BRB No. 05-0886 BLA

GARY WAYNE BURKHART	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
SUN COAL COMPANY, C/O ACORDIA EMPLOYERS SERVICE	)	DATE ISSUED: 06/26/2006
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order-Denial of Benefits of Daniel J. Roketenetz, 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.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denial Benefits (04-BLA-5741) of Administrative Law Judge Daniel J. Roketenetz 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). Claimant filed his application for benefits on November 1, 2002. Director's Exhibit 3. The administrative law judge accepted the parties' stipulation to sixteen years of coal mine employment and found that claimant failed to establish the existence of pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant alleges that the administrative law judge erred in the evaluation of the x-ray evidence and in finding that claimant was not totally disabled pursuant to Sections 718.202(a)(1) and 718.204(b)(2)(iv). Claimant further argues that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete and credible pulmonary evaluation pursuant to 20 C.F.R. §725.406. Employer responds, urging affirmance of the denial of benefits. In response, the Director asserts that he will not file a substantive response addressing the merits of claimant's entitlement, but with respect to the issue of total disability concedes that Dr. Simpao's opinion is incomplete pursuant to 20 C.F.R.§725.456(e) because the physician failed to determine whether claimant's "mild impairment" would prevent him from performing his usual coal mine employment. Director's Brief at 1. The Director argues, however that Dr. Simpao's failure to comment on disability is harmless if the Board determines that the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis as an independent basis for denying the claim. The Director states that if the Board vacates the administrative law judge's findings on pneumoconiosis the record must be reopened to "augment Dr. Simpao's opinion on the disability record." Director's Brief at 1.[1]

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[1] The administrative law judge's length of coal mine employment determination, and his findings pursuant to 20 C.F.R. §§718.202(a)(2),(3) and 718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, BLR 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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*). 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); *Perry v. Director,* OWCP9 BLR 1-1 (1986) (*en banc*).

Pursuant to Section 718.202(a)(1), the administrative law judge reasonably found that the preponderance of the x-ray interpretations by the better qualified physicians was negative for the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1): Decision and Order at 8; *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995). The record contains six interpretations of four x-rays. The administrative law judge reasonably found that the January 3, 2003 x-ray was negative for pneumoconiosis because although it was interpreted positive for pneumoconiosis by Dr. Simpao, who holds no special radiological qualifications, Dr. Hayes, a B reader and Board-certified radiologist interpreted the x-ray as negative. *Id.;* Decision and Order at 6; Director's Exhibits 13, 24. The administrative law judge correctly found that the January 3, 2004 and June 14, 2004 x-rays were only interpreted as negative for pneumoconiosis by B readers, Drs. Dahhan and Rosenberg, and did not consider the x-ray included in claimant's medical records because it was not classified in "ILO" form or taken for the purpose of diagnosing pneumoconiosis. Decision and Order at 6; Director's Exhibits 31, 34; Employer's Exhibit 12. Because the administrative law judge permissibly considered both the quality and the quantity of the x-ray evidence in finding that it did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), claimant's arguments to the contrary lack merit. *See Staton*¸ 65 F.3d at 59-60, 19 BLR at 2-280; Claimant's Brief at 3.

Pursuant to Section 718.202(a)(4), the administrative law judge found that the reasoned and documented medical opinion evidence did not establish the existence of pneumoconiosis. The administrative law judge specifically found that Dr. Kilgore's reference to other physicians' diagnoses of pneumoconiosis was unreasoned and undocumented. Decision and Order at 11; Claimant's Exhibit 1. In contrast, he relied on the "well" reasoned and documented opinions of Drs. Dahhan and Rosenberg that claimant did not have pneumoconiosis. Decision and Order at 9-10; Director's Exhibit 34; Employer's Exhibits 1-3. These findings are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge further found that Dr. Simpao, who examined claimant on behalf of the Department of Labor, diagnosed small airway disease but failed to opine that the disease was chronic or due to coal mine employment. Decision and Order at 11; Director's Exhibit 13. The administrative law judge found that this

diagnosis did not constitute legal pneumoconiosis. Decision and Order at 11. Claimant did not contest these findings. However, claimant argues that the Director has failed to provide him with a complete, credible pulmonary evaluation to substantiate his claim as required under the Act. Claimant's Brief at 4. Employer argues that because claimant raised for the first time on appeal the issue that the Director failed to provide him with a complete and credible pulmonary evaluation the issue is waived. Employer further argues that Dr. Simpao addressed the elements of entitlement, including the issue of pneumoconiosis; therefore the Director provided him with a complete pulmonary evaluation. The Director concedes that Dr. Simpao's opinion is incomplete but only with respect to the issue of the extent of claimant's disability. Director's Brief at 1. The Director further asserts that Dr. Simpao's failure to comment on disability is harmless if the Board affirms the administrative law judge's finding that claimant also failed to prove he has pneumoconiosis, an independent basis for denying the claim. *Id.*

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), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-88 n.3 (1994); *see also Newman v. Director, OWCP*, 745 F. 2d 1162, 7 BLR 2-25 (8th Cir. 1984).

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 13; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). On the issue of the existence of pneumoconiosis, the administrative law judge found that Dr. Simpao's diagnosis of clinical pneumoconiosis was based on a positive x-ray reading that the administrative law judge found was re-read as negative by a higher-qualified physician. The administrative law judge further found that Dr. Simpao's diagnosis of small airway disease was insufficient to constitute legal pneumoconiosis because the doctor did not state the disease was chronic or due to coal mine employment pursuant to Section 718.201(a)(2). *Id.* Decision and Order at 11. By contrast, the administrative law judge found better documented and reasoned the opinions of Drs. Rosenberg and Dahhan that claimant does not have pneumoconiosis. Decision and Order at 11; *see Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999)(explaining that "ALJs may evaluate the relative merits of conflicting physicians' opinions and choose to credit one . . . over the other"). Because the administrative law judge found Dr. Simpao's report outweighed, there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation on the issue of the existence

of pneumoconiosis. *Cf. Hodges*, 18 BLR at 1-88 n.3; *see* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.406; *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*).

Because claimant does not otherwise challenge the administrative law judge's weighing of the medical opinion evidence and crediting of the opinions of Drs. Rosenberg and Dahhan, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

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 administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112. Consequently, error, if any, regarding the administrative law judge findings on total disability is harmless.

Accordingly, the administrative law judge's Decision and Order-Denial of Benefits is affirmed.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge