

BRB No. 07-0646 BLA

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| G. C. |) | |
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| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
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| UNITED STATES COAL, INCORPORATED |) | DATE ISSUED: 04/29/2008 |
| |) | |
| 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 Denying Living Miner's Benefits of William S. Colwell, Administrative Law Judge, United States Department of Labor.

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

Rita Roppolo (Gregory F. Jacob, Solicitor of Labor; 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 Living Miner's Benefits (04-BLA-5925) of Administrative Law Judge William S. Colwell on a claim¹ filed pursuant

¹ Claimant filed his claim on October 30, 2002. Director's Exhibit 2.

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 credited claimant with sixteen years of qualifying coal mine employment. Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find pneumoconiosis established by x-ray evidence under Section 718.202(a)(1) and total respiratory disability established by medical opinion evidence under Section 718.204(b)(2)(iv). Claimant additionally contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary evaluation on the issue of pneumoconiosis as required by Section 413(b) of the Act, 30 U.S.C. §923(b). Employer has not responded. The Director responds, arguing that he has satisfied his obligation to provide claimant with a complete, credible pulmonary evaluation on the issue of pneumoconiosis 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,³ 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In challenging the administrative law judge's finding that claimant failed to establish pneumoconiosis by x-ray evidence 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 weight of x-ray interpretations. Claimant further contends that the administrative law judge "may have selectively analyzed" the x-ray evidence.

² The administrative law judge's findings under 20 C.F.R. §§718.202(a)(2)-(4) and 718.204(b)(2)(i)-(iii) are affirmed, as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in coal mining in Tennessee. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

Contrary to claimant's argument, where x-ray evidence is in conflict, consideration *shall* be given to the readers' radiological qualifications. 20 C.F.R. §718.202(a)(1). In this case, the administrative law judge properly found that the x-ray evidence of record was insufficient to establish pneumoconiosis since Dr. Baker's positive reading of the December 10, 2002 x-ray was outweighed by Dr. Wiot's negative reading of the same x-ray, because Dr. Wiot was both a B reader and a Board-certified radiologist and Dr. Baker was only a B reader. Further, the administrative law judge noted that the only other x-ray evidence did not establish the existence of pneumoconiosis as the December 13, 1996 x-ray was read as negative and the other x-rays taken in 1983, 1990, and 1996 did not contain an ILO Classification, as required under Section 718.202(a)(1).⁴ Decision and Order at 10; Director's Exhibit 11; Employer's Exhibit 2. Accordingly, we affirm the administrative law judge's determination that claimant failed to establish pneumoconiosis by x-ray evidence under Section 718.202(a)(1). 20 C.F.R. §718.202(a)(1); *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); *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988).

Claimant's contention that the administrative law judge "may have selectively analyzed" the x-ray evidence is also rejected. 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).

Claimant also contends that he was not provided with a complete, credible pulmonary evaluation on the issue of pneumoconiosis because the administrative law judge rejected Dr. Baker's opinion. We agree with the Director, however, that because Dr. Baker addressed the issue, and found that claimant had pneumoconiosis, claimant was provided with a complete, credible pulmonary evaluation on the issue.⁵ *See Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *see also Fitch v. Director, OWCP*, 9 BLR 1-45 (1986). Accordingly, claimant's argument is rejected.

⁴ Claimant also contends that the administrative law judge erred in allowing employer to admit more than one rereading of each x-ray in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414(a)(3)(ii). The record, however, does not support this allegation.

⁵ The administrative law judge noted that Dr. Baker's opinion includes the results of an examination, history, an x-ray, and objective testing. Director's Exhibit 11.

Finally, claimant argues that the administrative law judge erred in finding that the medical opinion evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Specifically, claimant contends that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine employment as a roof bolter with the medical opinion evidence assessing disability. Claimant further contends that, considering the heavy concentrations of coal dust exposure he was exposed to on a daily basis, his condition would preclude him from engaging in his usual employment which required exposure to dust on a daily basis.

In finding that the medical opinion evidence of record failed to establish total disability at Section 718.204(b)(2)(iv), however, the administrative law judge noted that Dr. Baker found that claimant did not have a respiratory or pulmonary impairment. Director's Exhibit 11. The administrative law judge found that the opinion was supported by non-qualifying blood gas study and pulmonary function study results at 20 C.F.R. §718.204(b)(2)(i), (ii). Decision and Order at 18. Accordingly, the administrative law judge's finding that total respiratory disability was not established based on medical opinion evidence at Section 718.204(b)(2)(iv) is affirmed.⁶

Further, contrary to claimant's argument, as there is no opinion of record finding a respiratory or pulmonary impairment, there is no need to weigh the exertional requirements against an assessment of impairment. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172-173, 21 BLR 2-34, 2-45-46 (4th Cir. 1997). Moreover, the fact that claimant should not work in a dusty environment is not sufficient to establish total respiratory disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). Nor, contrary to claimant's argument, does a finding of pneumoconiosis provide a presumption that claimant is totally disabled by it. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

⁶ Dr. Baker's opinion was the sole medical opinion in the record.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge