BRB No. 07-0237 BLA

R.W.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MASTER BLEND COALS & ENERGY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 11/30/2007
Employer-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 William S. Colwell, Administrative Law Judge, United States Department of Labor.

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

David H. Neeley (Neeley Law Office, P.S.C.), Prestonsburg, Kentucky, for employer.

Sarah M. Hurley (Jonathan L. Snare, Acting 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2004-BLA-06081) of Administrative Law Judge William S. Colwell with respect to 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 considered the claim, filed on August 16, 2002, pursuant to the regulations set forth in 20 C.F.R. Part 718. Director's Exhibit 1. The administrative law judge determined that, although the evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), claimant did not prove that he has pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1). Claimant also argues that remand is required because the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim.[1] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has also responded and maintains that a remand for a complete pulmonary evaluation is not warranted in this case.[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 supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and*

[1] Claimant further alleges that "the administrative law judge erred in resolving that the claimant was not totally disabled." Claimant's Brief at 2. However, the administrative law judge determined that the evidence of record was sufficient to establish that claimant is totally disabled under 20 C.F.R. §718.204(b)(2).

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established total disability under 20 C.F.R. §718.204(b)(2). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Sons, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).[3]

Pursuant to Section 718.202(a)(1), the administrative law judge considered five interpretations of four x-rays. The administrative law judge found that the films dated August 5, 1996 and June 10, 2003 were negative for pneumoconiosis, as each film was read as negative by a B reader and there were no other interpretations of these x-rays. Decision and Order at 10; Director's Exhibit 11; Employer's Exhibit 1. The administrative law judge determined that the film dated June 13, 2002 was positive for pneumoconiosis, as the positive readings by Dr. Simpao, who has no special radiological qualifications, and Dr. Alexander, who is dually qualified as a Board-certified radiologist and B reader, "slightly outweighed" the negative reading by Dr. Halbert, who is a dually qualified physician. *Id.*; Director's Exhibits 9, 10; Claimant's Exhibits 1, 2. The administrative law judge concluded that because the preponderance of x-rays was negative, claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Decision and Order at 11.

Claimant argues that the administrative law judge's finding must be vacated, as the administrative law judge erred in relying upon the physicians' qualifications and the numerical superiority of the negative x-ray interpretations. Claimant also contends that the administrative law judge selectively analyzed the x-ray evidence. Claimant's allegations of error are without merit. The administrative law judge performed both a qualitative and quantitative analysis of the evidence and acted within his discretion as fact-finder in determining that the x-rays of record were insufficient to establish the existence of pneumoconiosis, as two of the three films of record were interpreted as negative for the disease. *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); *Worhach v. Director*, OWCP, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990). We affirm, therefore, the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis under Section 718.202(a)(1). We also affirm, as unchallenged on appeal, the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2)-(4). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant further 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

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit as claimant's last year of coal mine employment was in Kentucky. Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

judge] concluded that Dr. Simpao's report was based merely upon an erroneous x-ray interpretation, and that his opinion was outweighed by the better qualified physicians of record." Claimant's Brief at 4. 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 evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406; *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (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. Director's Exhibit 9; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). The administrative law judge did not find, nor does claimant allege, that Dr. Simpao's report was incomplete with respect to the issue of the existence of pneumoconiosis. Furthermore, the administrative law judge did not ultimately rely upon a determination that Dr. Simpao's opinion was unreasoned or undocumented with respect to this issue. Rather, the administrative law judge rationally concluded that Dr. Simpao's diagnosis of pneumoconiosis was outweighed by the contrary opinion of Dr. Broudy, because Dr. Broudy's opinion was well-explained and better supported by the objective evidence of record. Decision and Order at 12; Director's Exhibit 11; *see Gray v. SLC Coal Co*., 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999). We hold, therefore, that 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.[4] *Cf. Hodges*, 18 BLR at 1-93.

In light of our affirmance of 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), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Trent*, 11 BLR at 1-27; *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*).

[4] Contrary to claimant's assertion, the administrative law judge did not find that Dr. Simpao's diagnosis of pneumoconiosis was based upon an erroneous x-ray interpretation. In fact, the administrative law judge treated the x-ray read by Dr. Simpao as positive for pneumoconiosis, but found it outweighed by the remaining two x-rays of record, which were interpreted as negative by B readers. Decision and Order at 11.

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