BRB No. 06-0414 BLA

LESTER BAKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAIN COALS CORPORATION	)	DATE ISSUED: 10/30/2006
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE GROUP	)	
	)	
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 – Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

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

Sarah M. Hurley (Howard M. Radzely, 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 - Denial of Benefits (04-BLA-6417) of Administrative Law Judge Daniel J. Roketenetz 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). In a Decision and Order dated January 25, 2006, the administrative law judge credited the miner with 20.81 years of coal mine employment,[1] and found that the evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and failed to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b), (c). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4), and erred in his evaluation of the medical opinion evidence relevant to the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv).[2] Claimant further asserts that since the administrative law judge discredited Dr. Simpao's report on the issue of total disability, because the doctor failed to address the level of claimant's pulmonary disability, the Director, Office of Workers' Compensation Programs (the Director), has failed to provide claimant with a complete, credible pulmonary evaluation sufficient to substantiate his claim as required under Section 413(b) of the Act, 30 U.S.C. §923(b). 20 C.F.R. §725.406(a).[3] Employer responds, urging affirmance of the administrative law judge's denial of benefits. In response to claimant's argument that he was not provided with a complete, credible pulmonary evaluation, the Director argues that since Dr. Simpao provided claimant with a credible opinion on the issue of pneumoconiosis, and the administrative law judge

[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] The administrative law judge's evidentiary rulings, his finding of 20.81 years of coal mine employment and his findings that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) or (3), and further failed to establish the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(i)-(iii), are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] The Department of Labor has a statutory duty to provide a miner with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate the claim. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 184 (1994).

properly found that the existence of pneumoconiosis was not established in this case, any failure by Dr. Simpao to completely address the issue of total disability is moot and does not require remand.

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 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 a finding of 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).

Claimant asserts that the administrative law judge erred in relying almost solely on the qualifications of the interpreting physicians and the numerical superiority of the x-ray interpretations in evaluating the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). Claimant's Brief at 3. We disagree.

In finding the x-ray evidence insufficient to establish the existence of pneumoconiosis, the administrative law judge properly noted that the relevant x-ray evidence of record consisted of six readings of four x-rays.[4] Decision and Order at 6-7. A March 19, 2003 x-ray was read once as positive by Dr. Baker, a B-reader, and once as negative by Dr. Wiot, a dually qualified B-reader and Board-certified radiologist. Director's Exhibit 15; Employer's Exhibit 14. The administrative law judge permissibly found this x-ray to be negative based on Dr. Wiot's superior qualifications. *Staton v. Norfolk & Western Railway Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999) (*en banc on recon.*); Decision and Order at 6. In addition, a June 17, 2003 x-ray was read once as positive by Dr. Simpao, a physician with no specialized qualifications for the reading of x-rays, and once as negative by Dr. Wiot, a dually qualified B-reader and Board-certified radiologist. Director's Exhibit 13; Employer's Exhibit 15. The administrative law judge permissibly found this x-ray to be negative based on Dr. Wiot's superior qualifications. *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Cranor*, 22 BLR at 1-7; Decision and Order at 5. An August 25, 2003 x-ray was read once as negative by Dr. Dahhan, a B-reader, and, thus,

[4] The record contains an additional reading for quality only (Quality 1), by Dr. Barrett, of the June 17, 2003 x-ray. Director's Exhibit 14.

was found to be negative by the administrative law judge. Employer's Exhibit 6; Decision and Order at 7. Finally, a June 14, 2005 x-ray was read once as negative by Dr. Rosenberg, a B-reader, and, thus, was found to be negative by the administrative law judge. Employer's Exhibit 1; Decision and Order at 7. Contrary to claimant's arguments, the administrative law judge properly considered both the quantity and the quality of the x-ray readings of record, and permissibly found that, when taken as a whole, the preponderance of negative readings by B-readers and dually qualified readers outweighs the positive x-ray readings of record. *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Cranor*, 22 BLR at 1-7; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); Decision and Order at 7-8. Consequently, we affirm the administrative law judge's weighing of the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1) as it is supported by substantial evidence. In addition, we reject claimant's comment that the administrative law judge "may have selectively analyzed" the x-ray evidence. Claimant's Brief at 3. 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 selective analysis of the x-ray evidence. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-5 (2004).

Claimant also challenges the administrative law judge's finding that pneumoconiosis was not established by medical opinion evidence at Section 718.202(a)(4), asserting that the administrative law judge erred in rejecting the opinion of Dr. Baker. We disagree.

In considering the medical opinion evidence on the issue of pneumoconiosis, the administrative law judge found that Dr. Baker diagnosed "coal workers' pneumoconiosis, category 1/0" based on a positive x-ray reading. Director's Exhibit 14. In addition, the administrative law judge noted that Dr. Baker indicated that claimant's pulmonary function study showed a mild obstructive defect. Director's Exhibit 14; Decision and Order at 9-10. Contrary to claimant's arguments, the administrative law judge permissibly accorded little weight to Dr. Baker's diagnosis of coal workers' pneumoconiosis as unreasoned because the physician failed to point to any objective data or medical testing in support of his conclusion besides his own reading of a chest x-ray, which was subsequently re-read as negative by a more highly qualified reader. *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); *Hutchens v. Director, OWCP*, 8 BLR 1- 16 (1985); *see Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); Director's Exhibit 15; Decision and Order at 11. In addition, claimant asserts that Dr. Baker attributes the etiology of claimant's chronic respiratory disease, at least in part, to coal dust exposure. *See* 20 C.F.R. §718.201. Dr. Baker's report, as it appears in the record, however, does not support this contention. Claimant's Brief at 4; Director's Exhibit 15.

Claimant raises no other arguments regarding the administrative law judge's weighing of the medical opinion evidence relevant to the existence of pneumoconiosis. The administrative law judge accorded determinative weight to the opinions of Drs. Dahhan and Rosenberg, that claimant did not have either clinical or legal pneumoconiosis, as he found them well-reasoned and documented. Because the administrative law judge examined each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103, and explained whether the diagnoses contained therein constituted reasoned medical judgments under 20 C.F.R. §718.202(a)(4), we affirm the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000). Consequently, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a).

Additionally, we reject claimant's assertion that, because the administrative law judge found that Dr. Simpao made no express finding with respect to the issue of total disability, claimant is entitled to have the denial of benefits vacated, and the case remanded for the Director to provide him with a new, complete, pulmonary evaluation pursuant to 20 C.F.R. §725.406. Claimant's Brief at 6. Contrary to claimant's arguments, as the Director correctly points out that, because we affirm herein the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a), we need not address claimant's challenge to the sufficiency of Dr. Simpao's opinion regarding total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). *See Cline v. Director, OWCP*, 917 F.2d 9, 14 BLR 2-102 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984). As the evidence fails to establish the existence of pneumoconiosis, an essential element of entitlement, an award of benefits is precluded in this case. *See Trent*, 11 BLR at 1-27.

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