

BRB No. 07-0397 BLA

E.P.)
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 Claimant-Petitioner)
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 v.)
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 BLEDSOE COAL CORPORATION) DATE ISSUED: 01/17/2008
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 and)
)
 JAMES RIVER COAL COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
 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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

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

Helen H. Cox (Gregory F. Jacob, 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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.
PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (04-BLA-5376) of Administrative Law Judge Joseph E. Kane 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 claim for benefits on August 15, 2001. Director's Exhibit 2. The administrative law judge credited claimant with twenty-three years of coal mine employment.¹ Decision and Order at 3. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that claimant did not establish the existence of pneumoconiosis or that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in admitting into the record x-ray interpretations and medical reports that claimant alleges were in excess of the evidentiary limitations of 20 C.F.R. §725.414. Claimant further asserts that the administrative law judge erred in finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4),² and total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete and credible pulmonary evaluation sufficient to substantiate his claim. Employer responds, urging affirmance of the denial of benefits. The Director responds, asserting that the Board should reject claimant's argument that the case must be remanded to the district director for a complete 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising

¹ The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

² Because claimant does not challenge the administrative law judge's findings that the existence of pneumoconiosis was not established at 20 C.F.R. §718.202(a)(2), (3), we affirm them. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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).

Pursuant to 20 C.F.R. §725.414, claimant contends that the administrative law judge erred in allowing employer to submit four x-ray interpretations in support of its affirmative case, as employer may submit only two such x-ray interpretations pursuant to 20 C.F.R. §725.414(a).³ Claimant's contention lacks merit. The applicable provisions of 20 C.F.R. §725.414 entitled employer to submit, in its affirmative case, "no more than two chest X-ray interpretations," and, "in rebuttal of the case presented by the claimant, no more than one physician's interpretation of each chest X-ray . . . submitted by the claimant . . . and by the Director pursuant to § 725.406." 20 C.F.R. §725.414(a)(3)(i),(ii). The record reflects that employer submitted Dr. Broudy's interpretation of a December 21, 2001 x-ray and Dr. Rosenberg's interpretation of a February 17, 2004 x-ray, in support of its affirmative case. Employer's Exhibits 1, 2; Employer's Proposed Evidence Summary Form, Aug. 11, 2006; Administrative Law Judge Exhibit 2. Further, employer submitted Dr. Wiot's rebuttal interpretations of the November 3, 2001 and March 11, 2002 x-rays that claimant had submitted in his affirmative case. Director's Exhibits 25,

³ Section 725.414, in conjunction with 20 C.F.R. §725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). The claimant and the party opposing entitlement may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id.* "Notwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

26. Finally, employer submitted Dr. Wiot's rebuttal interpretation of the September 25, 2001 x-ray submitted by the Director pursuant to 20 C.F.R. §725.406 in connection with claimant's complete pulmonary evaluation. Director's Exhibit 26; Administrative Law Judge Exhibit 2. Thus, contrary to claimant's contention, the administrative law judge properly admitted employer's x-ray evidence pursuant to 20 C.F.R. §725.414.

Claimant further contends that the administrative law judge erred in allowing employer to submit three medical reports in support of its affirmative case. Claimant's contention has no merit. Employer was entitled to submit in support of its affirmative case "no more than two medical reports." 20 C.F.R. §725.414(a)(3)(i). Contrary to claimant's contention, employer submitted and the administrative law judge admitted only two affirmative medical reports, by Drs. Broudy and Rosenberg. Director's Exhibits 28, 29; Employer's Exhibits 1, 2. The third medical report to which claimant refers in his brief was prepared by Dr. Dahhan and was submitted by the Director as part of claimant's complete pulmonary evaluation. Director's Exhibit 10. Therefore, we reject claimant's arguments that the administrative law judge erred in his application of 20 C.F.R. §725.414(a), and we turn to the administrative law judge's consideration of the medical evidence.

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered nine readings of five x-rays. The administrative law judge noted that Dr. Dahhan, a B reader, and Dr. Wiot, a B reader and Board-certified radiologist, read the September 25, 2001 x-ray as negative for pneumoconiosis, while Dr. Alexander, a B reader and Board-certified radiologist, read the same x-ray as positive for pneumoconiosis. Director's Exhibits 10, 13, 23, 26. The administrative law judge found the September 25, 2001 x-ray to be equivocal, based upon the contrary readings by Drs. Wiot and Alexander, who possessed identical radiological qualifications. The administrative law judge also noted that Dr. Baker, a physician with no special radiological qualifications at the time of his x-ray reading, read the November 3, 2001 x-ray as positive for pneumoconiosis, while Dr. Wiot, a B reader and Board-certified radiologist, read the same x-ray as negative for pneumoconiosis. Based upon Dr. Wiot's superior radiological qualifications, the administrative law judge found the November 3, 2001 x-ray to be negative for pneumoconiosis. The administrative law judge also noted that Dr. Broudy, a B reader, read the December 21, 2001 x-ray as negative for pneumoconiosis, and his reading was uncontradicted. Employer's Exhibit 1. The administrative law judge therefore found this x-ray to be negative for pneumoconiosis. The administrative law judge additionally considered that Dr. Simpao, a physician with no radiological qualifications, read the March 11, 2002 x-ray as positive for pneumoconiosis, while Dr. Wiot, a B reader and Board-certified radiologist, read the same x-ray as negative for pneumoconiosis. Director's Exhibits 13, 23, 26. Based upon Dr. Wiot's superior qualifications, the administrative law judge found the March 11, 2002 x-ray to be negative for pneumoconiosis. Finally, the administrative law judge noted that Dr. Rosenberg, a B

reader, read the February 17, 2004 x-ray as negative for pneumoconiosis, and his reading was uncontradicted. Employer's Exhibit 2. The administrative law judge therefore found this x-ray to be negative for pneumoconiosis. Having determined that four of the x-rays were negative and one was equivocal for pneumoconiosis, the administrative law judge found that the "preponderance of the negative x-ray readings outweigh the positive readings. Therefore, pneumoconiosis has not been established under Section 718.202(a)(1)." Decision and Order at 9.

The administrative law judge based his finding on a proper qualitative analysis of the x-ray evidence. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, merely counted the negative readings, and "may have 'selectively analyzed'" the readings, lack merit. Claimant's Brief at 3. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered five medical reports. Drs. Baker and Simpao opined that claimant suffers from pneumoconiosis, while Drs. Dahhan, Broudy, and Rosenberg concluded that claimant does not have pneumoconiosis. Director's Exhibits 10, 12, 23, 28, 29; Employer's Exhibits 1, 2, 5. The administrative law judge found that Dr. Simpao's diagnosis of pneumoconiosis was well reasoned and documented, as it was based on claimant's history of coal dust exposure, chest x-ray, blood gas study, symptomatology and physical findings. Decision and Order at 10. Further, the administrative law judge explained that he discounted Dr. Baker's diagnosis of clinical pneumoconiosis, as it was based solely on Dr. Baker's own x-ray reading and claimant's coal dust exposure history, and Dr. Baker failed to otherwise explain how the results of objective tests supported his diagnosis of pneumoconiosis. *Id.* The administrative law judge also noted that, although Dr. Baker diagnosed chronic bronchitis related to coal dust exposure, Dr. Baker failed to explain the diagnosis other than to reference claimant's history of symptoms and to state that claimant was a nonsmoker. *Id.* By contrast, the administrative law judge found that the opinions of Drs. Dahhan, Broudy, and Rosenberg, that claimant does not have clinical or legal pneumoconiosis, were better reasoned and documented. He therefore found that the opinions of Drs. Dahhan, Broudy, and Rosenberg outweighed those of Drs. Baker and Simpao.

Claimant contends that the administrative law judge erred in discounting Dr. Baker's opinion as based on a positive x-ray reading that was "contrary to the [administrative law judge's] findings." Claimant's Brief at 5. Contrary to claimant's contention, the administrative law judge reasonably discounted Dr. Baker's diagnosis of "Coal Workers Pneumoconiosis, category 1/0," since it was based only on Dr. Baker's

own x-ray reading, which the administrative law judge had found outweighed by a negative reading from a more highly qualified physician, and a reference to claimant's coal dust exposure history. Decision and Order at 10; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-10 (6th Cir. 2000). The administrative law judge also permissibly found that Dr. Baker failed to otherwise explain how the documentation underlying his report supported his diagnosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR at 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Moreover, the administrative law judge went on to consider Dr. Baker's diagnosis of chronic bronchitis related to coal dust exposure, but found, within his discretion, that it did not establish legal pneumoconiosis,⁴ as Dr. Baker based the diagnosis solely on claimant's history, and failed to explain how the documentation supported his diagnosis. *See Cornett*, 227 F.3d at 569, 22 BLR at 2-10; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Claimant additionally contends that Dr. Baker's opinion was reasoned and documented and should not have been discredited. Claimant's Brief at 5. Claimant essentially requests a reweighing of the evidence, which the Board is not authorized to do. *Anderson*, 12 BLR at 1-113. Substantial evidence supports the administrative law judge's permissible determination that the opinion of Dr. Baker was not as well-reasoned or supported as the contrary opinions of Drs. Dahhan, Broudy, and Rosenberg. Consequently, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

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 judge's denial of benefits. *Anderson*, 12 BLR at 1-112; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*). Consequently, we need not address claimant's arguments concerning the administrative law judge's finding that claimant did not establish that he is totally disabled.

Claimant also contends that he is entitled to a remand of the case to the district director for the Director to provide him with a complete and credible pulmonary evaluation, because the administrative law judge found that "Dr. Simpao's report was unreasoned and undocumented as to the issue of total disability." Claimant's Brief at 6. However, as the Director responds, this contention lacks merit. Dr. Simpao's opinion was obtained and submitted by claimant, not the Director. Director's Brief at 2.

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

⁴ "Legal" pneumoconiosis includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

evaluation.” 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994). As the Director notes, claimant selected Dr. Dahhan to provide his Department of Labor sponsored pulmonary evaluation. Director’s Exhibit 9. The record reflects that Dr. Dahhan 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 11; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). Based on claimant’s history of coal dust exposure, chest x-ray, blood gas study, pulmonary function study, symptoms, and physical examination, Dr. Dahhan opined that the claimant has no respiratory impairment or occupational lung disease related to coal mine employment and has the respiratory capacity to perform the work of a coal miner. Director’s Exhibit 10. The administrative law judge found that Dr. Dahhan’s opinion was well reasoned and well documented, and he credited it. In sum, we agree with the Director that he satisfied his obligation to provide claimant with a complete pulmonary evaluation. *Cf. Hodges*, 18 BLR at 1-93.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge