

BRB No. 05-0157 BLA

FINLEY PENNINGTON)	
)	
Claimant-Petitioner)	
v.)	
)	
LEECO, INCORPORATED)	DATE ISSUED: 08/19/2005
)	
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 of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

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

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

Rita Roppolo (Howard M. Radzely, Solicitor of Labor, Donald S. Shire, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-5258) of Administrative Law Judge Stuart A. Levin (the administrative law judge) denying benefits on a subsequent 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 found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability due to pneumoconiosis pursuant to 20

C.F.R. §718.204(c), and thereby was insufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied the claim.¹

On appeal, claimant challenges the administrative law judge's findings that the newly submitted x-ray interpretation evidence and medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (4). Claimant also contends that the administrative law judge erred in finding that the newly submitted medical opinion evidence failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). Additionally, claimant contends that the Department of Labor (DOL) failed to provide him with a complete and credible pulmonary evaluation pursuant to Section 413(b) of the Act. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, (the Director) responds, asserting only that Dr. Hussain's medical report satisfies his obligation to provide claimant with a complete and credible pulmonary evaluation pursuant to Section 413(b) of the Act.²

¹ The relevant procedural history of this claim follows. Claimant filed his first claim with the Department of Labor (DOL) on November 25, 1992. Director's Exhibit 1. Following a hearing, Administrative Law Judge Bernard J. Gilday denied benefits in a Decision and Order dated August 10, 1994. Judge Gilday found that the evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4)(2000), and was insufficient to establish total respiratory disability pursuant to Section 718.204(c)(1)-(4)(2000). Following claimant's appeal, the Board affirmed the administrative law judge's finding that that the evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4)(2000). *Pennington v. Leeco, Inc.*, BRB No. 94-3823 BLA (September 25, 1995)(unpub.). Claimant filed this subsequent claim on March 5, 2001. Director's Exhibit 3. Following another hearing, Administrative Law Judge Stuart A. Levin issued a Decision and Order dated September 3, 2004, wherein he found that the newly submitted evidence of record failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), and failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge found that the newly submitted evidence of record failed to establish a change in applicable condition of entitlement pursuant to Section 725.309(d), and thereby, he denied the subsequent claim. Claimant then filed the instant appeal with the Board.

² The administrative law judge's finding that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (3) and that the evidence failed to establish total respiratory disability pursuant to 20 C.F.R.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant first contends that the administrative law judge erred in failing to find that the new x-ray interpretation evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Claimant asserts that the administrative law judge improperly relied upon the x-ray interpretations by physicians with superior credentials and the numerical superiority of the negative x-ray readings, noting that the Board has held that an administrative law judge is not required to defer to doctors with superior qualifications, nor is he required to accept as conclusive the numerical superiority of the x-ray interpretations. Claimant's Brief at 2-3.

The administrative law judge considered the five readings of four x-rays in conjunction with the readers' radiological qualifications and noted that there were three negative interpretations and two positive interpretations.³ Decision and Order at 4. Additionally, the administrative law judge noted that of the three negative x-ray readings, two were by physicians who were Board-certified radiologists and B-readers and one was by a B-reader. *Id*; Director's Exhibits 22, 23; Employer's Exhibit 1. The administrative law judge found that the record contained only two positive readings, both by physicians who possessed no special radiological qualifications. Decision and Order at 4; Director's Exhibits 9, 11.

§718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ Dr. Sargent reread Dr. Hussain's September 5, 2001 x-ray, and noted only that the film quality was "1", the highest quality possible, without commenting on whether the film was positive or negative for pneumoconiosis. Director's Exhibit 10.

The administrative law judge gave greater weight to the interpretations by the physicians who possessed superior radiological qualifications than to the physicians who possessed no special radiological qualifications. The administrative law judge's evaluation of the x-ray evidence was a proper qualitative and quantitative analysis of the x-ray interpretation evidence. *Staton v. Norfolk and Western Railway 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); see *Worhach v. Director, OWCP*, 17 BLR 1- 105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Accordingly, we reject claimant's argument regarding the administrative law judge's analysis of the x-ray evidence at Section 718.202(a)(1) and affirm his finding thereunder. In addition, we reject claimant's contention that the administrative law judge "may" have "selectively analyzed" the x-ray evidence. Claimant's Brief at 3. This argument is rejected as claimant provides no support for this general allegation. See *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *White v. New White Coal Co.*, 23 BLR 1-1, 1-5 (2004).

Claimant next contends that the administrative law judge erred in rejecting Dr. Baker's opinion, finding the existence of pneumoconiosis, for the reason that it was based solely on a positive x-ray reading. Claimant asserts that since Dr Baker's diagnosis of pneumoconiosis was based on, in addition to a positive x-ray, a physical examination, medical and work histories, a pulmonary function study, and an arterial blood gas study, it was a documented and reasoned opinion and should, therefore, have been credited. Claimant's Brief at 4-5.

In considering the opinion of Dr. Baker, on the issue of pneumoconiosis, however, the administrative law judge accorded it less weight because he found it to be based on x-ray changes and claimant's history of coal mine employment, while Dr. Dahhan's conclusion that claimant did not have pneumoconiosis was based on, in addition to a negative x-ray, clinical findings on examination, the results of laboratory testing, including pulmonary function and blood gas testing, a CT scan reading, and the medical review report of Dr. Vuskovich. The administrative law judge also noted that the x-ray Dr. Baker read as positive was subsequently reread negative by a better qualified physician.

A review of Dr. Baker's report supports the administrative law judge's finding that it was based on x-ray, and a history of coal mine employment history, *i.e.*, Dr. Baker found 1/0 pneumoconiosis, and stated that claimant had pneumoconiosis based on his abnormal x-ray and history of coal dust exposure. The x-ray relied on by Dr. Baker, who possessed no special radiological qualifications was, however, subsequently read negative by a Board-certified, B-reader. Further, the pulmonary function and blood gas studies conducted by Dr. Baker were normal. Director's Exhibit 11; Decision and Order at 5. Accordingly, the

administrative law judge properly concluded that claimant failed to establish the presence of pneumoconiosis pursuant to Section 718.202(a)(4), as the opinion of Dr. Dahhan, that claimant did not have pneumoconiosis, was better supported and reasoned than the opinion of Dr. Baker. Decision and Order at 6; see *Eastover Mining Co. v. Williams*, 338 F. 2d 501, 22 BLR 2-625 (6th Cir. 2003); *Cornett v. Benham Coal Co.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach*, 17 BLR at 1-110; *Trumbo v. Director, OWCP*, 17 BLR 1-85, 1-89 n.4 (1993); *Clark*, 12 BLR at 1-155; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Dillon v. Peabody Coal Co.*, 11 BLR at 1-113 (1988); *Lucostic v. Director, OWCP*, 8 BLR 1-46 (1983); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Additionally, claimant contends that because the administrative law judge rejected Dr. Hussain's opinion on the existence of pneumoconiosis, the Director has failed to provide him with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act. Claimant's Brief at 5-6. The Director responds, however, that he is only required to provide claimant with a complete and credible examination, not a dispositive one. Director's Brief at 1-2.

The record reflects that Dr. Hussain conducted an examination and a full range of testing required by the regulations, and that he addressed each element of entitlement on the DOL examination form. 20 C.F.R. §§718.101(a); 718.104, 725.406(a); Director's Exhibit 9. In considering the opinion of Dr. Hussain along with the opinions of Drs. Baker and Dahhan on the issue of pneumoconiosis, the administrative law judge did not reject Dr. Hussain's opinion, rather he found that Dr. Dahhan's opinion was better supported by its underlying documentation than Dr. Hussain's and therefore found Dr. Hussain's opinion "outweighed" by the opinion of Dr. Dahhan. Decision and Order at 6. This was proper. See *Cline v. Director, OWCP*, 917 F. 2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F. 2d 1162, 1166, 7 BLR 2-25 2-31 (8th Cir. 1984). Claimant's contention that the Director did not fulfill his statutory obligation of providing claimant with a complete and credible pulmonary evaluation is, therefore, rejected.

We affirm, therefore, the administrative law judge's finding that the new evidence failed to establish a change in an applicable condition of entitlement by failing to establish the existence of pneumoconiosis. Because the administrative law judge went on to find that the existence of pneumoconiosis, an essential element of entitlement, was not established on consideration of all the evidence of record, Decision and Order at 6, we need not reach claimant's argument on total disability at Section 718.204(b)(2)(iv). See *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

Accordingly, the Decision and Order of administrative law judge denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge