BRB No. 09-0263 BLA

B.W. Claimant-Petitioner	)	
v.	)	
LEECO, INCORPORATED	)	DATE ISSUED: 09/09/2009
and	)	
JAMES RIVER COAL COMPANY	)	
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 Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

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

Timothy J. Walker (Ferreri & Fogle, PLLC), Lexington, Kentucky, for employer.

Michelle S. Gerdano (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, 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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (07-BLA-5793) of Administrative Law Judge Donald W. Mosser 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 twenty-two years of coal mine employment[2] based on the parties' stipulation. Decision and Order at 3. 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 the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §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 x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and that the medical opinion evidence did not establish 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 pulmonary evaluation sufficient to substantiate his claim. Employer responds, urging affirmance of the denial of benefits. The Director has filed a limited response, requesting that the Board reject claimant's request that the case be remanded to the district director, based upon the Director's alleged failure to provide claimant with a complete 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

[1] Claimant filed his claim for benefits on August 7, 2006. Director's Exhibit 2. The district director denied benefits and claimant timely requested a hearing, which was held on September 28, 2007. Director's Exhibits 22, 23, 25.

[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibits 3-7. 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 pursuant to 20 C.F.R. §718.202(a)(2)-(4), we affirm them. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 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 that Dr. Westerfield, a B reader, read the sole x-ray of record, dated August 28, 2006, as negative for pneumoconiosis.[4] Director's Exhibit 11. Because there were no positive x-ray readings, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, and "may have 'selectively analyzed'" the readings, lack merit. Claimant's Brief at 3; *see White v. New White Coal Co.*, 23 BLR at 1-1, 1-4-5 (2004). We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1). Claimant has not otherwise challenged the administrative law judge's findings that the existence of pneumoconiosis was not established. *See* n.3, *supra*. Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a miner's claim under Part 718, we affirm the denial of benefits. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

Claimant contends that because the administrative law judge found Dr. Simpao's diagnosis of pneumoconiosis to be "unpersuasive and not well reasoned," the "Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 4. The Director responds that he met his statutory obligation to provide claimant with a complete pulmonary evaluation,[5] and further states that a remand to the district director for Dr. Simpao to clarify his opinion regarding the existence of pneumoconiosis would be futile in view of Dr. Simpao's opinion that claimant is not totally disabled. Director's Brief at 2.

[4] Dr. Barrett, a Board-certified radiologist and B reader, reviewed the August 28, 2006 x-ray for quality purposes only. Director's Exhibit 12.

[5] The Director, Office of Workers' Compensation Programs (the Director), states that he disagrees with the administrative law judge's finding that Dr. Simpao did not adequately explain the reasoning for his diagnosis of a mild restrictive pulmonary impairment due to both smoking and coal mine dust exposure. Director's Brief at 2 n.1.

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; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1984). The United States Court of Appeals for the Sixth Circuit recently set forth the standard for determining whether a pulmonary evaluation is complete:

> In the end, the DOL's duty to supply a "complete pulmonary evaluation" does not amount to a duty to meet the claimant's burden of proof for him. In some cases, that evaluation will do the trick. In other cases, it will not. But the test of "complete[ness]" is not whether the evaluation presents a winning case. The DOL meets its statutory obligation to provide a "complete pulmonary evaluation" under 30 U.S.C. § 923(b) when it pays for an examining physician who (1) performs all the medical tests required by 20 C.F.R. §§718.101(a) and 725.406(a), and (2) specifically links each conclusion in his or her medical opinion to those medical tests. Together, the completion of these tasks will result in a medical opinion . . . that is both documented, i.e., based on objective medical evidence, and reasoned.

Greene v. King James Coal Mining, Inc., --- F.3d ---, --- BLR ---, No. 08-4094, slip op. at 18-19, 2009 WL 2253369 at *11 (6th Cir. July 30, 2009). The court held in *Greene*, that while the physician who performed the DOL-sponsored pulmonary evaluation "could have explained his reasoning more carefully," the miner received a complete pulmonary evaluation, given that the physician's report addressed all of the elements of entitlement "even if lacking in persuasive detail." *Greene*, slip. op. at 19, 2009 WL 2253369 at *11.

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. Director's Exhibit 11; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). Contrary to claimant's contention, the fact that the administrative law judge found Dr. Simpao's opinion to be unpersuasive, because Dr. Simpao did not fully explain the basis for his diagnosis of pneumoconiosis, does not establish that the Director failed to meet his statutory obligation. Because Dr. Simpao performed all of the necessary tests and his report addressed the requisite elements of entitlement, we agree with the Director that claimant received a complete pulmonary evaluation. *See Greene*, slip op. at 18-19, 2009 WL 2253369 at *11; *R.G.B. v. Southern Ohio Coal Co.*, --- BLR ---, BRB No. 08-0491 BLA, slip op. at 19 (Aug. 28, 2009)(*en banc*). We therefore reject

claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation.[6] *See Hodges*, 18 BLR at 1-93.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

[6] Further, we agree with the Director that a remand for Dr. Simpao to further explain his diagnosis of pneumoconiosis would be pointless given that Dr. Simpao opined that claimant's mild respiratory impairment is not totally disabling, and there is no other evidence of total disability.