

BRB No. 08-0667 BLA

L.P. )  
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 Claimant-Petitioner )  
 )  
 v. )  
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 A E P KENTUCKY COAL ) DATE ISSUED: 05/21/2009  
 c/o GENERAL RECOVERY, )  
 INCORPORATED )  
 )  
 and )  
 )  
 AMERICAN ELECTRIC POWER )  
 CORPORATION )  
 )  
 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 Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Paul E. Jones and Todd P. Kennedy (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denial of Benefits (2006-BLA-5006) of Administrative Law Judge Thomas F. Phalen, Jr. 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). Adjudicating the claim pursuant to 20 C.F.R. Part 718, based on claimant's September 14, 2004 filing date, the administrative law judge accepted employer's stipulation of twenty-eight years of coal mine employment. Addressing the elements of entitlement, the administrative law judge found that the weight of the medical evidence of record, like and unlike, was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, however, found that the medical evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).<sup>1</sup> Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the medical opinion evidence was insufficient to establish the existence of clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not submit a substantive response brief unless requested to do so by the Board.<sup>2</sup>

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.<sup>3</sup> 33 U.S.C. §921(b)(3), as incorporated 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

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<sup>1</sup> Because claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), the administrative law judge also found that he could not establish that pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203. Decision and Order at 14.

<sup>2</sup> Claimant does not challenge the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). Therefore, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>3</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

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; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent*, 11 BLR at 1-27.

Claimant first contends that the administrative law judge erred in crediting the opinions of Drs. Broudy and Dahhan over the opinions of Drs. Baker and Rasmussen to find that clinical pneumoconiosis was not established at Section 718.202(a)(4). In assessing the weight to accord the conflicting medical opinion evidence, as to the existence of clinical pneumoconiosis, the administrative law judge properly accorded less weight to the opinions of Drs. Baker and Rasmussen on that issue, because they based their opinions, finding clinical pneumoconiosis, on their positive x-ray readings, contrary to the administrative law judge's finding that the weight of the x-ray evidence was negative for clinical pneumoconiosis. Decision and Order at 13, 14; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); see *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985). Accordingly, the administrative law judge properly found the opinions of Drs. Broudy and Dahhan, who found that claimant did not have clinical pneumoconiosis, more persuasive, as they were supported by the weight of the negative x-ray evidence. Decision and Order at 14; see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Consequently, the administrative law judge properly found that the medical opinion evidence did not establish the existence of clinical pneumoconiosis at Section 718.202(a)(4).

Turning to the issue of legal pneumoconiosis,<sup>4</sup> the administrative law judge properly found the opinions of Drs. Broudy and Dahhan, that claimant's lung disease was not due to coal dust exposure, but was, instead, due to claimant's smoking history, more credible than the contrary opinions of Drs. Baker and Rasmussen, because their opinions were more consistent with the more probative, objective clinical test results. The administrative law judge explained that, in addition to the negative x-ray evidence, the record contained "recent pulmonary function studies and arterial blood gases, which reveal significant improvement, inconsistent with the progressive and irreversible nature of pneumoconiosis."<sup>5</sup> Decision and Order at 14; see *Crockett Collieries, Inc., v.*

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<sup>4</sup> Legal pneumoconiosis is defined to include any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

<sup>5</sup> In addition to the x-ray evidence, the record contains the results of four pulmonary function studies, which contained both qualifying and non-qualifying results. The November 2, 2004 study yielded qualifying pre-bronchodilator values, but no post-bronchodilator test was administered. Director's Exhibit 9. The September 12, 2006

*Director, OWCP [Barrett]*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); Decision and Order at 14; Director's Exhibit 24; Employer's Exhibits 2, 3. Accordingly, the administrative law judge properly found that claimant failed to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), as he properly relied on the opinions of Drs. Broudy and Dahhan, which were better supported by the objective evidence of record.

As trier-of-fact, the administrative law judge is granted broad discretion to assess the evidence of record and draw his own conclusions and inferences therefrom. See *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). The Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge, when rational and supported by substantial evidence. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Consequently, because the administrative law judge provided a rational basis for according greater weight to the opinions of Drs. Broudy and Dahhan, we affirm his finding that the medical opinion evidence is insufficient to establish the existence of either clinical or legal pneumoconiosis at Section 718.202(a)(4). See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 272-76, 18 BLR 2A-1, 2A-6-9 (1994); See *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Barrett*, 478 F.3d at 355, 23 BLR at 2-482; *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark*, 12 BLR at 1-155. Because the medical evidence of record fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), an essential element of entitlement, an award of benefits is precluded. *Hill*, 123 F.3d at 415-16, 21 BLR at 2-196-197; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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study yielded qualifying values for both the pre- and post-bronchodilator tests. Employer's Exhibit 2. The April 22, 2005 study, and the October 17, 2006 study, the most recent pulmonary function study, yielded qualifying pre-bronchodilator results, but the post-bronchodilator tests yielded non-qualifying values. Director's Exhibit 24; Claimant's Exhibit 4.

Accordingly, the administrative law judge's Decision and Order Denial of 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