BRB No. 07-0182 BLA

J.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
APOGEE COAL COMPANY/ARCH OF KENTUCKY	)	DATE ISSUED: 09/28/2007
	)	
and	)	
	)	
ARCH COAL COMPANY, c/o UNDERWRITERS SAFETY & CLAIMS	)	
	)	
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 – Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Ronald C. Cox (Atkins Law Office), Harlan, Kentucky, for claimant.

Ralph D. Carter (Barret, Haynes, May & Carter P.S.C.), Hazard, Kentucky, for employer/carrier.

Before: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (04-BLA-6653) of Administrative Law Judge Thomas F. Phalen, Jr., on a miner's 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 thirteen years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718, based on claimant's June 9, 2003 filing date. Addressing the merits of entitlement, the administrative law judge found that the medical evidence was insufficient to establish either the existence of pneumoconiosis or that claimant is totally disabled by a 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 generally contends that the administrative law judge erred in finding the x-ray and medical opinion evidence insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1), (4). In addition, claimant generally contends that the administrative law judge erred in finding that claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv). In response, employer urges affirmance of the administrative law judge's denial of benefits, arguing that claimant has failed to raise any specific allegations of error in the administrative law judge's findings. The Director, Office of Workers' Compensation Programs, has submitted a letter stating that he will not be filing a response in this appeal.[1]

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 pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling.[2] *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co.*

[1] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination and the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3) or total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] As claimant's last coal mine employment was in Kentucky, we will apply the law of the United States Court of Appeals for the Sixth Circuit. Decision and Order at 4; Director's Exhibit 4; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

v. Hill, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In concluding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis, the administrative law judge found that the record consists of three readings of x-ray films dated July 12, 2003 and September 9, 2003. Decision and Order at 5. Weighing these interpretations in light of the readers' radiological qualifications, the administrative law judge found that Dr. Baker, a B reader, read the July 12, 2003 x-ray as positive for pneumoconiosis; whereas Dr. Wiot, who is both a B reader and a Board-certified radiologist, read this x-ray as negative for pneumoconiosis. Decision and Order at 5, 9; Director's Exhibits 12, 15. Based on Dr. Wiot's superior radiological credentials, the administrative law judge found the July 12, 2003 x-ray to be negative for pneumoconiosis. Decision and Order at 9. The administrative law judge further found that Dr. Jarboe, a B reader, read the September 9, 2003 x-ray as negative for pneumoconiosis. Decision and Order at 5, 9; Employer's Exhibit 14.. Consequently, the administrative law judge found that claimant did not establish the presence of pneumoconiosis pursuant to Section 718.202(a)(1). Decision and Order at 9.

In challenging this finding, claimant contends that because Dr. Baker's positive reading was based on a film rated as Quality 1, his reading should have been accorded greater weight than Dr. Wiot's negative interpretation, which was based on an x-ray film rated as Quality 2. Claimant's Brief at 3. In addition, claimant contends that Dr. Baker's positive interpretation was supported by his finding that claimant's history of coal dust exposure supported an interpretation of category 1/0, as well as the fact that Dr. Baker performed physical and objective testing to diagnose claimant with pneumoconiosis. *Id.* We hold that there is no merit to these contentions.

Contrary to claimant's argument, the administrative law judge was not required to accord greater weight to Dr. Baker's reading of the July 12, 2003 x-ray because he determined the film to be rated as Quality 1, whereas Dr. Wiot rated this film as Quality 2, because the film was light. Director's Exhibits 12, 15. The regulations do not require the film to be of optimal quality, but only that the film "shall be of suitable quality for proper classification of pneumoconiosis." 20 C.F.R. §718.102(a). Absent a finding that the film was unreadable, the administrative law judge was not required to defer to the reading of the x-ray designated as Quality 1. *See Preston v. Director, OWCP*, 6 BLR 1-1229, 1-1233 (1984); *Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214, 1-1215 (1984). Moreover, contrary to claimant's contention, the only evidence relevant to Section 718.202(a)(1) consists of physicians' chest x-ray readings. 20 C.F.R. §718.202(a)(1); *see Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-55 (1988); *Alley v. Riley Hall Coal Co.*, 6 BLR 1-376, 1-377 (1983). The administrative law judge did not err, therefore, in

declining to accord greater weight to Dr. Baker's positive x-ray interpretation because Dr. Baker also examined claimant. Consequently, we reject claimant's contentions and hold that the administrative law judge reasonably exercised his discretion, as trier-of-fact, in finding that the weight of the x-ray interpretations by the better qualified physicians was negative for the existence of pneumoconiosis. *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); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). We, therefore, affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), as it is supported by substantial evidence. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994).

Pursuant to Section 718.202(a)(4), the administrative law judge found that the record contains the medical opinion of Dr. Baker, that claimant suffers from pneumoconiosis, and the contrary opinion of Dr. Jarboe, that the evidence is insufficient to establish that claimant suffers from pneumoconiosis. The administrative law judge found that the opinion of Dr. Baker was not well-reasoned and well-documented because Dr. Baker based his diagnosis of clinical pneumoconiosis expressly on his positive x-ray reading and claimant's history of coal dust exposure. Decision and Order at 10-11; Director's Exhibit 12. In addition, the administrative law judge accorded little weight to Dr. Baker's diagnosis of legal pneumoconiosis because Dr. Baker's opinion, that claimant's chronic bronchitis was due to both coal dust exposure and cigarette smoking, was conclusory and Dr. Baker failed to provide an adequate explanation for his diagnosis. Decision and Order at 11; Director's Exhibit 12. The administrative law judge gave Dr. Jarboe's opinion, that claimant does not have clinical or legal pneumoconiosis, greater weight because it is well-reasoned and well-supported by the underlying objective studies. Decision and Order at 11-12; Director's Exhibit Director's Exhibits 14, 16. Consequently, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

In challenging the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis, claimant generally alleges that the administrative law judge erred in according Dr. Baker's opinion less weight than the opinions of Drs. Jarboe and Wiot. Claimant's Brief at 3-4. Claimant contends that "it is evident from the record that the claimant had 13 years of exposure and that the medical report of Dr. Glen Baker finding category 1/0 evidences the Claimant's pneumoconiosis." Claimant's Brief at 4. In addition, claimant generally states that Dr. Baker's opinion is a reasoned, well-documented opinion that is supported by his objective findings. *Id*. We disagree.

Contrary to claimant's contention, the administrative law judge permissibly found that Dr. Baker's diagnosis of clinical pneumoconiosis did not constitute a documented and reasoned medical opinion because the physician expressly relied upon his own positive interpretation of an x-ray, which was re-read as negative by a physician with superior radiological qualifications. Decision and Order at 11; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003); *Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985). In addition, the administrative law judge properly discounted Dr. Baker's opinion, that claimant's chronic bronchitis was due to her coal dust exposure and cigarette smoking, because Dr. Baker failed to adequately explain his conclusion, in light of the underlying documentation, that claimant suffers from legal pneumoconiosis. Decision and Order at 11; *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, 1-155 (1989)(*en banc*).

Moreover, the administrative law judge acted within his discretion, as trier-of-fact, in finding the medical opinion of Dr. Baker outweighed by the contrary opinion of Dr. Jarboe, which the administrative law judge rationally determined was better reasoned and documented, as Dr. Jarboe's conclusions were supported by the objective evidence that he considered. Decision and Order at 11; Director's Exhibit 14; *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence did not 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 Section 718.202(a)(1)-(4), a requisite element of entitlement under Part 718, an award of benefits is precluded. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Consequently, we need not address claimant's contentions regarding the administrative law judge's finding that the medical evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge