

BRB No. 04-0828 BLA

CLARK WALDEN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
INTERSTATE COAL COMPANY)	DATE ISSUED: 05/12/2005
)	
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 & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Rita Roppolo (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2003-BLA-05990) 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). The administrative law judge found twenty-one and one-quarter years of qualifying coal mine employment and that employer agreed that it was the proper responsible operator. Decision and Order at 4; Hearing Transcript at 6; Director's Exhibit 45. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.¹ Decision and Order at 1, 4. The administrative law judge determined, after considering all of the evidence of record, that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 5-10. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1), (4) and in failing to address whether total disability was established pursuant to 20 C.F.R. §718.204(b)(2). Claimant also asserts that the administrative law judge improperly admitted evidence pursuant to 20 C.F.R. §725.414 and that he was not provided a complete pulmonary evaluation as required by the Act and regulations. Employer responds, urging 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

¹ Claimant filed his claim for benefits with the Department of Labor on July 10, 2001, which was denied by the district director on February 27, 2003. Director's Exhibits 2, 40. Claimant subsequently requested a formal hearing before the Office of Administrative Law Judges on March 7, 2003. Director's Exhibit 41.

indicating that claimant has been provided with a complete pulmonary examination.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 applicable law, they are binding upon this Board and 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, 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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.³ Claimant's assertion that the administrative law judge failed to find the

² The administrative law judge's length of coal mine employment and responsible operator determinations as well as his findings pursuant to 20 C.F.R. §718.202(a)(2)-(3) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ This case arises within the jurisdiction of the United States Court of Appeals for the

existence of pneumoconiosis established lacks merit. The administrative law judge rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Pursuant to 20 C.F.R. §718.202(a)(1), claimant contends that the administrative law judge erred by relying on the physicians' radiological credentials and improperly relied the numerical superiority of the negative x-ray readings. Claimant also suggests that the administrative law judge "may have 'selectively analyzed' the x-ray evidence[.]" Claimant's Brief at 3-4. We disagree. The administrative law judge considered the readings of the x-rays of record and acted within his discretion in according greater weight to the negative readings by physicians who are B readers or Board-certified radiologists or both.⁴ Decision and Order at 5-7. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); Director's Exhibits 9, 10, 12; Employer's Exhibits 10, 11; Decision and Order at 5-7. Contrary to claimant's assertions, therefore, the administrative law judge conducted a proper qualitative analysis of the conflicting x-ray readings pursuant to 20 C.F.R. §718.202(a)(1). Director's Exhibits 9, 10, 12; Employer's Exhibits 10, 11; Decision

Sixth Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 3, 6.

⁴ The record indicates that Drs. Baker and Hussain have no special qualifications for the interpretation of x-rays. Director's Exhibits 9, 10. Drs. Poulos and Sargent are B readers and Board-certified radiologists. Director's Exhibits 9, 12; Employer's Exhibit 11. Drs. Dahhan and Repsher are B-readers. Employer's Exhibits 10, 11.

and Order at 5-7; *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); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*).

Claimant also contends that the administrative law judge erred in allowing employer to submit x-ray evidence in violation of the limitations set forth in 20 C.F.R. §725.414(a)(3)(i).⁵ Claimant's Brief at 3-4. The record indicates that employer submitted the x-ray readings of Drs. Repsher and Dahhan in support of its affirmative case. *See* 20 C.F.R. §725.414(a)(3)(i); Employer's Exhibits 1, 10, 11. Employer further submitted one rereading in rebuttal by Dr. Poulos of the July 28, 2001 and the September 14, 2001 x-rays by Drs. Baker and Hussain submitted by claimant and the Director. *See* 20 C.F.R. §725.414(a)(3)(ii); Director's Exhibits 9, 10, 12; Employer's Exhibit 1. These submissions were proper. *See* 20 C.F.R. §725.414(a)(3)(i), (ii); Decision and Order at 4-7. As employer is entitled to only two x-rays for its affirmative case and only one rebuttal reading each of claimant's affirmative evidence, however, the administrative law judge incorrectly indicated that the rereading by Dr. Sargent of the September 14, 2001 x-ray and the rereading by Dr. Poulos of the September 24, 2003 x-ray were admissible evidence pursuant to 20 C.F.R. §725.414. *See* 20 C.F.R. §725.414(a)(3)(i), (ii); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47

⁵ Revised 20 C.F.R. §725.414 applies to this claim, filed on July 10, 2001, which was after the effective date of the revised regulations. 20 C.F.R. §725.2(c).

(2004)(*en banc*); Decision and Order at 4-5; Director's Exhibit 9; Employer's Exhibit 11. Based upon the circumstances of the instant case, however, any error is harmless since the administrative law judge did not specifically rely upon these x-ray readings in reaching his decision. In addition, the exclusion of these readings from the record would not alter the administrative law judge's permissible finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis, as the physicians with superior radiological qualifications read the films as negative for the disease. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Director's Exhibits 9, 10, 12; Employer's Exhibits 10, 11; Decision and Order at 4-7.

Claimant further asserts that the administrative law judge failed to find the existence of pneumoconiosis established based upon the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). Claimant specifically contends that the administrative law judge erred in failing to accord appropriate weight to the opinion of Dr. Baker as it is sufficient to establish the existence of pneumoconiosis. Claimant's Brief at 4-5. We do not find merit in claimant's argument. In addressing the opinion of Dr. Baker, the administrative law judge rationally concluded that it was insufficient to establish the existence of clinical pneumoconiosis as the opinion was neither well reasoned nor well documented since the physician failed to fully consider the effects of claimant's twenty year history of smoking, his x-ray was reread as negative by Dr. Poulos, a more qualified reader, and as Dr. Baker did not offer any other explanation for his diagnosis of pneumoconiosis other than his own x-ray

interpretation. Decision and Order at 7-9; Director's Exhibit 10. This was proper. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); Decision and Order at 7-9; Director's Exhibit 10.

Claimant further asserts, with respect to 20 C.F.R. §718.202(a)(4), that he has not been provided with a complete credible pulmonary examination sufficient to substantiate the claim as required by the Act. Claimant's Brief at 6. Employer and the Director respond that claimant has been provided the required medical examination as required by the Act and regulations. 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 evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The Director fails to meet this duty where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *see also Newman v. Director, OWCP*, 745 F. 2d 1162, 7 BLR 2-25 (8th Cir. 1984).

The record reflects that Dr. Hussain conducted the Department of Labor examination of claimant, obtained the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. 20 C.F.R. §718.101(a), 718.104, 725.406(a); Director's Exhibit 9. The administrative law judge did

not find nor does claimant allege that Dr. Hussain's report was incomplete. Rather, the administrative law judge, in a proper exercise of his discretion, rationally accorded greater weight to the contrary opinions of Drs. Dahhan and Repsher, as they offered well reasoned and documented opinions which are supported by the objective medical evidence of record. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Perry*, 9 BLR 1-1; Decision and Order at 9; Director's Exhibits 9, 10; Employer's Exhibits 10, 11. Therefore, the administrative law judge permissibly found that the report of Dr. Hussain, diagnosing pneumoconiosis, was outweighed by the contrary evidence of record. *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999).

Because Dr. Hussain's report was complete and the administrative law judge found it outweighed by more persuasive medical opinions, which is not the same as finding Dr. Hussain's report incredible, there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. *See Hodges*, 18 BLR 1-84; *Petry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990); *see also Newman*, 745 F. 2d 1162, 7 BLR 2-25. Consequently, as claimant makes no other specific challenge to the administrative law judge's weighing of the medical opinion evidence pursuant to Section 718.202(a)(4), we affirm the administrative law judge's findings as they are supported by substantial evidence and are in accordance with law. *See Williams*, 338 F.3d 501, 22 BLR 2-623; *Stephens*, 298

F.3d 511, 22 BLR 2-495; *Trent*, 11 BLR 1-26; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Perry*, 9 BLR 1-1; *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Ondecko*, 512 U.S. 267, 18 BLR 2A-1; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge permissibly concluded that the evidence of record does not establish the existence of pneumoconiosis, claimant has not met his burden of proof on all the elements of entitlement. *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray*, 7 BLR 1-683, and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark*, 12 BLR 1-149; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis as it is supported by substantial evidence and is in accordance with law. *See Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

Because claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement in a miner's claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded and contrary to claimant's assertion, the administrative law judge was not required to further consider the evidence and make additional findings pursuant to 20

C.F.R. §718.204. *See 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

BETTY JEAN HALL
Administrative Appeals Judge