BRB No. 05-0301 BLA

SCOTT ROARK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NALLY & HAMILTON ENTERPRISES	)	
	)	
Employer-Respondent	)	DATE ISSUED: 10/31/2005
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Francesca L. Maggard (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer.

Jeffrey S. Goldberg (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 appeals the Decision and Order – Denying Benefits (03-BLA-6175) of Administrative Law Judge Jospeh E. Kane 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).[1] The administrative law judge credited claimant with fourteen years of coal mine employment. Considering the merits of the claim under 20 C.F.R. Part 718, the administrative law judge found the record evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4) and total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied. On appeal, claimant asserts that the administrative law judge erred in finding the x-ray evidence of record insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), and in finding that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2) in this case. Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), did not provide claimant with a complete, credible pulmonary evaluation, where the administrative law judge found that the opinion of Dr. Simpao, who evaluated claimant at the Director's request, was not well reasoned or documented on the issue of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and thus merited little weight. Both employer and the Director respond in support of the decision below.

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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose out of his coal mine employment, and that he is totally disabled due to a respiratory or pulmonary impairment arising out of coal mine employment. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Perry v. Director, OWCP,* 9 BLR 1-1 (1986)(*en banc*). Failure to establish any element of entitlement will preclude a finding of entitlement to benefits.

The administrative law judge found that the evidence of record is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4).[2] At 20 C.F.R.

[1]Claimant filed the instant claim on October 3, 2001. Director's Exhibit 2.

[2]Claimant does not challenge the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) and (a)(3). Claimant also does not challenge the administrative law judge's characterization and weighing of the medical opinion evidence in finding this evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). We, therefore, affirm these findings. *Coen v. Director, OWCP,* 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

§718.202(a)(1), claimant contends that the administrative law judge "relied almost solely on the qualifications of the physicians providing the x-ray interpretations," "placed substantial weight on the numerical superiority of x-ray interpretations," and "may have 'selectively analyzed' the x-ray evidence." Claimant's Brief at 3. Claimant's contentions lack merit. The administrative law judge properly accorded greater weight to Dr. Wheeler's negative rereading of the November 6, 2001 x-ray, which Dr. Simpao read as positive, because Dr. Wheeler is dually qualified as a Board-certified radiologist and B reader and Dr. Simpao is "without any specialized radiographic qualifications." Decision and Order at 5; 20 C.F.R. §718.202(a)(1); *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). The administrative law judge correctly noted that the only other substantive x-ray reading of record[3] is Dr. Broudy's negative reading of the x-ray dated January 4, 2002. *See* Director's Exhibit 11. Thus, the administrative law judge properly found that the weight of the x-ray evidence does not support claimant's burden to establish the existence of pneumoconiosis. Further, claimant provides no support for his assertion that the administrative law judge "may have 'selectively analyzed' the x-ray evidence," and a review of the administrative law judge's Decision and Order does not reveal selective analysis of the x-ray evidence. *White v. New White Coal Co.*, 23 BLR 1-1, 1-5 (2004). Because the administrative law judge's finding at 20 C.F.R. §718.202(a)(1) is supported by substantial evidence, we affirm it.

Claimant further contends that the Director failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required under Section 413(b) of the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b). Claimant bases his argument on the administrative law judge's finding at 20 C.F.R. §718.202(a)(4) that Dr. Simpao's diagnosis of pneumoconiosis, based on a positive x-ray reading and claimant's history of coal dust exposure, is not well reasoned or well documented.[4] *See* Decision and Order at 6-7. The Director contends, however, that he has met his statutory obligation to provide claimant with a complete and credible pulmonary evaluation by virtue of Dr. Simpao's November 6, 2001 assessment. The Director argues that the administrative law judge merely accorded greater weight to Dr. Broudy's opinion over Dr. Simpao's opinion on the issue of the existence of pneumoconiosis, and did not find

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[3]In addition, Dr. Sargent read the November 6, 2001 x-ray for quality purposes only and rated it Grade 1. Director's Exhibit 10.

[4]Dr. Simpao examined claimant at the request of the Director, Office of Workers' Compensation Programs. By report dated November 6, 2001, Dr. Simpao diagnosed coal workers' pneumoconiosis 1/0 based on claimant's chest x-ray, electrocardiogram, physical findings, and symptomatology. Director's Exhibit 10.

Dr. Simpao's opinion to be not credible. We agree with the Director's argument that inasmuch as the administrative law judge found Dr. Simpao's opinion outweighed by Dr. Broudy's report, rather than not credible, claimant's argument lacks merit. *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984).

Because claimant did not 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. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-5.

In light of the foregoing, we need not address claimant's arguments regarding the administrative law judge's finding that the evidence of record is insufficient to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2) as any error therein could not change the outcome of the case. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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