

BRB No. 06-0290 BLA

WILLIS FOUTS)
)
 Claimant-Petitioner)
)
 v.)
)
 BLUE DIAMOND COAL COMPANY,) DATE ISSUED: 08/30/2006
 INCORPORATED)
)
 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 – Denial of Benefits of Robert L. Hillyard, 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; 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-6004) of Administrative Law Judge Robert L. Hillyard rendered 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).¹ After crediting claimant with 20 years of coal mine employment, as stipulated by the parties, Decision and Order 4, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).² Accordingly, the administrative law judge denied benefits. On appeal, claimant argues that the administrative law judge violated the evidentiary limitations at 20 C.F.R. §725.414(a)(3)(i) and (ii) by admitting more than two x-rays with respect to employer's affirmative case and more than one x-ray with respect to employer's rebuttal of claimant's affirmative case. Claimant also argues 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), and asserts that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate the claim, as required by the Act. Claimant further argues that the administrative law judge erred in finding that claimant was not totally disabled 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

¹ The instant case is governed by the regulations that took effect on January 19, 2001, as the claim was filed on May 6, 2002. Decision and Order at 2, 7; Director's Exhibit 2.

² The administrative law judge also found that the evidence necessarily failed to establish that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) because claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4). Decision and Order at 11.

Director has filed a limited response, requesting that the Board reject claimant's request that the case be remanded to provide him with a complete, credible pulmonary evaluation.

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 initially contends that the administrative law judge violated the evidentiary limitations at Section 725.414(a)(3)(i) and (ii) by admitting an additional x-ray reading over the two permitted for employer's affirmative case, and by admitting an additional x-ray reading over the one permitted for employer's rebuttal. Claimant asserts that the administrative law judge was required to strike one of the three x-ray readings at Employer's Exhibits 1 and 3 and Director's Exhibit 16, and one of the two readings at Director's Exhibits 13 and 14, or require employer to show good cause as to why all of the x-rays should be admitted. The administrative law judge admitted all of these x-ray readings into evidence. Transcript at 5-8.

20 C.F.R. §725.414(a)(3)(i) permits an employer to submit no more than two chest x-rays as part of its affirmative case. 20 C.F.R. §725.414(a)(3)(ii) permits employer to submit no more than one x-ray interpretation in rebuttal to claimant's affirmative case. Medical evidence in excess of the limitations at Section 725.414(a)(3)(i) and (ii) shall not be admitted in the absence of good cause. 20 C.F.R. §725.456(b)(1).

We reject claimant's contention that the administrative law judge violated the evidentiary limitations at Section 725.414(a)(3)(i) and (ii) with respect to the x-ray interpretations. Claimant's affirmative case x-rays consist of the August 15, 2002 and March 8, 2003 x-rays, read by Drs. Simpao and Baker, respectively, as positive for pneumoconiosis. Director's Exhibits 12, 15. In rebuttal, employer submitted a negative interpretation of the August 15, 2002 x-ray by Dr. Poulos, Director's Exhibit 14, and an interpretation of the March 8, 2003 x-ray as "unreadable", by Dr. Wiot. Director's Exhibit 16. Dr. Barrett read the August 15, 2002 x-ray for film quality only. Director's Exhibit 13. As part of its affirmative case, employer submitted two negative readings by Drs. Dahhan and Poulos of the January 28, 2003 x-ray. Employer's Exhibits 1, 3. Contrary to claimant's contention, the administrative law judge was not required to strike one of the three x-ray readings at Employer's Exhibits 1 and 3, and Director's Exhibit 16, since Employer's Exhibits 1 and 3 are the two x-ray readings, both dated January 28, 2003, permitted as part of employer's affirmative case. Moreover, Director's Exhibit 16 is an x-ray rereading of the March 8, 2003 x-ray, permitted as employer's one x-ray interpretation in rebuttal of Dr. Baker's reading of that x-ray. Moreover, the administrative law judge was not required to strike one of the two x-ray readings at Director's Exhibits 13 and 14, since Director's Exhibit 14 is employer's rebuttal of Dr. Simpao's August 15, 2002 x-ray reading, and Director's Exhibit 13 is the Department of Labor's (DOL's) film quality reading by Dr. Barrett of its x-ray performed during the DOL-sponsored complete pulmonary evaluation.³ Consequently, we hold that the

³ The administrative law judge mischaracterized Director's Exhibit 13 as a negative

administrative law judge properly admitted all the x-ray evidence currently in the record, pursuant to Section 725.414(a)(3)(i) and (ii).

