

BRB No. 04-0773 BLA

CHARLES L. FRANCE)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
SHAMROCK COAL COMPANY)	
)	DATE ISSUED: 06/27/2005
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 Denying Claim of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd, PLLC), Washington, D.C., for employer.

Barry H. Joyner (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Claim (03-BLA-5937) of Administrative Law Judge Daniel F. Solomon 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 credited

claimant with eight years of coal mine employment, and adjudicated this subsequent claim pursuant to the regulations contained in 20 C.F.R. Part 718.¹ The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the newly submitted evidence insufficient to 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 evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Claimant next asserts that the administrative law judge erred in allowing employer to submit two x-ray rereadings of a single x-ray. 20 C.F.R. §725.414(a)(3)(ii). Claimant also challenges the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant additionally argues that he was not provided with a complete, credible pulmonary evaluation pursuant to 20 C.F.R. §725.406. *See* 30 U.S.C. §923(b). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, arguing that claimant's assertion that the administrative law judge erred in allowing employer to submit two rebuttal readings of an x-ray is without merit, and that the administrative law judge's Decision and Order is supported by substantial evidence. The Director further contends that, notwithstanding the fact that the administrative law judge permissibly credited medical opinions finding no totally disabling pulmonary impairment, the Director nonetheless satisfied his statutory obligation to provide claimant with a complete, credible pulmonary evaluation.²

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹ Claimant's first claim was filed on April 14, 1995. Director's Exhibit 40. It was denied for failure to establish any element of entitlement on September 12, 1995.

² Since the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§718.202(a)(2), (a)(3) and 718.204(b)(2)(i)-(iii) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-170 (1983).

Claimant first asserts that, in considering the evidence at 20 C.F.R. §718.202(a)(1), the administrative law judge ignored the limitations on evidence required by the regulations.³ Specifically, claimant argues that employer submitted, and the administrative law judge admitted into evidence, two readings in rebuttal of the positive reading of the September 14, 2001 x-ray by Dr. Hussain, which was provided by the Department of Labor. 20 C.F.R. §725.406(b); Director's Exhibit 12. Employer submitted Dr. Scott's negative interpretation of this x-ray as rebuttal evidence. 20 C.F.R. §725.414(a)(3)(ii); Director's Exhibit 25. However, contrary to claimant's suggestion, Dr. Broudy read as negative an x-ray dated July 23, 2002, not the September 14, 2001 x-ray. Director's Exhibit 22. Claimant is mistaken in suggesting that Dr. Broudy's interpretation was a rebuttal reading. Rather, this reading was submitted by employer as part of its affirmative case. 20 C.F.R. §725.414(a)(3)(i). Thus, we hold that the administrative law judge did not ignore the limitations on x-ray evidence mandated by the regulations.

³ The regulation at 20 C.F.R. §725.414, in conjunction with 20 C.F.R. §725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). The claimant and the party opposing entitlement may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), (a)(3)(iii). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406."³ 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (a)(3)(iii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id.* "Notwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Pursuant to Section 725.414(a)(5)(c), "[a] physician who prepared a medical report admitted under this section may testify with respect to the claim at any formal hearing . . . or by deposition." "Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

In challenging the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis, claimant asserts that an administrative law judge "need not defer to a doctor with superior qualifications and that an administrative law judge need not accept as conclusive the numerical superiority of the x-ray interpretations." Claimant's Brief at 3. Claimant also asserts that the administrative law judge "may have 'selectively analyzed' the x-ray evidence." Claimant's Brief at 4. In this case, the administrative law judge permissibly considered both the quality and quantity of the x-ray evidence in finding it insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).⁴ See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *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). Moreover, claimant has provided no support for his assertion that the administrative law judge "may have 'selectively analyzed' the x-ray evidence."

Claimant asserts that the Director failed to provide him with a complete, credible pulmonary evaluation, and thus claimant could not establish the existence of pneumoconiosis. Specifically, claimant asserts that the administrative law judge found Dr. Hussain's report to be well-documented, but not well-reasoned. As required by Section 413(b) of the Act, 30 U.S.C. §923(b), the Director has a statutory duty to provide claimant with a complete and credible pulmonary evaluation. *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). Claimant selected Dr. Hussain to perform a pulmonary examination on him. Dr. Hussain diagnosed pneumoconiosis and opined that claimant suffers from a mild impairment. Director's Exhibit 12. Dr. Hussain also opined that claimant has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. The administrative law judge did not discredit Dr. Hussain's opinion as devoid of any weight at all with respect to the issue

⁴ There are three relevant x-ray interpretations of record. The September 14, 2001 x-ray was read as 1/1 by Dr. Hussain, whose credentials are not of record, and as completely negative by Dr. Scott, a B reader and Board-certified radiologist, Director's Exhibits 12, 25. The July 23, 2002 x-ray was read only by Dr. Broudy, a B reader, as negative. Director's Exhibit 22. A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO/UC standards by successful completion of an examination established by the National Institute of Occupational Safety and Health. See 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16, *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

of pneumoconiosis. *See generally Cline v. Director, OWCP*, 972 F.2d 234, 14 BLR 2-102 (8th Cir. 1992). He merely found this opinion outweighed by the opinions of Drs. Fino and Broudy, who possessed superior qualifications.⁵ *See Scott v. Mason Coal Co.*, 14 BLR 1-38 (1990). The Director's obligation to provide claimant with a complete and credible pulmonary evaluation does not require him to provide claimant with the most persuasive medical opinion in the record. *See generally Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984). Thus, we reject claimant's assertion that the Director failed to fulfill his statutory obligation to provide a complete and credible pulmonary evaluation as required by Section 413(b) of the Act, 30 U.S.C. §923(b). *See* 20 C.F.R. §§718.101, 725.405(b).

Claimant next contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Specifically, claimant asserts that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine work with Dr. Hussain's assessment of claimant's impairment. Although Dr. Hussain opined that claimant suffers from a mild impairment, he also opined that claimant has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Director's Exhibit 12. Thus, we reject claimant's argument, as Dr. Hussain's opinion is insufficient to establish total disability. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991).

Claimant further contends that the administrative law judge "made no mention of claimant's age, education and work experience in conjunction with his assessment that claimant was not totally disabled." Claimant's Brief at 6. These factors, however, have no role in making disability determinations under Part C of the Act. *Ramey v. Kentland-Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985). Further, we reject claimant's assertion that the administrative law judge erred in failing to conclude that claimant's condition has worsened to the point that he is totally disabled since pneumoconiosis is a progressive and irreversible disease. The record contains no credited evidence that claimant has pneumoconiosis or is totally disabled from a respiratory impairment. 20 C.F.R. §§718.202(a), 718.204(b)(2).

Based on the foregoing, we affirm the administrative law judge's finding that the newly submitted medical opinions, including Dr. Hussain's opinion, are insufficient to

⁵ The administrative law judge found that Dr. Fino and Dr. Broudy are both Board-certified in internal medicine and in pulmonary disease. Decision and Order at 9; Director's Exhibit 22; Employer's Exhibit 6.

establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(iv), as it is supported by substantial evidence and is in accordance with law.

We further affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish a change in an applicable condition of entitlement under either 20 C.F.R. §718.202(a) or 20 C.F.R. §718.204(b)(2). 20 C.F.R. §725.309.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge