BRB No. 05-0272 BLA

ROY COLLETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	
	)	
and	)	
	)	
JAMES RIVER COAL COMPANY	)	DATE ISSUED: 11/18/2005
	)	
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 Jeffrey Tureck, 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.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits (03-BLA-5288) of Administrative Law Judge Jeffrey Tureck in a miner's 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). Initially, the administrative law judge found the miner's claim to be timely filed. Decision and Order at 2 n.3. Applying the regulations pursuant to 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). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to Section 718.202(a)(1). Claimant's Brief at 2-4. Claimant asserts that the administrative law judge erred in permitting employer to submit x-ray evidence in excess of the limitations outlined at 20 C.F.R. §725.414. *Id.* at 3. Claimant further asserts that because the administrative law judge found Dr. Hussain's opinion was not credible, the Director, Office of Workers' Compensation Programs (the Director), failed to provide claimant with a complete and credible pulmonary evaluation, as required under the Act. *Id.* at 4. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director responds, arguing that a remand for a complete and credible pulmonary evaluation is not needed in this case. The Director also asserts that it is unnecessary to remand this case, notwithstanding that the administrative law judge considered x-ray evidence, submitted by employer, which is in excess of the number permitted by Section 725.414.[2]

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,

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[1]Claimant is Roy Collett, the miner, who filed his claim for benefits on February 5, 2001. Director's Exhibit 2.

[2]We affirm the administrative law judge's finding that claimant's claim is timely filed and that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (a)(4), as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge did not render a finding regarding claimant's length of coal mine employment. Neither the Director, Office of Workers' Compensation Programs (the Director), nor employer, contests that claimant worked at least twenty years in coal mine employment. Director's Exhibit 30

and in accordance with applicable law. 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. 359 (1965).

To establish entitlement to benefits under Part 718 in a living miner's claim, a 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. 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*).

Claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge considered seven interpretations of five x-rays contained in the record, of which only one was read as positive for the existence of pneumoconiosis.[3] Decision and Order at 3. The administrative law judge initially noted that two of the negative interpretations by Dr. Broudy were "of very old chest x-rays" taken on May 16, 1986 and April 14, 1992. *Id.* Regarding the four other negative x-ray interpretations, the administrative law judge noted that they were by Dr. Wiot, who is a B reader[4] and a Board-certified radiologist, Dr. Broudy, who is a B reader, and Dr. Hartman, whose qualifications are not in the record. *Id.* The administrative law judge stated that although Dr. Hussain, who rendered the positive reading, is a Board-certified pulmonary specialist, he is not a B reader. Accordingly, the administrative law judge found the x-ray evidence negative for the existence of pneumoconiosis. *Id.*

Claimant contends that the administrative law judge erred in considering the qualifications of the physicians in weighing the x-ray evidence, in placing substantial weight on the numerical superiority of the x-ray readings, and in selectively analyzing the x-ray evidence. Claimant's Brief at 3. Contrary to claimant's assertion, the administrative law judge permissibly considered the radiological qualifications of the x-ray readers. *See Johnson v. Island Creek Coal Co.*, 846 F.2d 364, 11 BLR 2-161 (6th

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[3]In addition, Dr. Sargent interpreted claimant's August 15, 2001 x-ray for film quality only. Director's Exhibit 7.

[4]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 of Occupational Safety and Health. *See* 20 C.F.R. §718.202(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).

Cir. 1988); *Creech v. Benefits Review Board*, 841 F.2d 706, 11 BLR 2-86 (6th Cir. 1988); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Similarly, because the administrative law judge considered the x-ray readers' qualifications, he did not rely solely on the numerical superiority of the negative readings in rendering his finding. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995). Additionally, claimant's bald assertion that the administrative law judge selectively analyzed the x-ray evidence is without merit, because the administrative law judge considered both the positive and negative x-ray interpretations contained in the record. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984); *see generally Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Moreover, claimant contends that the administrative law judge erred in considering an excessive number of x-ray interpretations submitted by employer. The Director contends that any error the administrative law judge may have made in considering the excessive x-ray readings is harmless because these readings are negative and outweighed by the more recent x-ray evidence.[5] Director's Brief at 4. The administrative law judge permissibly accorded less weight to the only positive x-ray reading in the record because it was outweighed by the negative x-ray readings by physicians with superior qualifications. Therefore, we deem harmless any error the administrative law judge may have made in permitting employer to submit the negative interpretations by Dr. Broudy of the May 16, 1986 and April 14, 1992 x-rays, in excess of the evidentiary limitations set forth at Section 725.414.[6] *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Based on the foregoing, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[7]

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[5]Employer asserts that claimant's "argument fails to distinguish between the evidence from the prior claim and the current evidence" submitted by employer. Employer's Response Brief at 9. The record contains no evidence of a prior claim.

[6]If the administrative law judge had not considered Dr. Broudy's negative interpretations of the 1986 and 1992 x-rays, the administrative law judge still would have found the x-ray evidence insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), based on his rationale for discrediting the only positive x-ray reading in the record.

[7]Because there is no evidence of complicated pneumoconiosis and the instant case involves a living miner's claim filed after January 1, 1982, claimant is not entitled to any

Lastly, claimant argues that because the administrative law judge determined that Dr. Hussain's diagnosis of clinical pneumoconiosis was insufficient because it was based on an erroneous x-ray interpretation and an invalid ventilatory study, he erred in not remanding this case for a complete pulmonary evaluation. Dr. Hussain diagnosed clinical pneumoconiosis based on his reading of the August 15, 2001 x-ray. Director's Exhibit 7. In response to claimant's assertion, the Director contends that the administrative law judge erred in stating that Dr. Hussain's finding of clinical pneumoconiosis based on his August 15, 2001 x-ray reading is not credible. Rather, the Director argues that the administrative law judge should have found Dr. Hussain's clinical pneumoconiosis diagnosis to be unpersuasive in light of Dr. Wiot's negative reading of the same x-ray. The Director adds that because Dr. Hussain did not base his diagnosis of pneumoconiosis on the invalid pulmonary function study, this invalid study did not affect the credibility of his finding of clinical pneumoconiosis. Accordingly, the Director concludes that he "has met his obligation to provide a credible, but not necessarily a dispositive, medical opinion addressing the presence of pneumoconiosis, and the Board should reject claimant's argument to the contrary."[8] Director's Brief at 3.

Pursuant to Section 413(b) of the Act, "Each miner who files a claim for benefits under this subchapter shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). The regulation at 20 C.F.R. §725.406(a) provides that "[a] complete pulmonary evaluation includes a report of physical examination, a pulmonary function study, a chest roentgenogram and, unless medically contraindicated, a blood gas study." 20 C.F.R. §725.406(a).

We agree with the position taken by the Director, whose duty it is to ensure the proper enforcement and lawful administration of the Act, *Hodges,* 18 BLR at 1-87; *Pendley v. Director, OWCP,* 13 BLR 1-23 (1989)(*en banc order*), that a remand of the case is not warranted based on the facts of this case. As the Director correctly argues, Dr. Hussain's diagnosis of clinical pneumoconiosis, based on the August 15, 2001 x-ray, was not incredible, but unpersuasive because of the negative reading of the same x-ray by Dr.

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of the presumptions set forth at 20 C.F.R. §718.202(a)(3). *See* 20 C.F.R. §§718.304, 718.305(e), 718.306.

[8]Because we affirm the administrative law judge's denial of benefits based on his finding that the existence of pneumoconiosis has not been established, as the Director states, a supplemental disability opinion from Dr. Hussain could not alter the outcome of this case. Therefore, we deem any deficiency in Dr. Hussain's disability opinion to be harmless. *Larioni,* 6 BLR at 1-1278.

Wiot, whose radiological qualifications are superior to those of Dr. Hussain. Because the Director is only required to provide claimant with a complete pulmonary evaluation, not a dispositive one, Dr. Hussain's report fulfills the Director's statutory obligation. Therefore, we decline to remand this case for another pulmonary evaluation.

Because claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), a requisite element of entitlement under Part 718, we affirm the administrative law judge's denial of benefits. *See Trent,* 11 BLR at 1-27; *Perry,* 9 BLR at 1-2.

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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JUDITH S. BOGGS
Administrative Appeals Judge