BRB No. 05-0404 BLA

DARRELL ASHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLEDSOE COAL CORPORATION	)	
	)	
and	)	DATE ISSUED: 11/18/2005
	)	
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 of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Sarah M. Hurley (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 HALL, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order (03-BLA-5815) of Administrative Law Judge Joseph E. Kane (the administrative law judge) 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). The administrative law judge credited claimant with seventeen years of coal mine employment based on the parties' stipulation and adjudicated this claim pursuant to the regulations contained in 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). The administrative law judge also found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).[1] Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Specifically, claimant argues that the administrative law judge exceeded the evidentiary limitations set forth at 20 C.F.R. §725.414 in considering the conflicting x-ray evidence. Claimant also challenges the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Lastly, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate his claim. Employer responds, urging the Board to affirm the administrative law judge's denial of benefits.[2] The Director filed a limited response, arguing that he provided claimant with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act.[3]

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,

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[1]The administrative law judge further stated, "as [c]laimant has not established that he is totally disabled, he cannot establish that he is totally disabled due to pneumoconiosis." Decision and Order at 9.

[2]Employer argues that it should be dismissed from liability if the Board remands the case for a complete pulmonary evaluation because it would be deprived of the right to an impartial adjudication and due process. Employer's Brief at 13-14.

[3]Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii), we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Claimant contends that the administrative law judge erred in finding that the medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The record consists of the opinions of Drs. Hussain,[4] Broudy,[5] and Rosenberg.[6] In considering these medical opinions, the administrative law judge stated that "only Dr. Hussain opined that [c]laimant lacks the respiratory capacity to return to his former coal mine employment based on a diagnosis of a moderate impairment caused by pneumoconiosis." Decision and Order at 9. However, the administrative law judge found that Dr. Hussain's opinion is not probative evidence of total disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge specifically stated:

> …, Dr. Hussain failed to take a work history or to explore what exertional requirements [c]laimant experienced during his former coal mine employment. Additionally, this opinion is not well-documented because the doctor relied on an x-ray that I have determined to be negative for pneumoconiosis. Dr. Hussain's opinion is also not well-reasoned where he failed to consider the normal pulmonary function studies and normal arterial blood gas tests. Consequently, I find that this opinion is not probative evidence of total disability due to pneumoconiosis.

Id. Based on this determination, the administrative law judge concluded that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

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[4]Dr. Hussain opined that claimant has a moderate pulmonary impairment and does not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Director's Exhibit 11.

[5]Dr. Broudy opined that claimant retains the respiratory capacity to perform the work of an underground coal miner or to do similarly arduous manual labor. Director's Exhibit 43. Dr. Broudy also opined that claimant does not have a respiratory impairment. *Id*.

[6]Dr. Rosenberg opined that claimant does not have a respiratory or pulmonary impairment and could perform his previous coal mining job or other similarly arduous types of work. Employer's Exhibit 8.

During a deposition dated November 22, 2003, Dr. Rosenberg further opined that claimant retains the respiratory capacity to return to his previous job in and around the mining industry or a job requiring similarly arduous manual labor. Employer's Exhibit 10.

Claimant asserts that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine employment with the assessments of claimant's respiratory impairment by the physicians. As discussed *supra*, Drs. Broudy and Rosenberg opined that claimant does not have a respiratory impairment. Director's Exhibit 43; Employer's Exhibit 8. In contrast, Dr. Hussain opined that claimant has a moderate pulmonary impairment. Director's Exhibit 11. The administrative law judge, however, rationally found that Dr. Hussain's opinion is not well reasoned because it is not supported by the underlying objective tests.[7] *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985). Since the administrative law judge permissibly discounted Dr. Hussain's disability opinion at 20 C.F.R. §718.204(b)(2)(iv), the only medical opinion of record that could support a finding of total disability, we reject claimant's assertion that the administrative law judge erred in not considering the exertional requirements of claimant's usual coal mine work in conjunction with the opinions of the physicians.[8] *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[9]

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[7]The administrative law judge stated that "Dr. Hussain's opinion is…not well-reasoned where he failed to consider the normal pulmonary function studies and normal arterial blood gas tests." Decision and Order at 9.

[8]The administrative law judge also stated that "[Dr. Hussain's disability] opinion is not well-documented because [Dr. Hussain] relied on an x-ray that I have determined to be negative for pneumoconiosis." Decision and Order at 9. The Board has held that x-rays are not diagnostic of the extent of disability. *Short v. Westmoreland Coal Co.*, 10 BLR 1-127, 1-129 n.4 (1987); *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983). Since the administrative law judge provided a valid alternate basis for discounting Dr. Hussain's disability opinion, *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), namely, he discounted Dr. Hussain's disability opinion because it is not supported by the underlying objective tests, *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985), we hold that the administrative law judge's error in considering x-ray evidence with regard to the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv) is harmless, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[9]Contrary to claimant's contention, an administrative law judge is not required to consider claimant's age, education and work experience in determining whether claimant has established that he is totally disabled from his usual coal mine employment. *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-87 (1988). Additionally, we reject claimant's assertion that

Finally, claimant contends that the Director failed to provide him with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. Specifically, claimant argues that the administrative law judge concluded that Dr. Hussain's diagnosis of pneumoconiosis is based merely on an erroneous x-ray reading. *See* Claimant's Brief at 4. As claimant argues, a medical opinion that is merely a restatement of a positive x-ray is not a reasoned medical opinion at 20 C.F.R. §718.202(a)(4). *Cornett*, 227 F.3d at 575-6, 22 BLR at 2-120. However, claimant does not address the administrative law judge's consideration of Dr. Hussain's disability opinion in suggesting that the Director failed to provide him with a complete and credible pulmonary evaluation. As discussed *supra*, the administrative law judge gave less weight, but did not discredit outright, Dr. Hussain's opinion at 20 C.F.R. §718.204(b). Decision and Order at 9. Moreover, the Director, in the instant case, maintains that the statutory obligation to provide claimant with a complete pulmonary evaluation has been fulfilled. Regarding the issue of pneumoconiosis, the Director argues, *inter alia*, that, pursuant to 20 C.F.R. §718.202(a)(1), Dr. Hussain's diagnosis of pneumoconiosis on the sole basis of a positive x-ray reading satisfies the requirements of Section 413(b) of the Act. 30 U.S.C. §923(b). Turning to the issue of total disability, the Director argues that Dr. Hussain's disability assessment meets the requirements of Section 413(b) of the Act because Dr. Hussain evaluated the level of impairment and stated an opinion on claimant's ability to perform coal mine work. In addition, the Director argues that Dr. Hussain described the objective findings that supported his assessment.

As discussed *supra*, we herein dispose of this case on the issue of total disability. Thus, the defects, if any, in Dr. Hussain's opinion identified by claimant at 20 C.F.R. §718.202 are not critical to the disposition of the case. As set forth by Section 413(b) of the Act, 30 U.S.C. §923(b), the Department of Labor (the Department) has a statutory obligation to provide each miner who files a claim for benefits with an opportunity to substantiate his claim by means of a complete pulmonary evaluation. *See* 30 U.S.C. §923(b); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). Section 413(b) of the Act is implemented by 20 C.F.R. §725.406. Therein, the Department is charged with making arrangements for the miner to be given a complete pulmonary evaluation and assessing the adequacy of the evaluation provided. *See* 20 C.F.R. §725.406. As the promulgator of the Black Lung regulations and the administrator of the Act, it is the Director's duty to ensure the proper enforcement and

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the administrative law judge erred in not finding him totally disabled in light of the progressive and irreversible nature of pneumoconiosis. Claimant has the burden of submitting evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).

fair administration of the Black Lung program. *See generally* 20 C.F.R. §725.465(d); *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989)(*en banc* order); *Capers v. The Youghiogheny and Ohio Coal Co.*, 6 BLR 1-1234, 1-1237 n.4 (1984). Thus, we defer to the Director on the issue of whether the statutory obligation of the Department to provide claimant with a complete and credible pulmonary evaluation has been fulfilled. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *Newman*, 745 F.2d at 1166, 7 BLR at 2-31; *Hodges*, 18 BLR at 1-89-90; *Pettry*, 14 BLR at 1-100. Consequently, we decline to remand this case for a complete pulmonary evaluation.

In light of our decision to affirm the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718.[10] *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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

I concur.

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ROY P. SMITH
Administrative Appeals Judge

[10]In view of our disposition of the case at 20 C.F.R. §718.204(b), we decline to address claimant's contentions at 20 C.F.R. §718.202(a)(1). *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to decline to remand the case to the district director for a complete and credible pulmonary evaluation. Dr. Hussain performed the pulmonary evaluation on claimant for the Department of Labor. In his report, Dr. Hussain diagnosed pneumoconiosis and opined that claimant has a moderate pulmonary impairment. Director's Exhibit 11. Dr. Hussain also opined that claimant does not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. *Id*. Pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b), the Director has a statutory obligation to provide a complete and credible pulmonary evaluation of the miner. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). In the instant case, however, the administrative law judge found that Dr. Hussain's disability opinion is not entitled to probative weight on the grounds that it is not "well-documented" or "well reasoned." *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp*., 6 BLR 1-1291 (1984). Because the administrative law judge found that Dr. Hussain's disability opinion lacks credibility, the administrative law judge's findings that the evidence is insufficient to establish total disability at 20 C.F.R. §§718.204(b)(2)(iv) and 718.204(b)(2) overall cannot be affirmed. Consequently, I would remand the case to the district director to provide claimant with a complete and credible pulmonary evaluation. *Hodges*, 18 BLR at 1-88-9 n.3.

In addition, although the regulations limit the evidence admitted into the record to no more than two x-rays in support of each party's affirmative case, 20 C.F.R. §725.414, the administrative law judge considered the following three x-rays in support of employer's affirmative case: Dr. Broudy's negative reading of the October 30, 2001 x-ray, Dr. Wiot's negative reading of the October 30, 2001 x-ray, and Dr. Rosenberg's negative reading of the September 17, 2003 x-ray. Director's Exhibits 37, 43; Employer's Exhibit 8. The administrative law judge did not indicate that he found good cause for admitting x-rays in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414. *See* 20 C.F.R. §§725.414 and 725.456(b)(1). Thus, because there appear to be violations of the evidentiary limitations set forth at 20 C.F.R. §725.414, I would instruct the administrative law judge to determine if there is good cause for the admission of additional x-rays, if reached on remand.

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BETTY JEAN HALL
Administrative Appeals Judge