

BRB No. 05-0356 BLA

WILBERN MADON, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLEDSOE COAL CORPORATION	)	DATE ISSUED: 09/23/2005
	)	
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 Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

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

Sarah M. Hurley (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 (03-BLA-5933) of Administrative Law Judge Daniel F. Solomon 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 a claim for benefits on October 3, 2001. Director's

Exhibit 3. The district director issued a Proposed Decision and Order denying benefits on March 19, 2003. Director's Exhibit 30. Claimant requested a hearing, which was held on May 27, 2004. In his Decision and Order dated December 9, 2004, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

Claimant appeals, arguing that the administrative law judge erred in weighing the x-ray and medical opinions relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4). Claimant maintains that the administrative law judge erred in considering x-ray readings proffered by employer in excess of the evidentiary limitations. Claimant further asserts that, because the administrative law judge refused to assign probative weight to the opinion of the Department of Labor examining physician, Dr. Simpao, that claimant has pneumoconiosis, then the Department of Labor failed to provide claimant with a complete, credible pulmonary evaluation as required by Section 413(b) of the Act, 30 U.S.C. §923(b). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has also filed a brief, arguing that the Department of Labor satisfied its obligation to provide claimant with a complete, credible pulmonary evaluation.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). After consideration of the administrative law judge's Decision and Order, and the issues and arguments raised by the parties on appeal, we affirm as supported by substantial evidence the administrative law judge's denial of benefits.

Claimant asserts on appeal that the administrative law judge "may have" selectively analyzed the x-ray evidence at 20 C.F.R. §718.202(a)(1).<sup>1</sup> Claimant's Brief at 3. We disagree. In this case, the administrative law judge properly noted that the record contained eight readings of four x-rays dated November 10, 2001, November 29, 2001, February 1, 2002, and November 12, 2003. Of these eight readings, there were two

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<sup>1</sup> Because there was no biopsy evidence of record, the administrative law judge found that claimant was unable to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2). Decision and Order at 10. He also determined that claimant was unable to avail himself of any of the presumptions for establishing the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3). *Id.* The administrative law judge's findings with respect to Sections 718.202(a)(2), (3) are affirmed as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

positive readings for pneumoconiosis, five negative readings, and one quality reading. Decision and Order at 9-10. The administrative law judge specifically noted that the November 10, 2001 x-ray was read as positive by Dr. Baker, a B-reader, and negative by Dr. Hayes, a dually qualified Board-certified radiologist and B-reader. Director's Exhibits 14, 16; Decision and Order at 10. Similarly, the November 29, 2001 x-ray was read as positive by Dr. Simpao, an A-reader, but negative by Dr. Hayes. Director's Exhibits 13, 17; Decision and Order at 10. Taking into consideration the conflicting x-ray readings in light of the credentials of the readers, the administrative law judge permissibly chose to credit Dr. Hayes negative readings based on his dual qualifications and thus found that the November 10 and November 29, 2001 x-rays were negative for pneumoconiosis.<sup>2</sup> 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); Decision and Order at 10. The administrative law judge further noted that the remaining x-rays dated February 1, 2002 and November 12, 2003 were also negative for pneumoconiosis. Decision and Order at 10. Consequently, because substantial evidence supports the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis based on the x-ray evidence, the administrative law judge's finding at 20 C.F.R. §718.202(a)(1) is affirmed.<sup>3</sup>

We also reject claimant's argument that the administrative law judge erred in his consideration of Dr. Baker's opinion at 20 C.F.R. §718.202(a)(4) relevant to the existence of pneumoconiosis. Despite Dr. Baker's status as claimant's treating physician, the administrative law judge permissibly assigned less probative weight to Dr. Baker's

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<sup>2</sup> Because claimant's last coal mine employment occurred in Kentucky, this claim arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

<sup>3</sup> Claimant argues that the administrative law judge erred in admitting into the record three x-rays readings proffered by employer in support of its affirmative case, and in excess of the evidentiary limitations provided at 20 C.F.R. §725.414(a)(3)(i), which permit employer to submit only two readings in support of its affirmative case. Employer concedes that Dr. Wiot's negative reading of the February 1, 2002 x-ray was improperly considered by the administrative law judge. Employer's Brief at 8; Director's Exhibit 15. However, even if Dr. Wiot's reading were excluded from the record, the weight of the evidence as determined by the administrative law judge would not shift in claimant's favor. The negative readings by the dually qualified reader, Dr. Hayes, would still be entitled to controlling weight; and thus, the preponderance of the x-ray evidence would remain negative for pneumoconiosis at 20 C.F.R. §718.202(a)(1). Consequently, we hold that any error committed by the administrative law judge in considering Dr. Wiot's reading was harmless. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

opinion, that claimant has pneumoconiosis, as the administrative law judge found that Dr. Baker offered no explanation for his diagnosis of pneumoconiosis, other than his own positive-x-ray reading of claimant's November 10, 2001 x-ray, which had been rejected by the administrative law judge at Section 718.202(a)(1),<sup>4</sup> and claimant's history of coal dust exposure. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); 20 C.F.R. §718.101(d)(5); Director's Exhibit 14; Decision and Order at 11. Conversely, the administrative law judge properly credited the opinions of Drs. Broudy and Repsher, that claimant did not have pneumoconiosis, since he found their opinions were better reasoned and better supported by the objective evidence. *See King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Employer's Exhibits 1, 2; Decision and Order at 11. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).<sup>5</sup>

Lastly, we reject claimant's assertion that he is entitled to a new pulmonary evaluation pursuant to 20 C.F.R. §725.406.<sup>6</sup> Contrary to claimant's contention, the Director's obligation to provide him with a complete and credible pulmonary evaluation is not tantamount to an obligation to provide claimant with an examining physician's opinion that is given controlling weight by the administrative law judge. Director's Exhibit 23; Decision and Order at 10. Claimant is not entitled to a new pulmonary examination simply because the administrative law judge found Dr. Simpao's opinion on the existence of pneumoconiosis was outweighed by the contrary and better reasoned opinions of Drs. Broudy and Repsher, who opined that claimant did not have pneumoconiosis. To the extent that the administrative law judge considered Dr. Simpao to be a credible physician, who offered an opinion on the requisite elements of

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<sup>4</sup> The administrative law judge reiterated that it was more reasonable to conclude that claimant did not have x-ray evidence for pneumoconiosis based on the negative readings by physicians who were more qualified than Dr. Baker. Decision and Order at 11.

<sup>5</sup> Claimant does not challenge the weight accorded Dr. Simpao's opinion at 20 C.F.R. §718.202(a)(4).

<sup>6</sup> The Department of Labor has a statutory duty to provide a miner with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate the claim. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994).

entitlement in claimant's case, we find no basis for remanding the case for a new pulmonary evaluation. We thus hold that the Director satisfied his obligation under the Act to provide claimant with a complete and credible pulmonary evaluation. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Cline v. Director, OWCP*, 917 F.2d 9, 14 BLR 2-102 (8th Cir. 1992); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994).

Accordingly, the Decision and Order denying benefits of the administrative law judge is hereby 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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JUDITH S. BOGGS  
Administrative Appeals Judge