

BRB No. 06-0676 BLA

GARY L. RICE)
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 Claimant-Petitioner)
)
 v.)
)
 DUDE BRANCH MINING COMPANY,)
 INCORPORATED)
)
 and)
)
 AMERICAN INTERNATIONAL SOUTH) DATE ISSUED: 05/09/2007
 INSURANCE COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Order Granting Employer's Motion for Reconsideration of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for claimant.

Timothy J. Walker (Ferreri & Fogle), Lexington, Kentucky, for employer.

Michelle S. Gerdano (Jonathan L. Snare, Acting 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 Order Granting Employer's Motion for Reconsideration (04-BLA-5683) of Administrative Law Judge Joseph E. Kane 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).¹ The administrative law judge found at least twenty-three years of qualifying coal mine employment, Order Granting Employer's Motion for Reconsideration at 3; Hearing Transcript at 12, and, considering entitlement pursuant to 20 C.F.R. Part 718, concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).² Order Granting Employer's Motion for Reconsideration at 7-10. Benefits were, accordingly, denied.

On appeal, claimant contends that the administrative law judge should have found the existence of pneumoconiosis and disability established, based on the medical opinion evidence.³ Claimant also asserts that because the administrative law judge rejected the

¹ The administrative law judge initially denied benefits in a Decision and Order issued on April 15, 2005. Employer requested reconsideration of that Decision and Order based on errors made by the administrative law judge in his evidentiary findings, specifically the administrative law judge's exclusion of Dr. Wiot's reading of the January 8, 2003 x-ray, the exclusion of Dr. Baker's reading of the December 6, 2002 x-ray, and the exclusion of Dr. Wiot's rebuttal readings of the December 6, 2002 and May 12, 2003 x-rays. Employer also asserted that the issue of total disability due to pneumoconiosis should have been addressed. Claimant did not respond to employer's request for reconsideration. Considering employer's assertions and reviewing the evidence again, the administrative law judge concluded that he had made errors in his previous evidentiary findings and therefore granted employer's request for reconsideration and stated that he would reevaluate the issues of entitlement in the Order Granting Employer's Motion for Reconsideration which he termed a revised decision and order. Order Granting Employer's Motion for Reconsideration. It is from this Order, denying benefits, that claimant appeals.

² The claim for benefits was filed on September 19, 2002. Director's Exhibit 2.

³ The administrative law judge's length of coal mine employment determination as well as his finding that pneumoconiosis was not established pursuant to 20 C.F.R.

opinion of Dr. Baker, the case must be remanded as claimant was not provided with a complete, credible pulmonary evaluation, as required under the Act and regulations. 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that he will not respond to the merits of the appeal, but states that claimant has been provided with a complete, credible pulmonary evaluation.

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'Keefe 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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

Pursuant to 20 C.F.R. §718.202(a)(1), claimant contends that the administrative law judge erred in failing to find Dr. Powell's positive x-ray interpretation sufficient to establish the existence of pneumoconiosis. Claimant's Brief at 2. We disagree.

The administrative law judge considered the eight readings of the four x-rays of record in light of the readers' radiological qualifications. Order Granting Employer's Motion for Reconsideration at 7. Although Dr. Baker interpreted the December 6, 2002 x-ray as positive for pneumoconiosis, the administrative law judge found Dr. Baker's positive reading rebutted by the negative reading of Dr. Wiot, a Board-certified radiologist and B reader. The administrative law judge also found the January 8, 2003 x-ray to be negative, even though it was read as positive by Dr. Baker, because it was subsequently reread as negative by Drs. Wiot and Spitz, Board-certified, B readers. Regarding the May 12, 2003 x-ray, the administrative law judge found it to be negative, even though it was initially interpreted as positive by Dr. Powell, a B reader, because Dr. Wiot subsequently read it as showing no abnormalities consistent with pneumoconiosis. The administrative law judge found the December 2, 2003 x-ray to be negative as it was interpreted as negative by Dr. Westerfield. The administrative law judge concluded,

§718.202(a)(2), (3) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

therefore, that claimant failed to establish the existence of pneumoconiosis by a preponderance of the x-ray evidence. Order Granting Employer's Motion for Reconsideration at 7. As this finding is supported by substantial evidence, it is affirmed. See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Staton v. Norfolk & Western Railroad 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). We, therefore, affirm the administrative law judge's finding that the existence of pneumoconiosis was not established by x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge erred in failing to accord appropriate weight to the opinion of Dr. Baker, as it was sufficient to establish the existence of pneumoconiosis. Claimant's Brief at 3-4. We disagree.

Dr. Baker diagnosed claimant with 1) coal workers' pneumoconiosis, based on x-ray and coal dust exposure, and 2) chronic obstructive pulmonary disease and chronic bronchitis, due to coal dust exposure and cigarette smoking. Director's Exhibit 11. The administrative law judge found that Dr. Baker's opinion as to the existence of clinical pneumoconiosis was entitled to no weight as his finding was based on only an x-ray and coal dust exposure history. Order Granting Employer's Motion for Reconsideration at 8. The administrative law judge accorded only some weight to the opinion as to the existence of legal pneumoconiosis because the doctor failed to explain the lack of physical findings supporting his diagnoses.⁴ This was reasonable. See *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Clark*, 12 BLR 1-149; *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985).

Finally, claimant contends that because the administrative law judge found Dr. Baker's opinion, on the existence of clinical and legal pneumoconiosis, to be inadequate, "[c]laimant was not afforded the opportunity to have a pulmonary evaluation. . .

⁴ The administrative law judge credited the opinion of Dr. Westerfield that claimant did not have clinical pneumoconiosis, as it was based on the doctor's negative x-ray. Further, the administrative law judge found that the doctor's opinion that claimant did not have legal pneumoconiosis was based on his review of all the medical evidence, including claimant's heavy cigarette smoking history, clinical history, negative x-ray, and the results of claimant's pulmonary function and blood gas studies. Order Granting Employer's Motion for Reconsideration at 8.

sufficient to substantiate [his] claim for benefits.” Claimant’s Brief at 5-6 (unpaginated). In response, the Director contends that claimant was provided with a sufficient medical evaluation. Director’s Brief at 2-3. The Director contends that 1) Dr. Baker provided claimant with a complete evaluation, based on examination, x-ray, pulmonary function study, blood gas study, and electrocardiogram and 2) that the administrative law judge accorded some weight to Dr. Baker’s opinion, but found it outweighed by the better reasoned opinion of Dr. Westerfield.

The Act requires that “[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by 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 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.” *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *see also Newman v. Director, OWCP*, 745 F. 2d 1162, 7 BLR 2-25 (8th Cir. 1984).

The record reflects that Dr. Baker conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director’s Exhibit 11. The administrative law judge did not find, nor does claimant allege, that Dr. Baker’s report was incomplete. With respect to the issue of the existence of pneumoconiosis, one of the elements which defeated entitlement in this case, the administrative law judge found that Dr. Baker’s opinion was merely outweighed by the contrary evidence of record. Order Granting Employer’s Motion for Reconsideration at 8. Accordingly, we agree with the Director that he fulfilled his statutory obligation to provide claimant with a complete and credible pulmonary evaluation, and reject claimant’s argument to the contrary. *See Cline v. Director, OWCP*, 972 F.2d 234, 14 BLR 2-102 (8th Cir. 1992); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990).

Because claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement, an award of benefits is precluded on this claim and we need not address claimant’s contention regarding total disability at 20 C.F.R. §718.204(b)(2). *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, the administrative law judge's Order Granting Employer's Motion for Reconsideration and denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge