BRB No. 06-0229 BLA
and 06-0229 BLA-A

HAROLD ALLEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 11/15/2006
	)	
Employer-Respondent Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order on Remand (03-BLA-5523) of Administrative Law Judge Stuart A. Levin 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). This case has previously been before the Board. In a Decision and Order dated January 20, 2004, the administrative law judge credited the miner with at least nineteen years of coal mine employment,[1] and found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied. On appeal, the Board rejected employer's contention that the evidentiary limitations regulation, set forth at 20 C.F.R. §725.414, is an invalid regulation, and likewise rejected employer's contention that claimant waived the evidentiary limitations by failing to object below. *Allen v. Shamrock Coal Co.*, BRB No. 04-0410 BLA (Dec. 28, 2004) (unpub.), slip op. at 3. The Board further held, however, that the administrative law judge had erred in accepting and relying upon employer's third medical report, from Dr. Rosenberg, without rendering the requisite finding of whether employer demonstrated good cause, pursuant to 20 C.F.R. §725.456(b)(1), for admitting medical reports in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414. *Allen*, BRB No. 04-0410 BLA (Dec. 28, 2004)(unpub.), slip op. at 3. Therefore, the Board vacated the administrative law judge's decision and order and remanded the case for the administrative law judge to apply Sections 725.414 and 725.456(b)(1). In light of this holding, the Board declined to address claimant's allegations of error regarding the administrative law judge's findings on the merits of entitlement, or employer's additional argument that Dr. Rosenberg's report constituted admissible rebuttal evidence pursuant to 20 C.F.R. §725.414(a)(3)(ii). *Allen*, BRB No. 04-0410 BLA (Dec. 28, 2004)(unpub.), slip op. at 3-4.

In a Decision and Order on Remand dated January 20, 2004, the administrative law judge excluded the opinion of Dr. Rosenberg, employer's third medical opinion, finding that employer had not established good cause for admission of a third medical report pursuant to Sections 725.414(a)(3)(i) and 725.456(b)(1), and that Dr. Rosenberg's opinion was not admissible as rebuttal evidence pursuant to Section 725.414(a)(3)(ii). Considering the merits of entitlement, the administrative law judge found that the medical evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and failed to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b), (c). Accordingly, benefits were denied.

[1] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibits 3, 17. 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, 1-202 (1989)(*en banc*).

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4), and erred in his evaluation of the medical opinion evidence relevant to the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance. Employer also cross-appeals, challenging the administrative law judge's exclusion of Dr. Rosenberg's report as evidence submitted by employer in excess of the limitations set forth at 20 C.F.R. §725.414. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in claimant's appeal, but responds to employer's cross-appeal, urging affirmance of the administrative law judge's evidentiary rulings.[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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, 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 a finding of entitlement. *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).

Claimant asserts that the administrative law judge erred in relying almost solely on the qualifications of the interpreting physicians and the numerical superiority of the x-ray interpretations in evaluating the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). Claimant's Brief at 3. We disagree. Incorporating his prior findings by reference, in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis, the administrative law judge properly noted that the relevant x-ray evidence of record consists of six readings of four x-rays.[3] Decision and Order at 4; Decision and Order on

[2] The administrative law judge's findings that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) or (3), and further failed to establish the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(i)-(iii), are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] The record contains an additional reading for quality only (Quality 1), by Dr. Sargent, of the July 11, 2001 x-ray. Director's Exhibit 14.

Remand at 3. A February 24, 2001 x-ray was read once as positive by Dr. Baker, a physician with no specialized qualifications for the reading of x-rays, and once as negative by Dr. Wheeler, a dually qualified B-reader and Board-certified radiologist. Director's Exhibits 10, 12. The administrative law judge permissibly found this x-ray to be negative based on Dr. Wheeler's superior qualifications. *Staton v. Norfolk & Western Railway Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc on recon*.); Decision and Order at 4; Decision and Order on Remand at 3. In addition, a June 5, 2001 x-ray was read once as negative by Dr. Dahhan, a B-reader, and, thus, was found to be negative by the administrative law judge. Director's Exhibit 11; Decision and Order at 4; Decision and Order on Remand at 3. A July 11, 2001 x-ray was read once as positive by Dr. Hussain, a physician with no specialized qualifications for the reading of x-rays, and once as negative by Dr. Hayes, a dually qualified B-reader and Board-certified radiologist. Director's Exhibit 13; Employer's Exhibit 1. The administrative law judge permissibly found this x-ray to be negative based on Dr. Hayes' superior qualifications. *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Cranor*, 22 BLR at 1-7; Decision and Order at 4; Decision and Order on Remand at 3. Finally, a May 28, 2003 x-ray was read once as negative by Dr. Broudy, a B-reader, and, thus, was found to be negative by the administrative law judge. Employer's Exhibit 4; Decision and Order at 4; Decision and Order on Remand at 3. Contrary to claimant's arguments, the administrative law judge properly considered both the quantity and the quality of the x-ray readings of record, and permissibly found that the preponderance of negative readings by B-readers and dually qualified readers outweighs the positive x-ray readings by lesser qualified physicians. *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Cranor*, 22 BLR at 1-7; *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); Decision and Order at 4; Decision and Order on Remand at 3. Consequently, we affirm the administrative law judge's weighing of the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1) as it is supported by substantial evidence. In addition, we reject claimant's comment that the administrative law judge "may have selectively analyzed" the x-ray evidence. Claimant's Brief at 3. Claimant has not provided any support for that assertion, nor does a review of the evidence and the administrative law judge's Decision and Order reveal selective analysis of the x-ray evidence. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-5 (2004).

Claimant also challenges the administrative law judge's finding that pneumoconiosis was not established by medical opinion evidence at Section 718.202(a)(4), asserting that the administrative law judge erred in rejecting the opinions of Drs. Baker and Hussain. Claimant's Brief at 4-5. Claimant's argument is without merit.

In considering the medical opinion evidence,[4] the administrative law judge properly noted that in his February 24, 2001 report, Dr. Baker diagnosed coal workers' pneumoconiosis based on claimant's abnormal chest x-ray and history of dust exposure, and chronic bronchitis by history, and stated that claimant's lung disease was due to coal dust exposure. Director's Exhibit 10. In addition, Dr. Baker stated that claimant had a Class II respiratory impairment, also caused in part by his coal dust exposure. Director's Exhibit 10; Decision and Order on Remand at 3. Considering the opinion of Dr. Hussain, the administrative law judge properly noted that the physician diagnosed both pneumoconiosis and a moderate respiratory impairment due to coal dust exposure. Director's Exhibit 13; Decision and Order on Remand at 3. Contrary to claimant's arguments, the administrative law judge did not reject the opinions of Drs. Baker and Hussain, but permissibly found their conclusions outweighed by the contrary opinions of Drs. Dahhan and Broudy, that claimant does not have pneumoconiosis, which the administrative law judge found to be more persuasive. The administrative law judge specifically found that while Dr. Baker and Dr. Hussain based their diagnoses largely on claimant's history of dust exposure and their own chest-x-ray readings, which were subsequently re-read as negative by more highly qualified readers, by contrast, the opinions of Drs. Dahhan and Broudy were better reasoned and better supported by the objective evidence of record. Decision and Order on remand at 3. *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Martin v. Ligon Preparation Co.*, F.3d , 2005 WL 492241 (6th Cir. 2005); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Director's Exhibits 10, 11, 13; Employer's Exhibit 4; Decision and Order on Remand at 3.

It is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Because the administrative law judge examined each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103, and explained whether the diagnoses contained therein constituted reasoned medical judgments under Section 718.202(a)(4), we affirm the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-

[4] The relevant medical opinion evidence of record consists of the opinions of Drs. Baker and Hussain, who diagnosed the existence of pneumoconiosis, and Drs. Dahhan and Broudy, who found no evidence of pneumoconiosis or any coal dust related lung disease. Director's Exhibits 10, 11, 13; Employer's Exhibit 4.

120 (6th Cir. 2000). Consequently, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a).

Because we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a), we need not address claimant's challenge to the administrative law judge's findings in determining that the evidence fails to establish the existence of a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(iv). A finding of entitlement to benefits is precluded in this case. *See Trent*, 11 BLR at 1-27. Finally, because we affirm the denial of benefits, we need not address employer's cross-appeal.

Accordingly, the administrative law judge's Decision and Order on Remand 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