

BRB No. 07-0178 BLA

B.T.S.)
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 Claimant-Petitioner)
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 v.)
)
 NEW HORIZON COAL, INCORPORATED)
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 and)
)
 KENTUCKY EMPLOYERS MUTUAL) DATE ISSUED: 10/17/2007
 INSURANCE)
)
 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 William S. Colwell,
Administrative Law Judge, United States Department of Labor.

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

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville,
Kentucky, for employer.

Rita A. Roppolo (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 (04-BLA-5881) of Administrative Law Judge William S. Colwell rendered 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 Claimant filed his claim for benefits on September 26, 2002. Director's Exhibit 3. The administrative law judge credited claimant with twenty-seven years of coal mine employment.² Decision and Order at 4. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that claimant failed to establish either the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. Employer responds, urging affirmance of the denial of benefits. The Director responds that he met his obligation to provide claimant with a complete and credible pulmonary evaluation.³

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹ Claimant's first claim, filed on March 15, 2001, was withdrawn on June 28, 2002. Director's Exhibit 1. Thus, that claim is considered never to have been filed, pursuant to 20 C.F.R. §725.306(b).

² The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

³ Because claimant does not challenge the administrative law judge's findings that the existence of pneumoconiosis was not established at 20 C.F.R. §718.202(a)(2)-(4), we affirm them. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered five readings of three x-rays. Dr. Broudy, a B reader, read the December 3, 2002 x-ray as negative for pneumoconiosis. Director's Exhibit 25. The administrative law judge noted that Dr. Simpao, a physician with no special radiological qualifications, read the May 12, 2003 x-ray⁴ as positive for pneumoconiosis, while Dr. Wheeler, a B reader and Board-certified radiologist, read the same x-ray as negative for pneumoconiosis. Director's Exhibits 24, 27. In addition, Dr. Dahhan, a B reader, read the June 2, 2005 x-ray as negative for pneumoconiosis. Employer's Exhibit 1. The administrative law judge found that Dr. Simpao's reading was outweighed by the contrary readings of Drs. Wheeler, Dahhan, and Broudy, based on their superior radiological qualifications. The administrative law judge found that "[b]ased upon the preponderance of negative readings by the more highly qualified physicians . . . the x-ray evidence does not support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)." Decision and Order at 10-11.

The administrative law judge based his finding on a proper qualitative analysis of the x-ray evidence. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). 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. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Claimant further contends that because the administrative law judge discounted Dr. Simpao's opinion diagnosing pneumoconiosis, as it was based on an "erroneous x-ray interpretation, and . . . was not sufficiently explained," the Director failed to provide claimant with a "credible pulmonary evaluation." Claimant's Brief at 4. The Director responds that there was no violation of his duty to provide claimant with a complete pulmonary evaluation.

⁴ The May 12, 2003 x-ray was read by Dr. Barrett for its quality only. Director's Exhibit 24.

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), as implemented by 20 C.F.R. §§718.101(a), 725.406. 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 24. The administrative law judge found that Dr. Simpao’s diagnosis of pneumoconiosis was not well-reasoned because it was based on Dr. Simpao’s own positive x-ray reading, which the administrative law judge found outweighed by the negative x-ray readings by physicians with superior radiological credentials. Decision and Order at 11. The administrative law judge also found that Dr. Simpao failed to otherwise explain how the documentation underlying his report supported his diagnosis. *Id.*; see *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Additionally, the administrative law judge chose to give “greater weight” to the better reasoned and documented opinions of Drs. Dahhan and Broudy, that claimant does not suffer from pneumoconiosis. *Id.*; see *Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999)(explaining that “[administrative law judges] may evaluate the relative merits of conflicting physicians’ opinions and choose to credit one . . . over the other”). We agree with the Director that the administrative law judge found Dr. Simpao’s opinion outweighed, and that this finding does not indicate a failure by the Director to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation. *Cf. Hodges v. BethEnergy Mines*, 18 BLR 1-84 (1994).

Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in the miner’s claim under Part 718, we affirm the administrative law judge’s denial of benefits. *Anderson*, 12 BLR at 1-112; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*). Consequently, we need not address claimant’s arguments concerning the administrative law judge’s finding that claimant did not establish that he is totally disabled.

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