BRB No. 08-0398 BLA

T.M.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 12/29/2008
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen, Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 (07-BLA-5048) of Administrative Law Judge Thomas F. Phalen (the administrative law judge) denying benefits on a claim filed on December 4, 2001 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). This case has been before the Board on a prior occasion. In a Decision and Order dated June 29, 2005, Administrative Law Judge Pamela Lakes Wood credited claimant with five years of coal mine employment,[1] dismissed Bledsoe Deep Mining Company as the responsible

[1] The record indicates that claimant was last employed in the coal mining industry in Kentucky. Director's Exhibits 3, 6, 11. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v.*

operator, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Judge Wood found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, Judge Wood denied benefits. In disposing of claimant's appeal, the Board affirmed Judge Wood's length of coal mine employment finding and her dismissal of Bledsoe Deep Mining Company as the responsible operator. The Board also affirmed Judge Wood's findings that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4). Further, the Board granted the motion to remand of the Director, Office of Workers' Compensation Programs (the Director), based on the Director's concession that Dr. Baker's January 11, 2002 opinion failed to meet his obligation of providing claimant with a complete pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. [*T.M.*] *v. Bledsoe Deep Mining Co.*, BRB No. 05-0894 BLA (Apr. 28, 2006)(unpub.).

On remand, the administrative law judge credited claimant with five years of coal mine employment, and found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Claimant also challenges the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Further, claimant challenges the administrative law judge's finding that the evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). The Director responds, urging affirmance of the administrative law judge's Decision and Order.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

Director, OWCP, 12 BLR 1-200 (1989)(*en banc*).

[2] Because the administrative law judge's length of coal mine employment finding and his findings that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), (3) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish 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 (1989).

Claimant initially contends that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Specifically, claimant asserts that the administrative law judge improperly relied on the qualifications of the physicians submitting negative x-ray readings, and the numerical superiority of the negative x-ray readings. The administrative law judge noted that "in Judge Wood's 2005 decision and order, she determined that based on the unanimously negative x-ray interpretations, [c]laimant did not suffer from pneumoconiosis under §718.202(a)(1)." Decision and Order at 7. The administrative law judge also noted that claimant did not submit any additional x-ray evidence. The administrative law judge therefore found that the preponderance of the x-ray evidence was negative for pneumoconiosis.

The record consists of the three interpretations of two x-rays dated January 11, 2002[3] and June 23, 2003. All of the x-ray readings were negative for pneumoconiosis. Director's Exhibits 8, 9, 25. Consequently, we reject claimant's assertion that the administrative law judge improperly relied on the qualifications of the physicians submitting negative x-ray readings, and the numerical superiority of the negative x-ray readings.[4] *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). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).

Claimant next contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The record consists of the reports of Drs. Baker and Dahhan. In a January 11, 2002 report, Dr. Baker opined that claimant has chronic obstructive

[3] Dr. Sargent, a B reader and a Board-certified radiologist, read the January 11, 2002 x-ray for quality only. Director's Exhibit 8.

[4] Claimant generally suggests that the administrative law judge may have selectively analyzed the x-ray evidence. Claimant provides no support for his contention, however, and the Decision and Order reflects that the administrative law judge properly considered all of the x-ray evidence, as discussed *supra*, without engaging in a selective analysis. Decision and Order at 7. Thus, we reject claimant's suggestion.

pulmonary disease and chronic bronchitis related to coal dust exposure. Director's Exhibit 8. In an attached form, however, Dr. Baker indicated that claimant does not have an occupational lung disease caused by his coal mine employment. *Id*. In a subsequent report dated June 5, 2006, Dr. Baker opined that claimant does not have either clinical pneumoconiosis or legal pneumoconiosis. Director's Exhibit 37. Dr. Dahhan opined that claimant does not have coal workers' pneumoconiosis. Director's Exhibit 25.

The administrative law judge initially gave little or no weight to Dr. Baker's January 11, 2002 opinion, because it was inconsistent, equivocal, and unreasoned. Decision and Order at 8. By contrast, the administrative law judge gave probative weight to Dr. Baker's June 5, 2006 opinion, because it was unequivocal and adequately supported by the underlying objective evidence. *Id*. The administrative law judge also gave probative weight to Dr. Dahhan's June 27, 2003 opinion, because it was adequately supported by the underlying objective evidence and, thus, well-reasoned and well-documented. *Id*. In addition, the administrative law judge gave probative weight to Dr. Dahhan's opinion based on his superior qualifications. *Id*. Consequently, the administrative law judge found that the preponderance of the medical opinion evidence did not establish the existence of pneumoconiosis. *Id*.

Claimant argues that the administrative law judge erred in discrediting Dr. Baker's January 11, 2002 opinion. In considering Dr. Baker's January 11, 2002 opinion, the administrative law judge noted that Judge Wood had found that it was inconsistent, equivocal, and unreasoned. The administrative law judge specifically stated:

> [Judge Wood] found that while [Dr. Baker] had articulated his basis for this diagnosis, he failed to state a reason for [attributing] [c]laimant's condition to coal dust exposure. (DX 29). In addition, she noted the contradiction in Dr. Baker's report concerning the etiology of an occupational lung disease. (DX 29). On appeal, the Board specifically affirmed Judge Wood's conclusion.

Decision and Order at 8. The administrative law judge then indicated that she concurred with Judge Wood's findings regarding Dr. Baker's January 11, 2002 opinion.

As the trier-of-fact, the administrative law judge has broad discretion to assess the evidence of record and determine whether a party has met its burden of proof. *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Because it was not unreasonable for the administrative law judge to agree with Judge Wood's finding that Dr. Baker's January 11, 2002 opinion was inconsistent, equivocal, and unreasoned, *see Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*), we reject claimant's

assertion that the administrative law judge erred in discrediting it. Furthermore, we reject claimant's assertion that the administrative law judge substituted his opinion for that of the physicians. Thus, because the administrative law judge properly discredited the only medical opinion of record that could support a finding of pneumoconiosis, we affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

In view of our affirmance of the administrative law judge's finding that the medical evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits.[5] *Anderson*, 12 BLR at 1-112.

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

[5] In view of our disposition of the case at 20 C.F.R. §718.202(a), we decline to address claimant's contentions at 20 C.F.R. §718.204(b)(2)(iv). *Larioni v. Director, OWCP*, 6 BLR at 1-1276 (1984).