly exercised his discretion, as trier-of-fact, by 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. Contrary to claimant's contention, this was a proper qualitative and quantative analysis of the x-ray evidence. *See* 20 C.F.R. §718.202(a)(1); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *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); *Worhach v. Director, OWCP*, 17 BLR 1- 105

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[2] Neither party has made any argument relevant to the evidentiary limitations set forth at 20 C.F.R. §725.414.

[3] Dr. Barrett reread Dr. Hussain's April 17, 2002 x-ray, and noted only that the film quality was "1", the highest quality possible, without commenting on whether the film was positive or negative for pneumoconiosis. Director's Exhibit 10. Moreover, Drs. Wiot and Sargent reread the January 25, 2002 film for quality only, and found that it was "unreadable." Director's Exhibits 10, 32; Decision and Order at 8.

(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*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Decision and Order at 10.

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 record or the administrative law judge's decision to support his speculation and a review of the evidence together with the administrative law judge's decision does not reveal a selective analysis of the x-ray evidence. We affirm, therefore, the administrative law judge's finding that the newly submitted 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) based on the report of Dr. Baker. Claimant asserts that Dr Baker diagnosed coal workers' pneumoconiosis based on a physical examination, medical and work histories, pulmonary function study, arterial blood gas study, and chest x-ray. Claimant's Brief at 4-5.

Upon consideration of Dr. Baker's opinion, the administrative law judge stated:

> [h]e based his diagnosis on a positive chest x-ray and [c]laimant's history of coal dust exposure. A diagnosis of pneumoconiosis based on a positive chest x-ray and a history of coal dust exposure alone is not a well documented and reasoned opinion. *Cornett v. Benham Coal, Inc.*, 227 F. 3d 569, 576 (6th Cir. 2000). As Dr. Baker provides no other basis for his diagnosis, I find his opinion to be poorly documented and reasoned. Dr. Baker also diagnosed Claimant with COPD and bronchitis. He did not address the etiology of these conditions. Thus, I find his opinion to be incomplete regarding these diagnoses.

Decision and Order at 9.

In addressing the medical opinion evidence pursuant to Section 718.202(a)(4), the administrative law judge found that only Dr. Baker opined that claimant suffered from pneumoconiosis whereas Drs. Repsher, Broudy and Hussian opined that claimant did not have pneumoconiosis. Decision and Order at 9-10; Director's Exhibits 9, 10; Employer's Exhibits 2, 6. Further in weighing the opinion of Drs. Baker, the administrative law judge also found that:

> Dr. Baker considered an employment history of ten years more than is shown

> in the record. As Dr. Baker considered Claimant's exposure history in the diagnosis, I find that the extended employment history may have affected his diagnosis.

Decision and Order at 9.

Having reviewed the record, we hold that the administrative law judge did not abuse his discretion when he held that Dr. Baker did not identify an adequate basis for his diagnosis of pneumoconiosis beyond his own positive x-ray interpretation and claimant's coal mine employment history. The administrative law judge did not err in discounting Dr. Baker's diagnosis for this reason. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000); *see 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 2-320 (4th Cir. 1998). Nor, did the administrative law judge err in finding that Dr. Baker's positive x-ray reading was outweighed by contrary readings by doctors with superior radiological credentials. Decision and Order at 9; Director's Exhibit 9; *see Eastover Mining Co. v. Williams*, 338 F. 2d 501, 22 BLR 2-625 (6th Cir. 2003); *Worhach*, 17 BLR at 1-110; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Accordingly, we affirm the administrative law judge's determination to discount Drs. Baker's opinion, as not fully explained. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990); *Clark*, 12 BLR at 1-155; *Cooper v. Director, OWCP*, 11 BLR 1-95 (1988)(Ramsey, CJ, concurring). Moreover, we hold that it was within the administrative law judge's discretion to discount Dr. Baker's opinion, in part, because he relied on an erroneous coal mine employment history. Decision and Order at 9; *see DeBusk v. Pittsburg & Midway Coal Co.*, 12 BLR 1-15 (1988); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988)(Ramsey, CJ, concurring); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985). We reject, therefore, claimant's contentions on this issue and affirm the administrative law judge's finding that the evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Claimant next asserts that because the administrative law judge found Dr. Hussain's January 25, 2002 report, which was provided claimant by the Director to be poorly documented and reasoned, "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 7-8. In response however, the Director asserts that he "is only required to provide a miner with a complete and credible examination, not a dispositive one." Director's Brief at 2.

The record reflects that Dr. Hussian conducted an examination and a full range of testing, and that he addressed each element of entitlement of the DOL examination form. Director's Exhibit 10; *see* 20 C.F.R. §§718.101(a), 718.104, 725.406(a). Claimant does not

allege that the administrative law judge found Dr. Hussain's report to be incomplete. Rather, at Section 718.202(a)(4), the administrative law judge found that Dr. Hussain's report was "poorly documented and reasoned and entitled to less weight." Decision and Order at 10. Moreover, at Section 718.204(b)(2)(iv), the administrative law judge credited Dr. Hussain's opinion that claimant was not totally disabled. Decision and Order at 11. Thus, the administrative law judge did not reject Dr. Hussain's opinion. The administrative law judge credited, to some degree, Dr. Hussain's diagnosis that claimant did not have pneumoconiosis and was not totally disabled by a respiratory impairment. *See Williams*, 338 F. 3d at 514, 22 BLR 2-644. As the Director asserts, the Act requires that "[each] miner who files a claim…be provided an opportunity to substantiate his or her claim means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406. The Director only fails to meet this duty where "the administrative law judge finds a medical opinion incomplete", or where "the administrative law judge finds that the opinion, although complete, lacks credibility," and is not entitled to any weight at all. *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88, n. 3 (1994), *see also 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, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984). In the instant case, Dr. Hussain's report was credited in part and was complete. The administrative law judge did not find that it completely lacked credibility. We reject, therefore, claimant's contention that the Director did not fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. *See Hodges*, 18 BLR at 1-93.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element of entitlement. *See Trent*, 11 BLR at 1-27; *White v. Director, OWCP*, 6 BLR 1-368 (1983). Further, the administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Anderson*, 12 BLR at 1-113; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20(1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987). Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a miner's claim under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits, and we need not address the administrative law judge's finding on total disability at 20 C.F.R. §718.204(b)(2). *See Trent*, 11 BLR at 1-29; *Perry*, 9 BLR at 1-2; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

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