

BRB No. 06-0556 BLA

AMEL SMITH)
)
 Claimant-Petitioner)
)
 v.)
)
 H C COAL COMPANY) DATE ISSUED: 11/29/2006
)
 and)
)
 KENTUCKY COAL PRODUCERS)
 SELF-INSURANCE FUND)
)
 Employer/Carrier-)
 Respondent)
)
 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 Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

Rodney E. Buttermore, Jr. (Buttermore & Boggs), Harlan, Kentucky, 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 the Decision and Order-Denying Benefits (2004-BLA-5269) of Administrative Law Judge Rudolf L. Jansen on this subsequent 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 found that the record supported a coal mine employment history of ten years, and that the instant claim constituted a subsequent claim pursuant to 20 C.F.R. §725.309.¹ The administrative law judge found that the newly submitted evidence of record established a change in an applicable condition of entitlement pursuant to Section 725.309 as such evidence established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), an element of entitlement previously adjudicated against claimant. Decision and Order at 14-17. Turning to the merits of entitlement, the administrative law judge found that while the evidence of record established the presence of a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(i)-(iv), Decision and Order at 21-22, the evidence failed to establish the existence of coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Decision and Order at 17-2. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in not finding the existence of pneumoconiosis established based on x-ray evidence. In addition, claimant contends that because the administrative law judge found Dr. Baker's opinion to be unreasoned, the Director, Office of Workers' Compensation Programs, (the Director) failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation pursuant to 30 U.S.C. §923(b). Employer responds, urging that the denial of benefits be affirmed. The Director responds, asserting that the Board should reject claimant's argument that the Director failed to provide him with a complete pulmonary evaluation. The Director contends that he is only required to provide claimant with a complete and credible examination, not a dispositive one and that the fact that the administrative law judge declined to rely on Dr. Baker's opinion diagnosing the existence of pneumoconiosis, which included the administration of appropriate testing, the

¹ Claimant initially filed a claim for benefits on September 9, 1985 which was denied on October 31, 1988 by Administrative Law Judge Richard E. Huddleston on the basis that claimant failed to establish a totally disabling respiratory impairment or disability causation pursuant to Section 718.204. Director's Exhibit 1. This denial was affirmed by the Board. *Id*; *Smith v. H&C Coal Co.*, BRB No. 88-3767 (Jul. 20, 1990). Claimant filed a second application on March 14, 1991, a claim which was dismissed at the request of claimant on March 27, 1991. Director's Exhibit 2. No further action was taken until the filing of the instant claim on June 19, 2002. Director's Exhibit 3. After denial by the district director, Director's Exhibit 28, claimant sought a hearing. After the hearing, on March 17, 2006, the administrative law judge issued the Decision and Order denying benefits from which claimant now appeals.

recording of relevant histories and the addressing of each element of entitlement, and instead credited the contrary opinions of Drs. Dahhan and Broudy as more credible and persuasive does not mean that the administrative law judge accorded no weight to Dr. Baker's opinion or that he found the opinion to be incredible. The Director contends, therefore, that Dr. Baker's opinion satisfied the Department's obligation to provide claimant with a complete, credible 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'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 element of entitlement precludes an award of benefits. *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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.³ Contrary to claimant's assertion, the administrative law judge properly relied upon the qualifications of the physicians in weighing the x-ray evidence and, in determining the weight to be assigned the interpretations, permissibly considered the numerical superiority of the negative x-ray evidence.⁴ The administrative

² The Director, Office of Workers' Compensation Programs, (the Director) further contends as support for his contention that Dr. Baker provided claimant with a complete, credible pulmonary evaluation the fact that the administrative law judge credited the doctor's opinion on total disability. Director's Brief at 2.

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

⁴ Section 718.202(a)(1) provides, in pertinent part, that where two or more x-ray reports are in conflict, in evaluating such x-rays reports consideration shall be given to the radiological qualifications of the physicians interpreting such x-rays. 20 C.F.R. §718.202(a)(1).

law judge thus properly found that the claimant failed to establish the existence of pneumoconiosis because the preponderance of x-ray readings by physicians with superior qualifications was negative. Decision and Order at 17-18; 20 C.F.R. §§718.102(c), 718.202(a)(1); *Staton v. Norfolk & Western Railway 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); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Likewise, claimant's contention that the administrative law judge "may have selectively analyzed" the x-ray evidence is rejected as claimant points to no evidence or finding by the administrative law judge which supports this contention. *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). Accordingly, the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) is affirmed.

Claimant next argues that because the administrative law judge found that the opinion of Dr. Baker, a physician "under contract with the Department of Labor," was entitled to little weight because it was poorly documented, the Director failed to perform his statutory obligation of providing claimant a complete, credible pulmonary examination. Claimant's Brief at 4. We reject claimant's contention and hold that the Director did not fail to provide claimant with a complete pulmonary evaluation. As the Director contends, he is only required to provide claimant with a complete pulmonary evaluation under 30 U.S.C. §923(b), not a dispositive one. Thus, as the Director contends, because Dr. Baker provided claimant with a complete pulmonary evaluation addressing the elements of entitlement (an opinion which was credited on the issue of total disability), the Director did not fail to satisfy his obligation because the administrative law judge accorded less weight to the opinion as less well reasoned and documented than the opinions of Drs. Dahhan and Broudy. *See* 30 U.S.C. §923(b); 20 C.F.R. §§725.405, 406; *Barnes v. ICO Corp.*, 31 F.3d 673, 18 BLR 2-319 (8th Cir. 1994); *Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25, 2-31 (8th Cir. 1984); *see also Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). As claimant has not alleged any other errors made by the administrative law judge in his consideration of the medical opinion evidence at Section 718.202(a)(4), *see Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), the administrative law judge's finding, that the medical opinion evidence fails to establish the existence of pneumoconiosis, is affirmed.

Because we affirm the administrative law judge's finding that the evidence fails to establish the existence of pneumoconiosis, a requisite element of entitlement, we must

affirm the denial of benefits and we need not reach claimant's argument concerning total disability.⁵ See *Anderson*, 12 BLR 1-111; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

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

BETTY JEAN HALL
Administrative Appeals Judge

⁵ Claimant asserts that the administrative law judge erred in failing to find the presence of a totally disabling respiratory impairment established. Contrary to claimant's assertion, the administrative law judge concluded that, in fact, the record established the existence of a totally disabling respiratory impairment. Decision and Order at 22. In view of our holding that claimant failed to establish the existence of pneumoconiosis, we will not address this issue. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).