Claimant also contends that the administrative law judge erred in finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).⁴ As set forth above, the relevant evidence consists of interpretations of three x-rays taken on March 8, 2003, January 28, 2003, and August 15, 2002. Director's Exhibits 12-16; Employer's Exhibits 1, 3. In considering the x-ray evidence, the administrative law judge acted within his discretion in crediting the negative interpretation of the August 15, 2002 x-ray by Dr. Poulos, a Board-certified radiologist and B reader, over the positive interpretation of Dr. Simpao, who has no radiological qualifications, based upon the better qualifications of Dr. Poulos.⁵ *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-

reading for pneumoconiosis, when it actually is a film quality reading only. *See* Decision and Order at 4; Employer's Response Brief at 10.

⁴ Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 9.

⁵ The administrative law judge also relied on the film quality reading of the August 15, 2002 x-ray by Dr. Barrett, a Board-certified radiologist and B reader, *see* Director's Exhibit 13, which the administrative law judge mischaracterized as including a reading that was negative for pneumoconiosis. *See* Decision and Order at 4, 8; Employer's Brief at 10. Any error on the part of the administrative law judge in characterizing Director's Exhibit 13 as a negative reading is harmless since the administrative law judge credited the readings by better qualified readers. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Specifically, eliminating this x-ray "reading" from consideration would still make the weight of the x-ray readings of the August 15, 2002 x-ray negative for pneumoconiosis; *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994): The administrative law judge credited the negative reading of the x-ray by Dr. Poulos, a Board-certified

271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 8; Director's Exhibits 12, 14. The administrative law judge rationally found that the January 28, 2003 x-ray was negative for pneumoconiosis, based on the two negative readings by Dr. Dahhan, a B reader, and Dr. Poulos, a Board-certified radiologist and B reader.⁶ Decision and Order at 8; Employer's Exhibits 1, 3. The administrative law judge rationally gave no probative weight to the March 8, 2003 x-ray due to the poor quality of the film since Dr. Wiot, a B reader and professor of radiology, found it unreadable, and was better qualified than Dr. Baker, a B reader, who read it as positive for pneumoconiosis, but identified the film quality as "2" due to underexposure. *See generally Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Gober v. Reading Anthracite Co.*, 12 BLR 1-67 (1988); Decision and Order at 8; Director's Exhibits 15, 16. Given the administrative law judge's method of weighing the x-ray readings, the administrative law judge properly found that no x-rays are positive for pneumoconiosis. Thus, the administrative law judge rationally found that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Decision and Order at 9. We, therefore, affirm the administrative law judge's finding that the x-ray

radiologist and B reader, over the positive interpretation of Dr. Simpao, with no radiological qualifications. Director's Exhibits 12, 14.

⁶ The administrative law judge mischaracterized Dr. Dahhan as a Board-certified radiologist and B reader, in his weighing of the evidence, Decision and Order at 8, after properly characterizing him as a B reader in his listing of the x-ray evidence. *See* Decision and Order at 5. The administrative law judge's error is harmless, however, as both readings

evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).⁷

Claimant further contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Specifically, claimant argues that the administrative law judge erred in finding that Dr. Baker's opinion of pneumoconiosis was not reasoned, because it was based only on his x-ray interpretation. Claimant asserts that an administrative law judge may not discredit a medical opinion because it is based on a positive chest x-ray interpretation that is contrary to the administrative law judge's findings, and because the record contains subsequent negative x-rays. In a report dated March 8, 2003, Dr. Baker diagnosed coal workers' pneumoconiosis, 1/1, based on an abnormal chest x-ray and coal dust exposure. Director's Exhibit 15 (Dr. Baker's report at 4). Dr. Baker recorded a twenty-three year underground coal mine employment history, reported that claimant currently smokes cigarettes and has smoked one pack per day since "age 20's", and obtained normal blood gas studies and pulmonary function studies showing a mild obstructive defect. Director's Exhibit 15 (Dr. Baker's report at 3).

We reject claimant's contentions concerning Dr. Baker's opinion. The administrative law judge rationally found that Dr. Baker's opinion was insufficient to establish clinical

of the January 28, 2003 x-ray are negative for pneumoconiosis. *See Larioni, supra.*

⁷ We reject claimant's assertion that the administrative law judge "may have selectively analyzed the x-ray evidence" as claimant has provided no support for his

pneumoconiosis, since it was based, in part, on an x-ray that the administrative law judge accorded no probative weight. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); Decision and Order at 10; Director's Exhibit 15. Moreover, the administrative law judge rationally found that the remaining basis of Dr. Baker's opinion of clinical pneumoconiosis, claimant's length of coal mine employment, was insufficient, by itself, to support such a diagnosis. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach, supra*; *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985); Decision and Order at 10; Director's Exhibit 15. Contrary to claimant's contentions, the administrative law judge did not discredit Dr. Baker's opinion because it was based on a positive chest x-ray interpretation contrary to the administrative law judge's findings, and because the record contains subsequent negative x-rays.⁸ Consequently, we affirm the administrative law judge's treatment of Dr. Baker's opinion at Section 718.202(a)(4). As claimant raises no other argument at Section 718.202(a)(4), the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis thereunder is affirmed. Claimant lastly contends that the Director failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required under Section 413(b) of the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v.*

assertion. Claimant's Brief at 4.

⁸ There are, in fact, no subsequent negative x-rays of record.

BethEnergy Mines, Inc., 18 BLR 1-84 (1994); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*). Claimant argues that the Director failed to provide him with a credible pulmonary evaluation in view of the fact that the administrative law judge discredited Dr. Simpao's report because the physician did not fully explain his diagnosis of pneumoconiosis. In the instant case, claimant selected Dr. Simpao to perform his DOL-sponsored pulmonary evaluation. Director's Exhibit 11. In a report dated August 15, 2002, Dr. Simpao diagnosed clinical pneumoconiosis. Director's Exhibit 12. Dr. Simpao performed a chest x-ray, pulmonary function studies, blood gas studies, and recorded claimant's coal mine employment and smoking histories. In his analysis of the medical opinion evidence pursuant to Section 718.202(a)(4), the administrative law judge rationally found that Dr. Simpao's opinion was entitled to less weight than the opinions of Drs. Dahhan and Rosenberg, based on Dr. Simpao's lack of pulmonary credentials and because Dr. Simpao failed to explain how his objective findings from his physical examination, and pulmonary function and blood gas studies, support his diagnosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 11; Director's Exhibit 12; Employer's Exhibits 1, 2. Additionally, the administrative law judge rationally found the opinions of Drs. Dahhan and Rosenberg entitled to substantial weight and some weight, respectively, based on their qualifications,⁹ and because their opinions are supported by the objective evidence. *See Wetzel, supra*;

⁹ Dr. Dahhan is Board-certified in internal medicine and pulmonary disease, while Dr. Rosenberg is Board-certified in internal medicine, pulmonary disease, and occupational medicine. Employer's Exhibits 6, 7. The record does not contain Dr. Simpao's

Decision and Order at 10; Employer's Exhibits 1, 2. As the Director correctly asserts, the administrative law judge's finding that Dr. Simpao's diagnosis of pneumoconiosis was entitled to less weight than the contrary opinions of Drs. Dahhan and Rosenberg does not render Dr. Simpao's opinion incomplete or incredible. The Director is not required to provide claimant with a dispositive medical evaluation, but only one that is complete and credible. *See Newman, supra*. We, therefore, reject claimant's contention that the Director failed to provide him with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate the claim.

In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Consequently, we need not address claimant's remaining contentions regarding the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge