BRB No. 05-0238 BLA

STANLEY BROCK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NALLY & HAMILTON ENTERPRISES	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 10/31/2005
	)	
	)	
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 – 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.

Francesca L. Maggard (Lewis & Lewis Law Office), Hazard, Kentucky, for employer.

Helen H. Cox (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[1] appeals the Decision and Order - Denying Benefits (03-BLA-5365) of Administrative Law Judge Rudolf A. Jansen in a miner's 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 credited claimant with sixteen years of coal mine employment pursuant to the parties' stipulation, Hearing Transcript at 9. Decision and Order at 3. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the new evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), but found the new evidence sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). *Id.* at 10-14. Therefore, the administrative law judge found that claimant demonstrated one of the elements of entitlement previously adjudicated against him in the prior claim pursuant to 20 C.F.R. §725.309, and considered the entire record to determine claimant's entitlement to benefits. *Id.* at 14. The administrative law judge found the record evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), but sufficient to establish total respiratory disability pursuant to Section 718.204(b). *Id.* at 14-17. 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 Section 718.202(a)(1) and (a)(4). Claimant's Brief at 2-5. Claimant further asserts that because the administrative law judge found Dr. Hussain's opinion to be entitled to less weight, the Director, Office of Workers' Compensation Programs (the Director), failed to provide claimant with a complete and credible pulmonary evaluation as required under the Act. *Id.* at 5-6. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director responds, arguing only that remand for a complete and credible pulmonary evaluation is not needed in this case.[2]

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[1]Claimant is Stanley Brock, the miner, who filed his present claim for benefits on February 5, 2001. Director's Exhibit 2. Claimant's previous claim for benefits, filed on July 25, 1994, was finally denied on December 16, 1994 because a Department of Labor claims examiner determined that claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment and total respiratory disability due to pneumoconiosis. Director's Exhibit 1.

[2]We affirm, as unchallenged on appeal, the administrative law judge's finding of sixteen years of coal mine employment and his finding, based upon the new evidence, that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b), an element of entitlement previously adjudicated against him pursuant to 20 C.F.R. §725.309. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek*

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 establish entitlement to benefits under Part 718 in a living miner's claim, a 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 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*).

Claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge considered twelve interpretations of nine x-ray readings contained in the record, of which only three were read as positive for the existence of pneumoconiosis.[3] Decision and Order at 14. Of these three positive x-ray interpretations, the administrative law judge noted that one was read by a B reader,[4] one was read by a physician who was neither a B reader nor a Board-certified radiologist, and one was read by a physician whose qualifications are not in the record. *Id.* Regarding the nine negative x-ray interpretations, the administrative law judge noted that three were read by dually qualified physicians and six were read by B readers. *Id.* The administrative law judge found that the x-ray evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) "[b]ecause the negative readings

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Coal Co., 6 BLR 1-710 (1983). Additionally, we affirm the administrative law judge's findings that the record evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (a)(3), as these findings are also unchallenged on appeal. *Id.*

[3]In addition, Dr. Sargent interpreted claimant's August 22, 2001 x-ray for film quality only. Director's Exhibit 15.

[4]A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

constitute the majority of [the x-ray] interpretations and are verified by more, highly-qualified physicians." *Id.* at 14-15.

Claimant contends that the administrative law judge erred in considering the qualifications of the physicians in weighing the x-ray evidence, in placing substantial weight on the numerical superiority of the x-ray readings, and in selectively analyzing the x-ray evidence. Claimant's Brief at 3. Contrary to claimant's assertion, the administrative law judge permissibly considered the radiological qualifications of the x-ray readers. *See Johnson v. Island Creek Coal Co.*, 846 F.2d 364, 11 BLR 2-161 (6th Cir. 1988); *Creech v. Benefits Review Board*, 841 F.2d 706, 11 BLR 2-86 (6th Cir. 1988); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Similarly, because the administrative law judge considered the x-ray readers' qualifications, he did not rely solely on the numerical superiority of the negative readings in rendering his finding. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995). Additionally, claimant's bald assertion that the administrative law judge selectively analyzed the x-ray evidence is without merit, because the administrative law judge considered both the positive and negative x-ray interpretations contained in the record. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984); *see generally Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Therefore, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Dahhan, Baker, Mallampalli, Hussain and Myers. Drs. Dahhan and Mallampalli found no evidence of coal workers' pneumoconiosis whereas Drs. Baker, Hussain, and Myers found the existence of pneumoconiosis. The administrative law judge determined that Dr. Baker's opinion was not well documented or reasoned because he found it to be "based on a positive x-ray and the Claimant's history of dust exposure." Decision and Order at 11. Because the administrative law judge found that Dr. Baker provided no other basis for his diagnosis, he accorded less weight to Dr. Baker's opinion. *Id.* Additionally, the administrative law judge found Dr. Baker's opinion to be "incomplete" regarding his diagnosis of "COPD or bronchitis" because Dr. Baker did not discuss the etiology of these aliments. *Id.* Similarly, the administrative law judge determined that Dr. Myers' report was "poorly documented and reasoned and entitled to less weight" because it was based solely on a positive x-ray. *Id.* at 12. The administrative law judge found Dr. Hussain's diagnosis of pneumoconiosis to be entitled to less weight because he relied on an inaccurate smoking history. *Id.* at 11. Moreover, the administrative law judge found Dr. Mallampalli's opinion that claimant's chronic obstructive pulmonary disease was "more likely related to smoking" to be conclusory because he does not explain this finding. *Id.* at 11-12. Conversely, the administrative

law judge determined that Dr. Dahhan's opinion is "well documented and reasoned and entitled to full weight." *Id.* at 11. In doing so, the administrative law judge noted that Dr. Dahhan based his diagnosis of no pneumoconiosis on his examination findings, a lack of radiological evidence, and the fact that the pulmonary function study showed a response to bronchodilators. *Id.* Additionally, the administrative law judge considered Dr. Baker's 1994 report, submitted in connection with claimant's first claim, in which he found chronic obstructive pulmonary disease and chronic bronchitis attributable to coal dust exposure and smoking. *Id.* at 15. The administrative law judge accorded greater weight "to the newly submitted medical evidence as it represents more accurately Claimant's current medical condition." *Id.* Therefore, the administrative law judge found "Dr. Dahhan's opinion to be controlling on the issue of pneumoconiosis as it is the only well documented and reasoned opinion of the newly submitted evidence." *Id.* Accordingly, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *Id.*

Claimant asserts that the administrative law judge erred in rejecting the November 23, 2002 opinion of Dr. Baker and the November 29, 2000 report of Dr. Myers because he found that their "opinions were merely based upon their x-ray interpretations." Claimant maintains that "an ALJ may not discredit the opinion of a physician whose report is based on a positive x-ray interpretation which is contrary to the ALJ's findings." Contrary to claimant's assertion, the administrative law judge did not reject the reports of Drs. Baker and Myers because their positive x-ray interpretations were contrary to his finding that the x-ray evidence was negative. Rather, the administrative law judge permissibly accorded less weight to the opinions of Drs. Baker and Myers because he found their opinions to be poorly documented and reasoned. *See Clark v. Karst-Robbins Coal Co.*, *12 BLR 1-149 (1989)(en banc); Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Accordingly, we reject claimant's assertions[5] and affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Lastly, claimant argues that, given the administrative law judge's finding at Section 718.202(a)(4) that Dr. Hussain's opinion is entitled to less weight because he relied on an inaccurate smoking history, the Director failed to fulfill his statutory

[5]Additionally, claimant asserts that the administrative law judge erred in interpreting medical tests and in substituting his conclusions for those of the physician. Claimant's Brief at 5. However, 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 that the administrative law judge interpreted medical tests or substituted his conclusions for those of the physicians of record.

obligation to provide him with a complete pulmonary evaluation. As required under Section 413(b) of the Act, 30 U.S.C. §923(b), the Director has a statutory obligation to provide a complete pulmonary evaluation of the miner. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-87 (1994). As Claimant notes, the administrative law judge accorded less weight to Dr. Hussain's diagnosis of pneumoconiosis because he relied on an inaccurate smoking history.[6] *See Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). However, the administrative law judge did not discredit Dr. Hussain's opinion as devoid of weight. *Cline v. Director, OWCP*, 972 F.2d 234, 16 BLR 2-137 (8th Cir. 1992). As the Director asserts, his obligation to provide claimant with a complete pulmonary evaluation does not require the Director to provide claimant with the most persuasive medical opinion in the record. *See Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984). Thus, we reject claimant's assertion that the Director failed to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation.[7]

Because claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), a requisite element of entitlement under Part 718, we affirm the administrative law judge's denial of benefits. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[6]The administrative law judge found that the record supports a smoking history of twenty-five pack years. Decision and Order at 3. Dr. Hussain noted on his examination form that claimant never smoked. Director's Exhibit 12. Director notes that claimant provided the information as to smoking history to Dr. Hussain. Director's Brief at 2 n.1.

[7]Although claimant generally states in his brief that "[p]ursuant to §725.414, there are no limitations to the amount of evidence that each party can submit," he does not allege any error committed by the administrative law judge with regard to this section. *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

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