

BRB No. 05-0390 BLA

LIGE SIZEMORE, JR.)
)
 Claimant-Petitioner)
)
 v.)
)
 J & R TRUCKING COMPANY,)
 INCORPORATED)
)
 and)
)
 LIBERTY MUTUAL INSURANCE GROUP) DATE ISSUED: 10/13/2005
)
 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 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; Donald S. Shire, 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 (03-BLA-6178) of Administrative Law Judge Joseph E. Kane denying benefits 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). The administrative law judge credited claimant with twenty-four years of coal mine employment pursuant to the parties' stipulation.¹ Decision and Order at 3; Hearing Transcript at 9. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 5. The administrative law judge found that the evidence of record did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(a)(4) or the presence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 5-9. 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 20 C.F.R. §718.202(a)(1), (a)(4) and in failing to find total disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant also asserts that he was not provided a complete pulmonary evaluation as required by the Act and regulations. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter asserting that claimant was provided with a complete pulmonary examination.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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is

¹ 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 Exhibits 3, 9.

² The administrative law judge's length of coal mine employment determination, as well as his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(b)(2)(i)-(iii), are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

Pursuant to Section 718.202(a)(1), the administrative law judge considered the six³ readings of the three x-rays of record in light of the readers' radiological qualifications. Decision and Order at 6. Only one reading was positive for pneumoconiosis, a "1/0" reading of the June 8, 2001 x-ray by Dr. Simpao, who has no specialized qualifications for the interpretation of x-rays. Director's Exhibit 11. Taking into account that the June 8, 2001 x-ray was read as negative for pneumoconiosis by Dr. Wheeler, a B-reader and Board-certified radiologist, the administrative law judge found that the June 8, 2001 x-ray was negative for pneumoconiosis. Because all of the other readings were negative, the administrative law judge found that claimant did not establish the existence of pneumoconiosis by a preponderance of the x-ray evidence. Decision and Order at 6. The administrative law judge conducted a proper qualitative analysis of the conflicting x-ray readings. *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). Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, merely counted the negative readings, and "may have 'selectively analyzed'" the readings, lack merit. Claimant's Brief at 3-4. We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge erred in finding that Dr. Baker did not specify his rationale for diagnosing pneumoconiosis. Claimant's Brief at 4-5. We disagree. Dr. Baker diagnosed claimant with coal workers' pneumoconiosis, category 0/1,⁴ based on x-ray, and chronic bronchitis "based on history." Director's Exhibit 12. Dr. Baker indicated that "any pulmonary impairment may be related to [claimant's] long history of coal dust exposure." Director's Exhibit 12. The administrative law judge acted within his discretion in finding Dr. Baker's opinion "unsupported," because Dr. Baker based his diagnosis of chronic bronchitis that may be due to coal dust "on history, but did not specify the basis for his rationale or the exact nature of the history he referred to in his diagnosis." Decision and Order at 7; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1985)(*en banc*). Thus, the administrative law judge rationally concluded that Dr. Baker failed to explain

³ Dr. Sargent interpreted the June 8, 2001 x-ray for quality purposes only. Director's Exhibit 11.

⁴ The administrative law judge observed correctly that an "0/1" x-ray classification is not evidence of pneumoconiosis. 20 C.F.R. §718.102(b); Decision and Order at 6.

how the documentation of physical findings supported his conclusion. See *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Collins v. J & L Steel*, 21 BLR 1-181, 1-189 (1999). Claimant's assertion that Dr. Baker's opinion was well reasoned merely requests that the Board reweigh the evidence, which we cannot do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1988). Consequently, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Pursuant to Section 718.204(b)(2)(iv), claimant initially asserts that in addressing the issue of total disability, the administrative law judge is required to consider the exertional requirements of claimant's usual coal mine work in conjunction with a physician's findings regarding the extent of any respiratory impairment. Claimant's Brief at 6, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). The only specific argument claimant sets forth, however, is that:

The claimant's usual coal mine work included being a mine foreman, miner operator, bolt machine operator, shuttle car operator and coal loader. It can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis.

Claimant's Brief at 6. Claimant's argument is without merit. A statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans and Gamble Co., Inc.*, 12 BLR 1-83 (1988).

Further, contrary to claimant's argument, the administrative law judge was not required to consider claimant's age, education, and work experience in determining whether claimant is totally disabled. These factors "are not relevant to the issue of the existence of a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv)." *White v. New White Coal Co.*, 23 BLR 1-1, 1-6-7 (2004). We also reject claimant's argument that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment, because an administrative law judge's findings must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n.8. Consequently, as claimant makes no other specific challenge to the administrative law judge's weighing of the medical opinion evidence pursuant to Section 718.204(b)(2), we affirm the administrative law judge's finding that claimant did not establish that he is

totally disabled pursuant to Section 718.204(b)(2)(iv). *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Finally, claimant contends that because the administrative law judge did not credit a diagnosis of pneumoconiosis contained in Dr. Simpao's June 8, 2001 opinion provided by the Department of Labor, "the Director has failed to provide the claimant with a complete, credible pulmonary examination sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 5. The Director responds that claimant has been provided the medical examination required by the Act and regulations. Director's Brief at 2-3.

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. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-88 n.3 (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. 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director's Exhibit 11. 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, the administrative law judge chose to give less weight to Dr. Simpao's opinion because he did not find it as well reasoned and documented as the contrary opinion by Dr. Dahhan, but he did not find that it lacked credibility. Decision and Order at 7; see *Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999)(explaining that "ALJ's may evaluate the relative merits of conflicting physicians' opinions and choose to credit one . . . over the other"). Because Dr. Simpao's report was complete and the administrative law judge did not find that it lacked credibility, 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. See *Hodges*, 18 BLR at 1-88 n.3.

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

JUDITH S. BOGGS
Administrative Appeals Judge