BRB No. 04-0383 BLA

ROBERT D. GRAY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 10/27/2004
	)	
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 on Remand – Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor

Robert D. Gray, Sr., Eddyville, Kentucky, *pro se.*

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appears without the assistance of counsel and appeals the Decision and Order on Remand – Denying Benefits (98-BLA 1262) of Administrative Law Judge Rudolf L. Jansen on a duplicate 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 is the second time that this case has been before the Board.[1] By Order on claimant's motion for reconsideration, the Board reiterated its affirmance of the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4). Accordingly, the Board affirmed the administrative law judge's Decision and Order – Denying Benefits. *Gray v. Peabody Coal Co.*, BRB No. 00-0109 BLA (Dec. 20, 2000) (unpublished Order). Claimant subsequently filed an appeal with the United States Court of Appeals for the Sixth Circuit.[2]

In an unpublished decision, the Sixth Circuit granted claimant's petition for review and remanded the case for the administrative law judge to reweigh the medical opinion evidence. *Gray v. Peabody Coal Co.*, No. 01-3083 (6th Cir. April 19, 2002) (unpublished). On remand, the administrative law judge found the medical opinion evidence insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4). Decision and Order on Remand – Denying Benefits at 6. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, employer argues that the administrative law judge's denial of benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, filed a letter indicating that he does not intend to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

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[1] The prior procedural history is set forth in the Board's Decision and Order of November 6, 2000. *Gray v. Peabody Coal Co.*, BRB No. 00-0109 BLA (Nov. 6, 2000) (unpublished).

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's last year of qualifying coal mine employment occurred in the Commonwealth of Kentucky. *Shupe v. Director, OWCP*, 12 BLFR 1-200 (1989)(*en banc*); Director's Exhibit 2.

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must prove 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 of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

In its unpublished decision, the Sixth Circuit instructed the administrative law judge to reweigh the evidence relevant to Section 718.202(a)(4) "after giving the opinion of Dr. Simpao additional weight based on his status as [claimant's] treating physician." *Gray v. Peabody Coal Co.*, No. 01-3083 (6th Cir. April 19, 2002) (unpublished), slip op. at 6. The Sixth Circuit held that because the administrative law judge determined that the opinion of Dr. Simpao "is well reasoned and well documented, the administrative law judge must give more weight to that opinion" than to the contrary opinions of the consulting physicians Drs. Branscomb and Fino, "even where those physicians have superior qualifications." *Id.* The Sixth Circuit further ordered the administrative law judge to "reconsider the weight initially given to the opinions of Drs. Branscomb and Fino" that claimant did not have pneumoconiosis, because neither reviewed all of the relevant x-rays reports, specifically, three positive x-ray reports by Dr. Brandon, a B reader and Board-certified radiologist. *Id.* The Sixth Circuit further noted that the administrative law judge "may determine that despite" the superior qualifications of Drs. Branscomb and Fino, "their opinions should be discounted where those opinions are based on an incomplete record that omits apparently credible x-ray reports favoring the claimant." *Id.*

Subsequently, the Sixth Circuit published a decision, *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003), in which it held that the opinions of treating physicians "get the deference they deserve based upon their power to persuade." 338 F.3d at 513, 22 BLR at 2-647. The Sixth Circuit noted that "a highly qualified treating physician who has lengthy experience with a miner may deserve tremendous deference, whereas a treating physician without the right pulmonary certifications should have his opinions appropriately discounted." *Id.* The Sixth Circuit explained that the case law and applicable regulatory scheme clearly provide that administrative law judges must evaluate treating physicians just as they consider other experts. *Id*.

In this case, the administrative law judge found that the opinion of Dr. Simpao was well documented and reasoned because it was based on the results of claimant's examination, his symptoms, a positive x-ray, and the results of pulmonary function and blood gas studies. Decision and Order on Remand – Denying Benefits at 5. The administrative law judge further found, however, that the record contains no information regarding Dr. Simpao's qualifications, and that Dr. Simpao did not review the other x-ray

interpretations or the medical reports of other physicians of record.[3] Decision and Order on Remand – Denying Benefits at 5; Employer's Exhibit 3. The administrative law judge found that in contrast, Drs. Branscomb and Fino reviewed a substantial portion of the medical evidence of record, including a significant number of x-rays interpretations, and both possess "specialized qualifications."[4]

Although Drs. Branscomb and Fino did not review the three positive interpretations submitted by Dr. Brandon, the administrative law judge found that of the twenty-one interpretations of eight x-rays of record, Dr. Fino considered thirteen interpretations of eight x-rays taken between 1995 and 1999, and Dr. Branscomb reviewed eight interpretations of x-rays taken between 1995 and 1998.[5] Decision and Order on Remand – Denying Benefits at 6. The administrative law judge also noted that Drs. Branscomb and Fino reviewed medical reports and x-rays "both finding pneumoconiosis and not." *Id*.

Relying on *Williams*, the administrative law judge permissibly discounted Dr. Simpao's opinion because unlike Drs. Branscomb and Fino, he is not highly qualified and did not have the benefit of reviewing the opinions of other physicians of record to form a complete picture of claimant's health. *Williams*, 338 F.3d 501, 22 BLR 2-625; Decision and Order on Remand – Denying Benefits at 5. We therefore affirm the administrative law judge's finding that Dr. Simpao's opinion is outweighed by those of Drs. Branscomb and Fino and that claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Because claimant has failed to establish the existence of pneumoconiosis, an award of benefits pursuant to 20 C.F.R. Part 718 is precluded. *Anderson*, 12 BLR 1-111 (1989); *Perry*, 9 BLR 1-1 (1986).

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[3] The administrative law judge found that Dr. Simpao testified that he specializes in the chest, but he did not discuss his board certifications, if any. Decision and Order on Remand – Denying Benefits at 5; Employer's Exhibit 3.

[4] The administrative law judge found that Dr. Fino is Board-certified in Internal Medicine and Pulmonary Diseases and Dr. Branscomb is Board-certified in Internal Medicine. Decision and Order on Remand – Denying Benefits at 6.

[5] In addition, the administrative law judge in his previous Decision and Order recorded that the three x-rays that were read positive for pneumoconiosis by Dr. Brandon were also read negative for pneumoconiosis by at least one dually qualified Board-certified radiologist and B reader. September 20, 1999 Decision and Order – Denying Benefits at 5.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits on Remand is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge