BRB No. 07-0160 BLA

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| G.H.<br><br>Claimant-Petitioner<br><br>v.<br><br>SHAMROCK COAL COMPANY, INCORPORATED<br><br>and<br><br>SUN COAL COMPANY, INCORPORATED<br>c/o ACORDIA EMPLOYERS SERVICE<br><br>Employer/Carriers-<br>Respondents<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED: 08/29/2007<br><br>DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, 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/carriers.

Barry H. Joyner (Jonathan L. Snare, Acting 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (05-BLA-5448) of Administrative Law Judge Robert D. Kaplan on a claim[1] 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 initially credited claimant with thirteen years and three months of qualifying coal mine employment. Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total respiratory disability pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis established by x-ray evidence under Section 718.202(a)(1) and total respiratory disability established under Section 718.204(b)(2)(iv). Claimant additionally contends that the administrative law judge discredited the medical opinion regarding total respiratory disability of Dr. Simpao, the physician who examined him at the behest of the Department of Labor. Claimant contends, therefore, that the Director, Office of Workers' Compensation Programs (the Director), has failed to provide claimant with a complete and credible pulmonary evaluation, necessary to substantiate his claim, as required by Section 413(b) of the Act, 30 U.S.C. §923(b). In response, employer urges affirmance of the denial of benefits. The Director, as party-in-interest, also responds, arguing that he has satisfied his obligation to provide claimant with a complete, credible pulmonary evaluation, as required by the Act.[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 the applicable law, they are binding upon this Board and

[1] Claimant filed an application for benefits on August 21, 2003. Director's Exhibit 2.

[2] We affirm the administrative law judge's determinations regarding length of coal mine employment and pursuant to 20 C.F.R. §§718.202(a)(2)-(a)(4), 718.204(b)(2)(i)-(iii), as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 7, 9, 12-14.

may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).[3]

In challenging the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1), claimant argues that the administrative law judge erred by placing substantial weight on the numerical superiority of the negative x-ray interpretations and by relying exclusively on the qualifications of the physicians providing those x-ray interpretations. Claimant contends that the administrative law judge is not required either to defer to a physician with superior qualifications or to accept as conclusive the numerical superiority of x-ray interpretations. Claimant further contends that the administrative law judge "may have selectively analyzed" the x-ray evidence.

Contrary to claimant's argument, however, where x-ray evidence is in conflict, consideration shall be given to the readers' radiological qualifications. 20 C.F.R. §718.202(a)(1). The administrative law judge, therefore, properly considered the radiological qualifications of the physicians in weighing the x-ray readings. The administrative law judge properly found that the sole positive interpretation of Dr. Simpao, who possessed no radiological qualifications or expertise, was outweighed by the negative interpretations of Dr. Scott, a Board-certified radiologist and B reader, and Drs. Rosenberg and Broudy, B readers, whose negative interpretations were uncontroverted. This was rational. 20 C.F.R. §718.202(a)(1); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 9; Director's Exhibits 14, 29, 33; Employer's Exhibits 1, 2. Because the administrative law judge's analysis constitutes a qualitative and quantitative analysis of the x-ray evidence, we affirm his weighing of the conflicting readings and his resultant finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See 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. 1994). In addition, we reject claimant's contention that the administrative law judge "may have selectively analyzed" the x-ray evidence, since claimant has not provided any support for that assertion, nor does a review of the evidence and the administrative law judge's Decision and Order reveal that he engaged in a selective analysis of the x-ray evidence. *See White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-4 (2004).

[3] 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*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 2.

Claimant also argues that the Director has failed to provide him with a complete, credible pulmonary evaluation, in light of the fact that the administrative law judge found that Dr. Simpao made no finding on whether or not claimant was totally disabled. We agree with the Director's assertion that since claimant did not challenge the propriety of Dr. Simpao's opinion concerning the existence of pneumoconiosis and claimant did not challenge the administrative law judge's determination that the existence of pneumoconiosis was not established under Section 718.202(a)(4), entitlement to benefits is precluded. Thus, remand of the case for a complete pulmonary evaluation is not necessary as the outcome of the case would not be affected.

Because we affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement under Part 718, entitlement to benefits is precluded, and we need not consider claimant's argument regarding total respiratory disability at Section 718.204(b)(2)(iv). *See* 20 C.F.R. §718.204(b)(2); *Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*).

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is 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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BETTY JEAN HALL
Administrative Appeals Judge