BRB No. 04-0209 BLA

GARY D. RICE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RAMEY TRUCKING	)	
	)	DATE ISSUED: 09/28/2004
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.

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

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order of Administrative Law Judge Stuart A. Levin denying benefits 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 claim for benefits on April 3, 2001. After crediting claimant with twenty years of coal mine employment, the administrative law judge considered entitlement pursuant to the applicable regulations at 20 C.F.R. Part 718. The administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that, while claimant established total disability pursuant to 20 C.F.R. §718.204(b), he failed to establish disability causation pursuant to 20 C.F.R. §718.204(c). Accordingly, he denied benefits. On appeal, claimant contends that the administrative law judge improperly denied benefits, challenging the administrative law judge's findings under Sections 718.202(a)(1), (a)(4) and 718.204(c). Employer has not filed a response

brief. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend to participate in this appeal.[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 rational, supported by substantial evidence, and 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).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In challenging the administrative law judge's weighing of the x-ray evidence of record under Section 718.202(a)(1), claimant argues that the administrative law judge erred in finding that the negative x-ray interpretations of record outweigh Dr. Simpao's positive reading of the film dated May 29, 2001, the sole positive x-ray reading of record. Claimant argues that the administrative law judge improperly relied on the qualifications of the physicians submitting the negative interpretations, and the numerical superiority of the negative readings. Claimant's contention is without merit. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge must consider the quantity of the evidence in light of the difference in qualifications of the readers. *See Staton v. Norfolk & Western Railroad 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). In this case, the administrative law judge properly found that Dr. Simpao's positive reading of the May 29, 2001 was outweighed by Dr. Wiot's negative reading of the film, since Dr. Wiot is a B reader and Board-certified radiologist, in contrast to Dr. Simpao, who possesses neither qualification. *See Staton*, 65 F.3d at 59, 19 BLR at 2-280; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; Decision and Order at 4; Director's Exhibit 7; Employer's Exhibit 1. The administrative law judge also properly found that the other two interpretations of the May 29, 2001 film, by Drs. Sargent and Harrison, do not contradict Dr. Wiot's negative interpretation of the film inasmuch as

[1]We affirm, as unchallenged on appeal, the administrative law judge's finding of twenty years of coal mine employment, and findings that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (a)(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 2, 4-5.

they do not indicate the presence of pneumoconiosis.[2] Decision and Order at 4; Director's Exhibits 7, 10. Furthermore, the administrative law judge correctly found that the remaining x-ray reading of record, Dr. Dahhan's interpretation of a film dated May 13, 2003, is negative for the disease. Decision and Order at 4; Employer's Exhibit 2. Because it is supported by substantial evidence and is in accordance with law, we affirm the administrative law judge's finding that the x-ray evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).[3] *See Staton*, 65 F.3d at 59, 19 BLR at 2-280; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); Decision and Order at 4; Director's Exhibits 7, 10; Employer's Exhibits 1, 2.

In challenging the administrative law judge's findings with regard to the medical opinion evidence under Section 718.202(a)(4), claimant argues that the administrative law judge erred in rejecting Dr. Simpao's examination report, dated May 29, 2001. Specifically, claimant asserts that the administrative law judge erred in discounting Dr. Simpao's report on the ground that it was based upon a positive x-ray reading which conflicted with the administrative law judge's determination that the weight of the x-ray evidence was negative. Claimant suggests that the administrative law judge thereby improperly substituted his opinion for Dr. Simpao's opinion, and asserts that it was error for the administrative law judge not to find the opinion to be reasoned and documented in view of the fact that the doctor based his diagnosis of pneumoconiosis not only upon a positive x-ray reading, but also upon a physical examination, pulmonary function study, and medical and work histories. Claimant also contends that Dr. Simpao's opinion should have been credited because the doctor is Board-certified in internal medicine and pulmonary medicine. Claimant's contentions lack merit.

The administrative law judge considered the two medical opinions of record relevant to the issue of the existence of pneumoconiosis under Section 718.202(a)(4) –

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[2]Dr. Sargent, a B reader/Board-certified radiologist, indicated that the May 29, 2001 film was a "quality three" film, and stated that the film showed "processing mottling," "questionable cardiomegaly," and "questionable calcified nodes right." Director's Exhibit 10. Dr. Harrison did not diagnose pneumoconiosis, and indicated that the May 29, 2001 film showed "mild chronic pulmonary parenchymal/interstitial changes," and "mild pleural thickening left hemithorax." Director's Exhibit 7.

[3]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 4. Thus, we reject claimant's suggestion.

i.e., the conflicting opinions of Drs. Simpao and Dahhan. Decision and Order at 5-6; Director's Exhibit 7; Employer's Exhibit 2. Dr. Simpao examined claimant on May 29, 2001, and diagnosed pneumoconiosis based on his 1/1 x-ray reading and claimant's twenty-one to twenty-three years of coal dust exposure. Director's Exhibit 7. Dr. Dahhan examined claimant on May 13, 2003, and concluded that claimant does not have pneumoconiosis, but has chronic obstructive pulmonary disease resulting from his thirty-four year cigarette smoking history. Employer's Exhibit 2. The administrative law judge noted that both physicians are Board-certified pulmonary specialists, and reasonably concluded that the qualifications of the physicians thus did not provide a basis upon which to credit one opinion over the other. Decision and Order at 6; Claimant's Exhibit 1; Employer's Exhibit 2. Contrary to claimant's contention, the administrative law judge properly discounted Dr. Simpao's opinion, however, because Dr. Simpao based his opinion on his positive reading of the May 29, 2001 x-ray, which was reread as negative by Dr. Wiot, a physician with superior radiological qualifications, as discussed *supra*. *Winters v. Director, OWCP*, 6 BLR 1-877 (1984); Decision and Order at 6; Director's Exhibit 7. The administrative law judge also properly discounted Dr. Simpao's opinion on the basis that it was not as well supported and thorough as Dr. Dahhan's report. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); Decision and Order at 6; Director's Exhibit 7; Employer's Exhibit 2. In this regard, the administrative law judge determined that, while both physicians noted a similar coal mine employment history in excess of twenty years, Dr. Simpao did not discuss claimant's extensive and continued smoking history, whereas Dr. Dahhan explained how claimant's objective studies and carboxyhemoglobin levels support a conclusion that claimant's disease and impairment are due to cigarette smoking. *Id*. We affirm, therefore, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a)(4).

Because we affirm the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4), a requisite element of entitlement under Part 718, we affirm the administrative law judge's denial of benefits. *See Trent*, 11 BLR at 1-27; *Gee*, 9 BLR at 1-5; *Perry*, 9 BLR at 1-2. We need not address, therefore, claimant's contentions with regard to disability causation under Section 718.204(c).

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

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge