BRB No. 06-0301 BLA

BOBBY L. BROWN		
Claimant-Petitioner	)	
v.	)	
WEBSTER COUNTY COAL CORPORATION	)	DATE ISSUED: 09/18/2006
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Ronald K. Bruce, Madisonville, Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (04-BLA-6193) of Administrative Law Judge Robert L. Hillyard 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] The administrative law judge credited claimant with

[1] The instant case is governed by the regulations that took effect on January 19, 2001, as the claim was filed on January 21, 2003. Decision and Order at 10; Director's Exhibit 2.

twenty-five years of coal mine employment, as stipulated by the parties. Decision and Order at 4; Transcript at 10. The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4),[2] but sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iv). The administrative law judge also found that the evidence was insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (4), and total disability due to pneumoconiosis pursuant to Section 718.204(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief.[3]

The Board 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).

Claimant first argues that the administrative law judge erred in weighing the x-ray evidence at Section 718.202(a)(1). The x-ray evidence consists of interpretations of four x-rays taken on May 20, 2003, June 17, 2003, May 17, 2004, and March 16, 2005.[4] The

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[2] After finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), the administrative law judge found that the evidence necessarily failed to establish that claimant's pneumoconiosis arose out of his coal mine employment. Decision and Order at 15.

[3] The administrative law judge's findings that the evidence was sufficient to establish twenty-five years of coal mine employment as stipulated by the parties, and total disability pursuant to 20 C.F.R. §718.204(b), but insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) and (a)(3), are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 4, 12, 16.

[4] Although Dr. Simpao, who has no radiological qualifications, and Dr. Westerfield, a B reader, interpreted the May 20, 2003 x-ray as positive for pneumoconiosis, Director's Exhibits 14, 16, Dr. Wiot, a Board-certified radiologist and B reader, interpreted this x-ray as negative for pneumoconiosis. Employer's Exhibit 8. Dr. Barrett, a Board-certified radiologist and B reader, interpreted the May 20, 2003 x-ray for film quality only, which the administrative law judge mischaracterized as negative for pneumoconiosis. Decision and Order at 4, 11; Director's Exhibit 15. The June 17, 2003 x-ray was interpreted as positive for

administrative law judge considered each x-ray of record, and determined whether it was positive or negative for pneumoconiosis, based on the quantity and quality of the x-ray readings. The administrative law judge found that the May 20, 2003 x-ray is negative for pneumoconiosis, giving greater weight to the negative readings by Drs. Wiot and Barrett, both Board-certified radiologists and B readers. The administrative law judge found the June 17, 2003 x-ray inconclusive as to the existence of pneumoconiosis because it was read as both positive and negative for pneumoconiosis by B readers, Drs. Westerfield and Broudy, respectively. The administrative law judge found the May 17, 2004 x-ray positive for pneumoconiosis based upon Dr. Brandon's reading, because he was dually certified as a Board-certified radiologist and B reader, despite the x-ray being read as both positive and negative for pneumoconiosis by B readers, Drs. Baker and Repsher, respectively. Giving greater weight to the negative interpretation by Dr. Wiot, both a Board-certified radiologist and B reader, the administrative law judge found the March 16, 2005 x-ray negative for pneumoconiosis, despite the positive reading by Dr. Westerfield, a B reader. The administrative law judge concluded that the preponderance of the x-ray evidence does not establish the existence of pneumoconiosis, based on his findings that two x-rays show the absence of pneumoconiosis, one x-ray is positive for pneumoconiosis, and one x-ray is inconclusive as to the existence of pneumoconiosis.

Claimant contends that the administrative law judge erred by mischaracterizing Dr. Barrett's film quality only reading as a negative reading, and that this error changes the weight of the x-ray evidence. Claimant additionally contends that the administrative law judge should have found that pneumoconiosis was established by x-ray based on the numerical superiority of the positive x-ray readings. We reject claimant's contentions at Section 718.202(a)(1). The weight of the May 20, 2003 x-ray is still negative for pneumoconiosis, extracting Dr. Barrett's interpretation from the other readings, because the administrative law judge gave greater weight to the x-ray readings by dually certified physicians. The May 20, 2003 x-ray includes a positive reading by a physician with no radiological qualifications and another positive reading by a B reader. The remaining reading of the May 20, 2003 x-ray was a negative reading by a dually certified physician. An administrative law judge may credit x-ray interpretations by Board-certified radiologists and

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pneumoconiosis by Dr. Westerfield, a B reader, Claimant's Exhibit 2, but negative for pneumoconiosis by Dr. Broudy, a B reader. Director's Exhibit 17; Employer's Exhibit 7. The May 17, 2004 x-ray was read as positive for pneumoconiosis by Dr. Brandon, a Board-certified radiologist and B reader, and by Dr. Baker, a B reader, Claimant's Exhibits 1, 3, and negative for pneumoconiosis by Dr. Repsher, a B reader. Employer's Exhibit 1. The March 16, 2005 x-ray was read as positive for pneumoconiosis by Dr. Westerfield, a B reader, but negative for pneumoconiosis by Dr. Wiot, a Board-certified radiologist and B reader. Claimant's Exhibit 4; Employer's Exhibit 9.

B readers with greater weight. *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); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). Thus, any error in the administrative law judge's mischaracterization of Dr. Barrett's film quality reading of the May 20, 2003 x-ray as negative for pneumoconiosis is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Claimant's remaining contention that the administrative law judge should have found pneumoconiosis, based on a simple numerical superiority of the positive x-ray readings is also rejected where, as here, the administrative law judge acted within his discretion in taking into account the qualifications of the readers, in determining that the weight of the x-ray evidence is negative for pneumoconiosis. *See Staton, supra; Woodward, supra; Worhach, supra*. Consequently, 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).

Claimant also argues that the administrative law judge erred in weighing the medical opinion evidence at Section 718.202(a)(4). A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[5] is sufficient to support a finding of pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge considered all the relevant medical opinions of record. The administrative law judge gave less weight to the opinions of Drs. Baker, Simpao, and Westerfield, that claimant has pneumoconiosis, and accorded substantial weight to Dr. Rosenberg's opinion that claimant does not have pneumoconiosis.[6]

In considering Dr. Simpao's diagnosis of pneumoconiosis, the administrative law gave it less weight because the physician's qualifications were not of record, and because Dr. Simpao failed to explain how his testing supported his diagnosis of pneumoconiosis and failed to address claimant's smoking history. Decision and Order at 13-14; Director's Exhibit 14. An administrative law judge may rationally accord little weight to a medical opinion where the physician's credentials are not in the record. *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring). Accordingly, the administrative law judge rationally gave less weight to Dr. Simpao's diagnosis of pneumoconiosis because of Dr. Simpao's lack of pulmonary credentials. Moreover, an administrative law judge may rationally find an opinion regarding pneumoconiosis not well-reasoned where the doctor failed to explain how his testing supported his diagnosis of pneumoconiosis. *See Clark v.*

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[5] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[6] The administrative law judge also gave little weight to Dr. Repsher's opinion that claimant does not have pneumoconiosis because it was unreasoned and undocumented. Decision and Order at 14-15.

Karst-Robbins Coal Co., 12 BLR 1-149 (1989)(*en banc*). Therefore, the administrative law judge rationally gave less weight to Dr. Simpao's diagnosis of pneumoconiosis because Dr. Simpao failed to explain how his findings support his diagnosis. Additionally, an administrative law judge may take into account the doctor's failure to address claimant's smoking history in weighing the evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Thus, the administrative law judge rationally gave less weight to Dr. Simpao's diagnosis of pneumoconiosis because Dr. Simpao failed to discuss claimant's lengthy cigarette smoking. As the administrative law judge provided three valid reasons for giving less weight to Dr. Simpao's diagnosis of pneumoconiosis, we affirm that finding. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382, 1-383 n. 4 (1983).

Likewise, in considering Dr. Baker's opinion that claimant has both clinical and legal pneumoconiosis, the administrative law judge gave it less weight because the smoking history recorded by Dr. Baker, which Dr. Baker did not discuss, is approximately one-half of claimant's actual smoking history.[7] Decision and Order at 14; Claimant's Exhibit 3. An administrative law judge may properly consider the accuracy of the smoking history relied upon by the physician in diagnosing pneumoconiosis, and as noted above, the physician's failure to discuss claimant's smoking history. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Stark, supra.* Consequently, the administrative law judge rationally gave less weight to Dr. Baker's diagnoses of clinical and legal pneumoconiosis because the doctor failed to discuss claimant's smoking history, and because the physician inaccurately recorded by one-half claimant's actual smoking history. As the administrative law judge provided two valid reasons for giving less weight to Dr. Baker's diagnosis of pneumoconiosis, we affirm his finding. *See Kozele, supra*.

Furthermore, in considering Dr. Westerfield's diagnosis of pneumoconiosis, the administrative law judge gave it little weight because its only bases were claimant's positive chest x-ray and coal dust exposure history. Decision and Order at 14; Claimant's Exhibit 4. An administrative law judge may permissibly discount a medical opinion diagnosing pneumoconiosis based only a positive chest x-ray and coal mine employment history. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985). Therefore, the administrative law judge rationally gave little weight to Dr. Westerfield's diagnosis of pneumoconiosis because it was based only on a positive chest x-ray and coal dust exposure history.

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[7] Dr. Baker recorded claimant's smoking history as one-half pack per day since age 18 and stated that claimant currently smokes a few cigarettes a day. Claimant's Exhibit 3 at 2. Drs. Simpao and Westerfield recorded that claimant previously smoked one pack per day. Director's Exhibit 14 at 2; Claimant's Exhibit 4 at 3. Claimant testified at the hearing as having previously smoked between one-half to one pack per day. Transcript at 16.

Lastly, in considering Dr. Rosenberg's opinion that claimant does not have pneumoconiosis, the administrative law judge accorded it substantial weight because it was well-reasoned and well-documented.[8] Decision and Order at 13; Employer's Exhibit 4. An administrative law judge may rationally accord substantial weight to a medical report because it is well-reasoned and well-documented. *See Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1986). Thus, we affirm the administrative law judge's treatment of Dr. Rosenberg's opinion.

Claimant contends that the administrative law judge should have accorded more weight to the opinions of Drs. Baker and Westerfield based on their qualifications and because they examined claimant. Additionally, claimant contends that the administrative law judge was required to accord less weight to Dr. Rosenberg's opinion because the physician did not examine claimant or review claimant's chest x-rays or pulmonary function studies. Moreover, claimant contends that Dr. Rosenberg "ignored the preponderance of the x-ray evidence and the medical opinion evidence." Claimant's Brief at 12. Contrary to claimant's contentions, the administrative law judge was not required to accord greater weight to the opinions of Drs. Baker and Westerfield because they are specialists. Dr. Rosenberg's credentials as Board-certified in internal medicine, pulmonary disease, and occupational medicine appear to equal or exceed the qualifications of Drs. Baker and Westerfield, who are both Board-certified in internal medicine and pulmonary disease. Nor was the administrative law judge required to accord great weight to the opinions of Drs. Baker and Westerfield because they examined claimant. *Eastover Mining Co.*, 338 F.3d at 511-512, 22 BLR at 2-644; *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1097, 1098, 17 BLR 2-123, 2-128, 2-129 (4th Cir. 1993). Moreover, an administrative law judge may not reject an opinion simply because the doctor did not examine claimant. *See Eastover Mining Co.*, 338 F.3d at 511-512, 22 BLR at 2-644, citing *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-177 (4th Cir. 2000)(an administrative law judge may not discredit a physician's

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[8] Dr. Rosenberg diagnosed claimant with a severe, disabling obstructive lung disease due to claimant's long history of cigarette smoking, based on chest x-rays, pulmonary function studies, CT scan, and other objective evidence. Employer's Exhibit 4. Dr. Rosenberg explained that claimant's CT scan of the chest revealed no findings of coal workers' pneumoconiosis and that CT scan findings in general are more accurate than chest x-rays in diagnosing pneumoconiosis. Moreover, Dr. Rosenberg opined that claimant's marked airflow obstruction, based on decreased FEV1 findings on claimant's pulmonary function study, is not seen in coal mine-induced obstruction. Dr. Rosenberg observed that claimant's elevated carboxyhemoglobin level confirms that claimant's chronic obstructive pulmonary disease relates to his long and continued smoking history. Dr. Rosenberg explicitly found that claimant does not have medical or legal coal workers' pneumoconiosis. The administrative law judge found that Dr. Rosenberg provided a thorough analysis as to why claimant's medical condition was attributed to cigarette smoke, and not coal dust exposure. Decision and Order at 13.

opinion solely because the physician did not examine claimant); *see also Bateman v. Eastern Associated Coal Corp.*, 22 BLR 1-255 (2003). Thus, the administrative law judge was not required to discredit Dr. Rosenberg's opinion because he did not examine claimant. Contrary to claimant's contentions that Dr. Rosenberg did not review any chest x-rays or pulmonary function studies of claimant, Dr. Rosenberg reviewed the chest x-rays of claimant by Drs. Baker, Brandon, Repsher, Simpao, Westerfield, and Wiot, and the pulmonary function studies of claimant by Drs. Baker, Repsher, Simpao, and Westerfield Additionally, contrary to claimant's contention, Dr. Rosenberg did not ignore "the preponderance of the x-ray evidence and the medical opinion evidence," which the administrative law judge found was negative for pneumoconiosis, but, rather, Dr. Rosenberg reviewed the x-rays and medical opinion evidence he was provided, and based his opinion on his review of that evidence. We, therefore, affirm the administrative law judge's decision to accord substantial weight to Dr. Rosenberg's opinion and little or less weight to the remaining opinions of record Thus, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4).

In light of our affirmance of the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), an essential element of entitlement, we affirm the administrative law judge's denial of benefits

under 20 C.F.R. Part 718.[9] *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[9] Thus, we need not address claimant's arguments at Section 718.204(c). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

REGINA C. McGRANERY
Administrative Appeals Judge