

BRB No. 05-0583 BLA

ARCHIE R. SIZEMORE)
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 Claimant-Petitioner)
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 v.)
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 LESLIE RESOURCES, INCORPORATED)
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 and)
)
 SECURITY INSURANCE COMPANY OF) DATE ISSUED: 11/22/2005
 HARTFORD)
)
 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 Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

Denise M. Davidson (Barret, Haynes, May, Carter & Davidson, P.S.C.), Hazard, Kentucky, for employer.

Jeffrey S. Goldberg (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 appeals the Decision and Order (03-BLA-6707) of Administrative Law Judge Rudolf L. Jansen 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 fourteen years of coal mine employment, pursuant to the parties' stipulation.¹ Decision and Order at 4; Hearing Transcript at 8. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 4, 9. The administrative law judge found that the evidence of record did not establish either the existence of pneumoconiosis or the presence of a totally disabling respiratory or pulmonary impairment, pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). Decision and Order at 10-14. 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 20 C.F.R. §718.202(a)(1) and in failing to find total disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant also asserts that he was not provided a complete pulmonary evaluation as required by the Act and regulations. 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 asserting that claimant was provided with a complete pulmonary evaluation.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, and in accordance with applicable law. 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 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

¹ The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibits 3, 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

² The administrative law judge's length of coal mine employment determination and his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 Section 718.202(a)(1), the administrative law judge considered the five³ readings of the two x-rays of record in light of the readers' radiological qualifications. Decision and Order at 10. One reading was positive for pneumoconiosis, a "1/1" reading of the July 30, 2001 x-ray by Dr. Simpao, who, the administrative law judge noted, lacks specialized qualifications for the interpretation of x-rays. Decision and Order at 6, 10; Director's Exhibit 11. Considering that the July 30, 2001 x-ray was also read negative for pneumoconiosis by Dr. Spitz, a B-reader and board-certified radiologist, the administrative law judge found that the July 30, 2001 x-ray was negative. Because all of the other readings were negative, the administrative law judge found that claimant did not establish the existence of pneumoconiosis by a preponderance of the x-ray evidence. Decision and Order at 10. The administrative law judge conducted a proper qualitative analysis of the conflicting x-ray readings. See *Staton v. Norfolk & Western Ry. 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). Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, merely counted the negative readings, and that the administrative law judge "may have 'selectively analyzed'" the readings, lack merit. Claimant's Brief at 3-4. We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), the administrative law judge found that the weight of the better documented and reasoned medical opinion evidence did not establish the existence of pneumoconiosis. Decision and Order 10-11. Claimant does not challenge this finding. It is therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Finally, claimant contends that because the administrative law judge did not credit a diagnosis of pneumoconiosis contained in Dr. Simpao's July 30, 2001 medical report provided by the Department of Labor, "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 4. The Director responds that he is "only required to provide miners with a complete and credible examination, not a dispositive one," and states that claimant was provided the medical evaluation required under the Act and regulations. Director's Brief at 2-3.

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

³ Dr. Sargent interpreted the July 30, 2001 x-ray for quality purposes only. Director's Exhibit 11.

evaluation.” 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director has met this duty may arise 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, 1-88 n.3 (1994); *see also Newman v. Director, OWCP*, 745 F. 2d 1162, 7 BLR 2-25 (8th Cir. 1984).

The record reflects that Dr. Simpao 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. Simpao’s report was incomplete on the issue of pneumoconiosis.⁴ The administrative law judge gave “less probative weight” to Dr. Simpao’s diagnosis of pneumoconiosis, because he did not find it as well reasoned and documented as the contrary opinion by Dr. Jarboe, but he did not find that it lacked credibility. Decision and Order at 10-11; *see Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999)(explaining that “ALJ’s may evaluate the relative merits of conflicting physicians’ opinions and choose to credit one ... over the other”). Because Dr. Simpao’s report was not found incomplete on the pneumoconiosis issue and the administrative law judge did not find that it lacked credibility, there is no merit to claimant’s argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation. *See Hodges*, 18 BLR at 1-88 and n.3.

Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a miner’s claim under Part 718, we affirm the administrative law judge’s denial of benefits. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Consequently, we need not address claimant’s allegations of error in the finding that he did not establish total disability pursuant to Section 718.204(b)(2).

⁴ Although the administrative law judge noted that Dr. Jarboe had opined that the pulmonary function study test conducted by Dr. Simpao was invalid, the administrative law judge made no finding to that effect. Moreover, he proceeded to consider the test results in evaluating whether claimant was totally disabled, evidencing that he did not consider the test results invalid. Decision and Order at 8, 10, 12-13.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge