

BRB No. 07-0106 BLA

C.N.)
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 Claimant-Petitioner)
)
 v.) DATE ISSUED: 08/30/2007
)
 MANALAPAN MINING COMPANY,)
 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 - Denying Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

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

W. Stacy Huff (Huff Law Office), Harlan, Kentucky, for employer.

Emily Goldberg-Kraft (Jonathan L. Snare, Acting 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (04-BLA-6596) of Administrative Law Judge Richard K. Malamphy 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). Based on claimant's September 12, 2003 filing date, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge then found that the parties stipulated to eighteen years of coal mine employment. Decision and Order at 2; Hearing Transcript at 7. The administrative law judge further found that the medical evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 3-7. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in not finding the existence of pneumoconiosis established based on the x-ray evidence pursuant to Section 718.202(a)(1), and erred in not finding total respiratory disability established based on the medical opinion evidence pursuant to Section 718.204(b)(2)(iv). In addition, claimant contends that since the administrative law judge concluded that "Dr. Simpao's report was based merely upon an erroneous x-ray interpretation," and that he made no finding concerning the issue of total disability, 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). Claimant's Brief at 4. Employer responds, urging that the denial of benefits be affirmed. The Director responds, asserting that the Board should reject claimant's argument that the Director failed to provide him with a complete pulmonary evaluation.¹

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20

¹ 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).

C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling.² See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant contends that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). The x-ray evidence consists of four interpretations of two x-rays taken on January 14, 2003 and August 25, 2004.³ Director's Exhibits 10, 19; Employer's Exhibits 2, 5. Weighing these readings in light of the readers' radiological qualifications, the administrative law judge found that Dr. Simpao, who possesses no specific radiological qualifications, read the January 14, 2003 x-ray as positive for pneumoconiosis; whereas Dr. Poulos, who is both a B reader and Board-certified radiologist, read this x-ray as negative for pneumoconiosis. Decision and Order at 3-4; Director's Exhibits 10, 19. The administrative law judge further found that Dr. Dahhan, a B reader, and Dr. Kendall, a Board-certified radiologist and B reader, read the August 25, 2004 x-ray as negative for pneumoconiosis. Decision and Order at 3; Employer's Exhibits 2, 5.

Based upon this review, the administrative law judge acted within his discretion as fact-finder in according greater weight to the negative readings, as they were performed by physicians who are B readers or B readers and Board certified-radiologists. Decision and Order at 4; 20 C.F.R. §718.202(a)(1); see *Dixon v. North Camp Coal Co.*, 8 BLR 1-31, 1-37 (1991); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984). Therefore, contrary to claimant's assertions, the record indicates that the administrative law judge based his finding on a proper qualitative analysis of the x-ray evidence. See *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004); *Woodward v. Director, OWCP*, 991 F.2d 314, 320, 17 BLR 2-77, 2-87 (6th Cir. 1993); *Sheckler*, 7 BLR at 1-131. Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, merely counted the negative readings, and that he may have

² As claimant's last coal mine employment occurred in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. Director's Exhibit 3; see *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

³ An additional reading by Dr. Barrett was obtained solely to assess the quality of the January 14, 2003 x-ray. Director's Exhibit 11.

selectively analyzed the readings, lack merit.⁴ Claimant's Brief at 3-4; Decision and Order at 3-4. We therefore affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) as supported by substantial evidence.

In light of our affirmance of the administrative law judge's finding that claimant did not 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 Part 718. See *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Consequently, we need not address claimant's contentions regarding the administrative law judge's finding that the medical opinion 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, 1-1278 (1984).

We must, however, address claimant's contention that he did not receive a complete pulmonary evaluation as required under the Act. Claimant contends that since the administrative law judge concluded that "Dr. Simpao's report was based merely upon an erroneous x-ray interpretation, and that he made no findings regarding the issue of total disability," 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). Claimant's Brief at 4. The Director responds that he is only required to provide claimant with a complete and credible examination, not a dispositive one, and the fact that the administrative law judge found Dr. Simpao's diagnosis of pneumoconiosis to be outweighed by the contrary evidence does not result in a violation of 20 C.F.R. §725.406(a). Director's Letter Brief at 2. In addition, the Director argues that remand for a complete, credible pulmonary evaluation is unnecessary because the administrative law judge's finding that pneumoconiosis was not established is dispositive, and any defect in the administrative law judge's consideration of Dr. Simpao's opinion on the issue of total disability would be moot.

The Act requires that "[e]ach miner who files a claim...be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); accord *Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105(8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25, 2-31 (8th Cir. 1984).

⁴ Claimant has provided no support for his assertion that the administrative law judge "may have 'selectively analyzed' the x-ray evidence." Claimant's Brief at 4.

The record reflects that Dr. Simpao conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. Director's Exhibit 10; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). On the issue of the existence of pneumoconiosis, the administrative law judge found that Dr. Simpao's diagnosis of "CWP 1/0" was based largely on a positive x-ray reading that the administrative law judge found outweighed by the negative reading of a physician with superior radiological credentials. Decision and Order at 4, 5. This was the sole cardiopulmonary diagnosis listed in Dr. Simpao's report, and the administrative law judge merely found the specific medical data for Dr. Simpao's diagnosis to be outweighed. Director's Exhibit 10. In addition, the administrative law judge ultimately accorded determinative weight to the medical opinions that claimant does not suffer from pneumoconiosis pursuant to Section 718.202(a)(4), a finding not challenged by claimant. Decision and Order at 5.

Dr. Simpao's report as to the existence of pneumoconiosis was complete and the administrative law judge merely found it outweighed. *Cf. Hodges*, 18 BLR at 1-93. Moreover, as the Director contends, because we affirm the administrative law judge's finding that pneumoconiosis is not established at Section 718.202(a), *see* discussion, *supra*, claimant could not prevail, even if the case were remanded to the administrative law judge for further development of Dr. Simpao's opinion regarding the issue of total disability. Because it would be futile, we decline to order a remand of this case. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

JUDITH S. BOGGS
Administrative Appeals Judge