BRB No. 08-0218 BLA

J.F.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEW RIDGE COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 09/29/2008
	)	
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 Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2005-BLA-5326) of Administrative Law Judge Larry S. Merck on a claim filed on November 8, 2002, 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). Director's Exhibit 2. Based on the parties' stipulation, the administrative law judge credited claimant with at least eighteen years of coal mine employment. Although the administrative law judge found that claimant was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), he found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[1] Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in failing to find that he has pneumoconiosis based on the positive x-ray evidence and Dr. Alam's opinion pursuant to 20 C.F.R. §718.202(a)(1),(4).[2] Carrier responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief unless specifically requested to do so by the Board.[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.[4] 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he suffers from pneumoconiosis arising out of coal mine employment, that he is totally disabled by a respiratory or pulmonary impairment, and that his total disability is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R.

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[1] The administrative law judge inadvertently referenced the regulation at 20 C.F.R. §718.204(b)(2)(iv), as opposed to 20 C.F.R. §718.202(a)(4), in weighing the medical opinion evidence as to the existence of pneumoconiosis. Decision and Order at 19. We will discuss his findings under the proper regulation.

[2] Claimant, however, also mistakenly asserts that the administrative law judge erred "in resolving that [he] was not totally disabled." Claimant's Brief at 6.

[3] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding of at least eighteen years of coal mine employment, and his findings pursuant to 20 C.F.R. §§718.202(a)(2), (3) and 718.204(b)(2). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

§§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).

Claimant contends that the administrative law judge erred in finding that he does not have pneumoconiosis. Pursuant to Section 718.202(a)(1), claimant asserts that the administrative law judge erred because he "selectively analyzed" the x-ray evidence and improperly relied upon the physician's qualifications and the numerical superiority of the negative x-ray interpretations. Claimant's Brief at 3. We reject claimant's assertions of error as they are without merit.

The administrative law judge considered six readings of four x-rays, of which there was only one positive reading for pneumoconiosis.[5] Decision and Order at 15, 16. As noted by the administrative law judge, Dr. Vuskovich, a B reader, read a May 8, 2002 x-ray as positive, while Dr. Meyer, a Board-certified radiologist and B reader, read the same x-ray as negative for pneumoconiosis. Director's Exhibit 25; Employer's Exhibit 3. Contrary to claimant's assertion, Section 718.202(a)(1) specifically provides that "where two or more [x]-ray reports are in conflict, in evaluating such x-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such [x]-rays." 20 C.F.R. §718.202(a)(1); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). In resolving the conflict in the evidence as it pertained to the May 8, 2002 x-ray, the administrative law judge gave controlling weight to Dr. Meyer's negative reading based on his superior qualifications as a dually qualified radiologist. Decision and Order at 16. The remaining x-rays dated March 29, 2006, June 23, 2003 and March 18, 2002 were read as negative for pneumoconiosis Director's Exhibits 17, 29; Employer's Exhibits 1, 2. Thus, the administrative law judge concluded that all four of the x-rays of record were negative for pneumoconiosis. Decision and Order at 16. Because substantial evidence supports the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4), it is affirmed. *See Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993).

Claimant next argues that because Dr. Alam provided a "well-reasoned" diagnosis of pneumoconiosis, the administrative law judge was required to credit his opinion at Section 718.202(a)(4). Claimant's Brief at 5. Claimant's argument is without merit. In discussing the medical opinion evidence at Section 718.202(a)(4), the administrative law judge correctly noted that none of the physicians of record diagnosed clinical

[5] Dr. Sargent read the March 18, 2002 x-ray for quality purposes only. Director's Exhibit 18.

pneumoconiosis. Decision and Order at 17. As to the issue of the existence of legal pneumoconiosis, the administrative law judge determined that Dr. Alam's diagnosis of chronic bronchitis and emphysema, due to a combination of cigarette smoking and coal dust exposure, was "adequately reasoned" and deserving of "full probative weight."[6] Decision and Order at 18. However, the administrative law judge also found Dr. Rephser's opinion, that claimant's emphysema was due entirely to smoking, to be reasoned and entitled to "additional weight," noting that fact that Dr. Repsher considered the most objective medical testing, and that he cited to several published medical studies to support his diagnosis.[7] Decision and Order at 18. Thus, the administrative law judge, in reliance on Dr. Repsher's opinion, found that claimant did not have legal pneumoconiosis.[8] *Id*.

Because claimant does not raise any specific error with regard to the weight accorded Dr. Repsher's opinion, *see Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), and since determinations as to the weight and credibility of the evidence are within the discretion of the trier-of-fact, we affirm the administrative law judge's finding that Dr. Alam's opinion was outweighed by Dr. Repsher's opinion. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Thus, we affirm the administrative law judge's finding that claimant failed to establish the existence of either clinical or legal pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order at 19. Since claimant failed to establish the existence of

[6] Dr. Alam examined claimant on March 18, 2002 at the request of the Department of Labor. Dr. Alam diagnosed chronic bronchitis and emphysema due to a combination of smoking and coal dust exposure, based on the results of claimant's pulmonary function and blood gas testing, symptoms and physical findings. Director's Exhibits 11, 42.

[7] Dr. Repsher examined claimant on March 29, 2006 and also reviewed the record evidence, including Dr. Alam's report. He opined that claimant suffered from severe chronic obstructive pulmonary disease with centrilobular and bullous emphysema, which he attributed to smoking in light of claimant's purely obstructive respiratory impairment as demonstrated on pulmonary function testing, and the normal arterial blood gas testing. Employer's Exhibits 2, 4. The administrative law judge noted that Dr. Repsher was "the only physician of record to support his findings with [published] medical studies." Decision and Order at 18.

[8] The administrative law judge found that Dr. Hippensteel's opinion, that claimant's emphysema was due entirely to smoking, was "inadequately reasoned" and, therefore, he gave it less weight at 20 C.F.R. §718.202(a)(4). Decision and Order at 18.

pneumoconiosis, a requisite element of entitlement, benefits are precluded. *Anderson,* 12 BLR at 1-112; *Trent,* 11 BLR at 1-27.

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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BETTY JEAN HALL
Administrative Appeals Judge