BRB No. 04-0142 BLA

JAMES E. HACKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 10/27/2004
	)	
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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

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

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (02-BLA-5258) of Administrative Law Judge Robert L. Hillyard 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). This case involves a claim filed on February 21, 2001. After crediting claimant with eight years of coal mine employment, the administrative law judge found that the evidence was insufficient to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). He also found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the

administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also argues that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[1]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The x-ray evidence consists of interpretations of four x-rays taken on May 16, 2001, May 23, 2001, October 23, 2001 and September 23, 2002. In considering whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge acted within his discretion in according the greatest weight to the x-ray interpretations rendered by physicians qualified as B readers and/or Board-certified radiologists. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); 11. Although Dr. Hussain, a physician with no special radiological qualifications, interpreted claimant's May 16, 2001 x-ray as positive for pneumoconiosis, Director's Exhibit 11, the administrative law judge noted that Dr. Scott, a B reader and Board-certified radiologist, interpreted this film as negative for pneumoconiosis. Decision and Order at 11; Director's Exhibit 23. The administrative law judge, therefore, found that claimant's October 16, 2001 x-ray was negative for pneumoconiosis. *Id.*

The administrative law judge noted that Dr. Hayes, a B reader and Board-certified radiologist, and Dr. Baker, a physician with no special radiological qualifications, interpreted claimant's May 23, 2001 x-ray as negative for pneumoconiosis. Decision and Order at 11; Director's Exhibit 13; Employer's Exhibit 1. The administrative law judge, therefore, found that claimant's May 23, 2001 x-ray was also negative for pneumoconiosis. *Id.*

[1]Since no party challenges the administrative law judge's findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Because Dr. Broudy, a B reader, interpreted claimant's October 23, 2001 x-ray as negative for pneumoconiosis, the administrative law judge found that this x-ray was negative for pneumoconiosis. Decision and Order at 11; Director's Exhibit 23. Finally, the administrative law judge noted that Dr. Baker, a physician with no special qualifications, interpreted claimant's September 23, 2002 x-ray as positive for pneumoconiosis. Decision and Order at 11; Claimant's Exhibit 1. Because there were no other interpretations of this film, the administrative law judge found that claimant's September 23, 2002 x-ray was positive for pneumoconiosis. *Id.*

In his consideration of whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge stated that:

> Each of the three x-rays taken in 2001 has been found to be negative for the existence of pneumoconiosis. The September 23, 2002 x-ray was read as positive by Dr. Baker, who lists no x-ray credentials. I afford greater weight to the numerical superiority of the negative x-ray interpretations coupled with the superior credentials of the readers who made those negative readings. I find the x-ray evidence to be negative and find the existence of pneumoconiosis has not been established pursuant to 20 C.F.R. §718.202(a)(1).

Decision and Order at 11-12.

The administrative law judge properly found that a preponderance of the x-ray interpretations by the best qualified physicians was negative for the existence of pneumoconiosis. *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. 1993). All four of the x-ray interpretations rendered by physicians qualified as B readers and/or Board-certified radiologists are negative for pneumoconiosis. Director's Exhibits 23, 25; Employer's Exhibit 1. Moreover, both of the positive interpretations of record were rendered by physicians with no special radiological qualifications. Director's

Exhibit 11; Claimant's Exhibit 1. Because it is supported by substantial evidence,[2] we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Claimant also argues that the administrative law judge erred in finding the opinions of Dr. Hussain and Baker insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge permissibly discredited the diagnosis of pneumoconiosis rendered by Dr. Hussain in his April 28, 2001 report because the administrative law judge found that it was merely a restatement of an x-ray opinion.[3] *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

In his May 23, 2001 report, Dr. Baker diagnosed chronic bronchitis based on history. Director's Exhibit 13. Although Dr. Baker indicated that claimant's lung disease was not the result of exposure to coal dust, he subsequently indicated that any pulmonary impairment was the result of coal dust exposure. *Id.* Dr. Baker stated that:

> [Claimant] has had less than a 12 pack year history of smoking and 10 year history of coal dust exposure. It is thought [that] his bronchitis and resting

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[2]In challenging the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis, claimant asserts that an administrative law judge "need not defer to a doctor with superior qualifications" and that an administrative law judge "need not accept as conclusive the numerical superiority of the x-ray interpretations." Claimant's Brief at 3. Claimant also asserts that the administrative law judge "may have 'selectively analyzed' the x-ray evidence." *Id.* In this case, the administrative law judge permissibly considered both the quality and the quantity of the x-ray evidence in finding it insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *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. 1993). Moreover, claimant has provided no support for his assertion that the administrative law judge "may have 'selectively analyzed' the x-ray evidence."

[3]The administrative law judge also noted that the May 16, 2001 x-ray that Dr. Hussain interpreted as positive for pneumoconiosis was interpreted by Dr. Scott, a better qualified physician, as negative for pneumoconiosis, thus calling into question the reliability of his opinion. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order at 13; Director's Exhibits 11, 23.

> arterial hypoxemia may be associated to some extent to his coal dust exposure and associated bronchitis.

Director's Exhibit 13.

The administrative law judge permissibly found that Dr. Baker's statement that claimant's chronic bronchitis "may be associated to some extent to his coal dust exposure" was too equivocal to constitute a diagnosis of legal pneumoconiosis.[4] *See* 20 C.F.R. §718.201(a)(2); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order at 15; Director's Exhibit 13.

Claimant contends that the administrative law judge erred in failing to accord greater weight to Dr. Baker's opinion based upon his status as claimant's treating physician. We disagree. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims.[5] *Eastover Mining Co. v. Williams*,

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[4]In an October 11, 2002 letter, Dr. Baker stated that:

> [Claimant] was seen on September 23, 2002 for a routine follow-up for Coal Workers' Pneumoconiosis and chronic bronchitis. A chest x-ray was taken on this date and showed evidence of Coal Workers' Pneumoconiosis, Category 1/0, on basis of 1980 ILO Classification. He does have a history of 10 years of coal dust exposure at the face of the mine. He is on a Combivent inhaler, which helps improve his symptoms of cough, sputum production, wheezing and shortness of breath. He will be seen for follow up in 8 weeks.

Claimant's Exhibit 1.

We note that Dr. Baker did not include a diagnosis of coal workers' pneumoconiosis in his October 11, 2002 letter. Dr. Baker merely indicated that claimant's September 23, 2002 x-ray showed evidence of coal workers' pneumoconiosis. Thus, Dr. Baker's October 11, 2002 letter does not support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

[5]Section 718.104(d) provides that an adjudicator must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. 20 C.F.R. §718.104(d). The Sixth Circuit has recognized that this provision codifies judicial precedent and does not work a substantive change in the law. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002).

338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). The Sixth Circuit has held that the opinions of treating physicians should be given the deference they deserve based upon their power to persuade. *Id.* The Sixth Circuit explained that the case law and applicable regulatory scheme clearly provide that the administrative law judge must evaluate treating physicians just as they consider other experts. *Id.* As discussed, *supra*, the administrative law judge properly discredited Dr. Baker's opinion because he found that it was equivocal. *See Justice, supra*.

Claimant's remaining statements neither raise any substantive issue nor identify any specific error on the part of the administrative law judge in determining that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis.[6] We, therefore, affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Consequently, we need not address claimant's contentions regarding the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[6]The medical opinion evidence also includes medical reports submitted by Drs. Broudy and Vuskovich. In a report dated October 23, 2001, Dr. Broudy opined that claimant did not suffer from coal workers' pneumoconiosis. Director's Exhibit 25. In a subsequent report dated February 12, 2003, Dr. Broudy opined that claimant did not suffer from coal workers' pneumoconiosis or any lung disease caused by the inhalation of coal mine dust. Employer's Exhibit 3. Dr. Broudy reiterated his opinion during a March 6, 2003 deposition. Employer's Exhibit 4. In a report dated March 4, 2003, Dr. Vuskovich opined that there was no x-ray evidence of coal workers' pneumoconiosis. Employer's Exhibit 2. Dr. Vuskovich also opined that there was no pulmonary impairment arising from claimant's coal mine employment. *Id.*

Accordingly, the administrative law judge's Decision and Order denying benefits 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