BRB No. 07-0751 BLA

E.P.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GRAYS KNOB COAL COMPANY	)	DATE ISSUED: 05/23/2008
	)	
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 Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

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

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2006-BLA-05486) of Administrative Law Judge Robert D. Kaplan rendered 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 credited claimant with five and one-quarter years of coal mine employment, and adjudicated this claim, filed on December 17, 2001, pursuant to the provisions of 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to the provisions of 20 C.F.R. §718.202(a)(1) and (a)(4). Employer has not responded. The

Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[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.[2] 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.C. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, 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 one of these elements precludes entitlement under the Act. *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).

Initially, claimant argues that the administrative law judge's evaluation of the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1) relied "almost solely" on the qualifications of the interpreting physicians, that he placed "substantial weight" on the numerical superiority of the negative x-ray readings, and may have "selectively analyzed" the x-ray evidence. Claimant's Brief at 3. Our review indicates that, in evaluating the x-ray of September 16, 2002, the administrative law judge chose to give greater weight to the negative interpretation of Dr. Verhulst, who is Board-certified in radiology, because her relevant qualifications are superior to those of Dr. Simpao, who possesses no special radiological qualifications. Decision and Order at 7. He therefore discounted Dr. Simpao's 1/0 interpretation and concluded that the September 16, 2002 x-ray is negative for the existence of pneumoconiosis. Moreover, the remaining x-ray of April 4, 2003 was interpreted as negative without contradiction by Dr. Dahhan, a B reader.[3] Decision and Order at 6-7. Accordingly, the administrative law judge

[1] We affirm, as unchallenged on appeal, the administrative law judge's finding with regard to the length of claimant's coal mine employment, and his finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) or (a)(3). *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[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.

determined that the weight of the x-ray evidence as a whole is negative and does not establish the presence of pneumoconiosis under Section 718.202(a)(1). *Id*.

An administrative law judge must consider the quantity of the x-ray evidence in light of the qualifications of the interpreting physicians. *Staton v Norfolk & Western Railroad Co*., 65 F.3d 55, 58, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Readings by physicians who are B readers or Board-certified radiologists are validly accorded greater weight than interpreting physicians without such qualifications. *See Roberts v. Bethlehem Mines Corp*., 8 BLR 1-211, 1-213 (1985). Moreover, Section 718.202(a)(1) requires that when two or more x-ray reports are in conflict, consideration shall be given to the radiological qualifications of the interpreting physicians. 20 C.F.R. §718.202(a)(1). Accordingly, the administrative law judge's consideration of both the qualitative nature and the quantitative nature of the various interpretations was appropriate. Moreover, because he rationally considered all of the x-ray evidence of record, claimant's assertion that the evidence may have been selectively analyzed is without merit. Substantial evidence supports the administrative law judge's determination that the x-ray evidence failed to establish the existence of pneumoconiosis under Section 718.202(a)(1); it is thus affirmed.

Next, claimant maintains that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). He asserts that the opinion of Dr. Simpao was documented and reasoned and was improperly discounted in favor of the opinion of Dr. Dahhan.[4] Claimant's arguments are without merit. The administrative law judge determined that Dr. Simpao's evaluation of September 16, 2002, based on a fourteen year coal mine employment history, diagnosed pneumoconiosis arising out of coal mine employment. Decision and Order at 8; Director's Exhibit 9. In December 2004, however, Dr. Simpao stated, that based on a "closer review" of claimant's pulmonary evaluation of September 2002, claimant "does **not** have CWP;" moreover, he then characterized the September 16, 2002

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§717.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Va. 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); Decision and Order at 6-7.

[4] While asserting that the administrative law judge should have credited Dr. Simpao's medical opinion from September 2002, claimant makes no mention of Dr. Simpao's "revised opinion" from December 2004, which concluded that claimant does not have pneumoconiosis. Decision and Order at 9. Moreover, claimant does not address the administrative law judge's comparison of Dr. Simpao's various reports.

x-ray as "questionable at 1/0." Decision and Order at 10; Director's Exhibit 34 at 2.[5] Accordingly, the administrative law judge found Dr. Simpao had provided a "revised opinion" in light of a coal mine employment history of five years and "changed his mind about the presence of pneumoconiosis." Decision and Order at 9-10; Director's Exhibit 34 at 2.

Addressing Dr. Dahhan's pulmonary evaluation of April 2003, which relied on a coal mine employment history of twelve years and concluded that claimant does not have pneumoconiosis, the administrative law judge found that in addition to the negative x-ray, Dr. Dahhan "placed substantial reliance" on objective test results that were inconsistent with the permanent effects of coal dust exposure. Decision and Order at 9-10; Director's Exhibits 10, 13; Employer's Exhibit 1. Moreover, he noted Dr. Dahhan's conclusions and corresponding deposition testimony confirming obstructive airway disease caused by a thirty pack year smoking history, regardless of the shorter coal mine employment history. *Id*.; Director's Exhibit 13 at 5-6, 8-9; Employer's Exhibit 1 at 5-6.

We discern no error in the administrative law judge's evaluation of the medical opinions of record. The administrative law judge found Dr. Dahhan's credentials to be "superior to those of Dr. Simpao;" as Dr. Dahhan is Board-certified in Pulmonary Medicine and Internal Medicine and is a "B reader," while Dr. Simpao is not Board-certified in any specialty, substantial evidence supports this finding. Decision and Order at 5, 8 n.5, 9-10; Director's Exhibit 13 at 4. Consideration of the professional qualifications of medical experts is an appropriate basis on which to assess the probative value of medical opinions. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 308, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Burns v. Director, OWCP*, 7 BLR 1-597, 1-599 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). Additionally, having reviewed the objective testing and analysis supporting Dr. Dahhan's determination that the medical evidence does not show the presence of pneumoconiosis, the administrative law judge stated "I fully credit Dr. Dahhan's opinion as it is reasoned and documented." Decision and Order at 10. Assigning conclusive weight to the opinion of Dr. Dahhan as the better qualified medical expert of record, whose opinion was specifically found to be both documented and reasoned, is rational and within the administrative law judge's discretion. It is therefore affirmed. Decision and Order at 8-9; s*ee Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 215-216, 20 BLR 2-360, 2-368

[5] The administrative law judge chose to give no weight to a "much shorter" report from Dr. Simpao, because it failed to state a clear opinion. Decision and Order at 9 n.6; Director's Exhibit 34 at 66. An administrative law judge may choose to assign no probative value to a medical opinion that is equivocal or inconclusive; as substantial evidence supports his assessment, it is affirmed. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

(6th Cir.1996); *see also Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp*., 8 BLR 1-46, 1-47 (1985).

Additionally, we reject claimant's contention that the Dr. Simpao's medical opinion was documented and should therefore have been accepted as sufficient to establish the existence of pneumoconiosis. Claimant's assertion is without merit, as the administrative law judge did not find Dr. Simpao's opinion undocumented; he fully reviewed the documentation for Dr. Simpao's pulmonary evaluation of September 16, 2002. Decision and Order at 8. Moreover, claimant advances no specific arguments with respect to the administrative law judge's analysis or comparison of Dr. Simpao's reports. Decision and Order at 9-10. Rather, claimant asserts that the administrative law judge interpreted medical tests and thereby improperly substituted his own conclusions for that of a physician. Claimant identifies no such instances however, nor does our review so indicate. Finally, in view of the administrative law judge's evaluation of the medical evidence of record, claimant's contention that Dr. Simpao's opinion was improperly discredited based on subsequent negative x-rays is without foundation. Claimant's assertions essentially amount to a request to reweigh the evidence, which is beyond the Board's scope of review. *See Anderson*, 12 BLR at 1-112. We therefore affirm the administrative law judge's determination that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Finally, claimant contends that the administrative law judge erred "in resolving that the claimant was not totally disabled." Claimant's Brief at 6. However, the administrative law judge stated that, in view of his finding that claimant has not established the presence of pneumoconiosis, the issue of total disability is moot. Decision and Order at 10. The probative evidence of record was rationally found insufficient to establish the existence of pneumoconiosis; claimant has therefore failed to prove one of the requisite elements of entitlement under the Act. *Anderson*, 12 BLR at 1-112. Accordingly, we affirm the administrative law judge's finding that the issue of total disability is rendered moot by his determination that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

The administrative law judge's findings are both supported by substantial evidence and in accord with law; we therefore affirm his conclusion that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).

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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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge