

BRB No. 04-0185 BLA

JOHN W. WELLS)
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 Claimant-Petitioner)
)
 v.)
)
 WHITAKER COAL CORPORATION)
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 and)
)
 SUN COAL COMPANY, INCORPORATED) DATE ISSUED: 08/20/2004
)
 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 Denying Benefits of Alice M. Craft,
Administrative Law Judge, United States Department of Labor.

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

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

Helen H. Cox (Howard 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2003-BLA-5261) of Administrative Law Judge Alice M. Craft 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). The administrative law judge credited claimant with twenty-five years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718, based on claimant's May 3, 2001 filing date.¹ Addressing the merits of entitlement, the administrative law judge found that the medical evidence of record was insufficient to establish either the existence of pneumoconiosis or the presence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a) and 718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings under Sections 718.202(a)(1), (4) and 718.204(b)(2)(iv), and argues that the administrative law judge did not comply with the evidentiary limitations set forth in 20 C.F.R. §725.414(3)(i). In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that he will not file a response brief on the merits of this appeal.² However, the Director notes that any error regarding Section 725.414(3)(i) is harmless.

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

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² The parties do not challenge the administrative law judge's decision to credit claimant with twenty-five years of coal mine employment, or his findings pursuant to 20 C.F.R. §718.202(a)(2), (3) and 718.204(b)(2)(i)-(iii). These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant contends that the administrative law judge "selectively analyzed" the x-ray evidence, that he erred in finding the x-ray evidence of record insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), and erred in considering two rebuttal interpretations of the x-ray taken on May 16, 2001 in violation of Section 725.414(a)(3)(ii). These contentions are without merit. The administrative law judge noted that Dr. Baker, who has no special radiological qualifications, characterized the May 16, 2001 x-ray as positive, while Drs. Barrett and Hayes, both Board-certified radiologists and B readers, found the same x-ray to be negative for pneumoconiosis. Decision and Order Denying Benefits at 11; Director's Exhibits 12, 22. Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge properly determined that this film was negative based upon the superior qualifications of Drs. Barrett and Hayes. Decision and Order Denying Benefits at 11. *Id.*; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Scott v. Mason Coal Co*, 14 BLR 1-37 (1990) (*en banc recon.*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Although the administrative law judge erred in admitting an additional rebuttal re-reading of the May 16, 2001 x-ray, in violation of the regulations pursuant to 20 C.F.R. §724.414(a)(3)(ii), her reliance upon the respective qualifications of the physicians to resolve the conflicting interpretations renders the error harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Similarly, the administrative law judge found that Dr. Hussain, who has no special radiographic qualifications, read the September 26, 2001 x-ray positive at stage 2/2, while Dr. Wheeler, who is a Board-certified radiologist and a B reader, found the same x-ray negative for pneumoconiosis. Decision and Order Denying Benefits at 11; Director's Exhibits 9, 22. The administrative law judge rationally found the September 26, 2001 x-ray negative for pneumoconiosis based on the superior qualifications of Dr. Wheeler. 20 C.F.R. §718.202(a)(1); *Adkins*, 958 F.2d 49, 16 BLR 2-61; *Scott*, 14 BLR 1-37; *Clark*, 12 BLR 1-149. Thus, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Under Section 718.202(a)(4), claimant argues that the administrative law judge erred in finding the medical opinion evidence of record insufficient to establish the existence of pneumoconiosis. Claimant contends that the reports of Drs. Baker and

Hussain are well documented and well reasoned and that in rejecting their reports, the administrative law judge stated that the physician's opinions were based merely upon their x-ray interpretations. Claimant asserts that in addition to claimant's positive x-ray, Drs. Baker and Hussain based their diagnoses of pneumoconiosis on a physical examination, claimant's symptoms, the results of blood gas and pulmonary function studies, and a review of claimant's medical and work histories.

The administrative law judge acknowledged that Drs. Baker and Hussain examined claimant, that Dr. Baker has been claimant's treating physician since 2001 and that their opinions recorded claimant's occupational and smoking histories and the results of claimant's physical examination, x-ray, pulmonary function and blood gas studies. Decision and Order Denying Benefits at 8, 13. However, the administrative law judge permissibly discredited the diagnoses of coal workers' pneumoconiosis rendered by Drs. Baker and Hussain because he found that they were merely restatements of x-ray opinions, noting that neither physician offered any explanation for his diagnosis of pneumoconiosis other than his own x-ray interpretation and claimant's length of coal dust exposure.³ Decision and Order Denying Benefits at 13; Director's Exhibits 9, 14; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

In addition, the administrative law judge acted within his discretion in according greater weight to the contrary opinions of Drs. Dahhan and Rosenberg because in addition to possessing "excellent credentials" and examining claimant, they "better explained" how the evidence supported their conclusion, and their opinions are in "better accord" with the evidence of record. Decision and Order Denying Benefits at 13; *Clark*, 12 BLR 1-149; *Fields v. Island Creek Coal Co.* 10 BLR 1-19 (1987). Specifically, the administrative law judge determined that the x-ray evidence as a whole was negative, that the consulting opinion of Dr. Vuskovich supported the finding that claimant does not suffer from pneumoconiosis, and that claimant's treatment records from the Lexington Clinic and Dr. Chaney failed to disclose a diagnosis or treatment of any lung condition. *Id.*; Employer's Exhibits 1, 5, 9, 12. Therefore, the administrative law judge acted rationally in according greater weight to the opinions of Drs. Dahhan and Rosenberg and in finding that the medical opinion evidence does not establish the existence of pneumoconiosis under Section 718.202(a)(4).

³ Dr. Baker diagnosed "Coal Worker's Pneumoconiosis Category 1/0, on basis of 1980 ILO Classification-based on abnormal x-rays and significant history of coal dust." Director's Exhibit 14. Dr. Hussain determined that the basis of his diagnosis was "x-ray findings, history of exposure." Director's Exhibit 9.

Because claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), an award of benefits pursuant to 20 C.F.R. Part 718 is precluded. We need not address, therefore, claimant's arguments under Section 718.204(b)(2)(iv). *See Anderson*, 12 BLR 1-111(1989); *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge