

BRB No. 07-0728 BLA

I.M.)
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 Claimant-Petitioner)
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 v.)
)
 ARCH ON THE NORTH FORK,) DATE ISSUED: 04/22/2008
 INCORPORATED)
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 and)
)
 UNDERWRITERS SAFETY & CLAIMS)
)
 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 Donald W. Mosser,
Administrative Law Judge, United States Department of Labor.

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

Denise M. Davidson (Davidson & Associates), Hazard, Kentucky, for
employer.

Emily Goldberg-Kraft (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 Benefits (2005-BLA-06194) of Administrative Law Judge Donald W. Mosser 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 that claimant established a coal mine employment history of eighteen years, but that the evidence failed to establish the existence of coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or the presence of a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), (c).¹ Decision and Order at 3-12. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in not finding the existence of pneumoconiosis established based on x-ray evidence at 20 C.F.R. §718.202(a)(1), and erred in not finding total respiratory disability established based on medical opinion evidence at 20 C.F.R. §718.204(b)(iv). In addition, claimant contends that because the administrative law judge rejected Dr. Simpao's medical opinion on the issue of pneumoconiosis, the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b). Employer responds, urging that the denial of benefits be affirmed. The Director, while taking no position on the merits of claimant's appeal, asserts that the Board should reject claimant's argument that the Director failed to provide him with a complete pulmonary evaluation.² The Director contends that he is only required to provide claimant with a complete, credible evaluation, not a dispositive one.³

¹ In finding that the medical opinion evidence failed to demonstrate that claimant was totally disabled, the administrative law judge incorrectly cited to 20 C.F.R. §718.204(c)(4) instead of §718.204(b)(2)(iv). That error is harmless, however, as it has no effect on the disposition of this case. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

² The Director, Office of Workers' Compensation Programs, contends that the fact that the administrative law judge found Dr. Simpao's diagnosis of pneumoconiosis to be outweighed by the contrary opinion of Dr. Jarboe does not mean that he failed to provide claimant with a complete, credible pulmonary evaluation.

³ We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination and the finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4) or total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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.⁴ 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 element of entitlement precludes an award of benefits. *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); *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. The administrative law judge properly found that the x-ray evidence in this case failed to establish the existence of pneumoconiosis at Section 718.202(a)(1) as it was all read as negative for pneumoconiosis.⁵ Decision and Order at 6, 10-11; 20 C.F.R. §§718.102(c), 718.202(a)(1); *Staton v. Norfolk & Western Railway 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). Claimant's contention that the administrative law judge "may have selectively analyzed" the x-ray evidence is rejected as claimant points to no evidence or finding by the administrative law judge that supports this contention. *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). The administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) is, therefore, affirmed.

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

⁵ In considering the x-ray evidence, the administrative law judge found that Dr. Westerfield, a B reader, read a November 11, 2004 x-ray as negative for pneumoconiosis, Director's Exhibit 8, and that Dr. Barrett, a B reader and Board-certified radiologist read the same x-ray film for quality only. Director's Exhibit 9. The administrative law judge further found that Dr. Jarboe, a B reader, read a December 9, 2004 x-ray as negative for pneumoconiosis, Director's Exhibit 10, and that Dr. Wiot, a B reader and Board-certified radiologist read the same x-ray as negative for pneumoconiosis. Director's Exhibit 11.

Claimant also contends that because the administrative law judge rejected Dr. Simpao's opinion on the issue of pneumoconiosis, the Director failed to provide him with a complete, credible pulmonary evaluation on the issue of pneumoconiosis, as required under the Act. We disagree. The administrative law judge properly accorded less weight to Dr. Simpao's opinion finding pneumoconiosis because he found that it was not as well-reasoned as the contrary opinion of Dr. Jarboe. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The Director contends: "there is no guarantee under the Act that the DOL-sponsored examination will trump all other evidence: the DOL-sponsored medical examination must be credible, not necessarily dispositive." Director's Letter at 3. Consequently, the Director contends that remand to the district director for another pulmonary evaluation is not required in this case. Director's Letter at 4.

The administrative law judge found that Dr. Simpao conducted a physical examination and a full range of testing, specifically a chest x-ray, pulmonary function study, blood gas study, and electrocardiogram. Decision and Order at 6, 9; Director's Exhibits 8, 13; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). Decision and Order at 9. However, the administrative law judge properly found Dr. Simpao's opinion outweighed by the contrary opinion of Dr. Jarboe, whose opinion was supported by its underlying documentation and was better explained.⁶ The administrative law judge also accorded greater weight to Dr. Jarboe's opinion because of the doctor's superior credentials in the area of pulmonary disease.⁷ Decision and Order at 9; *see Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999)(explaining that "ALJ's [sic] may evaluate the relative merits of conflicting physicians' opinions and choose to credit one over the other"). Because Dr. Simpao's report was complete regarding the issue of the existence of pneumoconiosis and the administrative law judge merely found it outweighed by a better reasoned opinion, we reject claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation. *Cline v. Director, OWCP*, 97 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

⁶ The administrative law judge found that Dr. Jarboe's opinion was based on a physical examination, pulmonary function study, blood gas study, electrocardiogram, symptoms, and claimant's medical, family, and occupational histories. The administrative law judge noted that Dr. Jarboe provided a detailed explanation of his findings and conclusions. The administrative law judge noted that, in addition, Dr. Jarboe reviewed Dr. Simpao's opinion. Director's Exhibit 10.

⁷ The administrative law judge noted that Dr. Jarboe was Board-certified in pulmonary diseases while Dr. Simpao was not. *See* Director's Exhibits 8, 10.

Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement under Part 718, we must affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112. Consequently, we need not address claimant's argument concerning total disability at Section 718.204(b)(2)(iv). *See Anderson*, 12 BLR at 1-112.

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