

BRB No. 05-0229 BLA

STANLEY WATTS)
)
 Claimant-Petitioner)
)
 v.)
)
 D&S WATTS TRUCKING COMPANY)
)
 and) DATE ISSUED: 12/28/2005
)
 KENTUCKY EMPLOYERS MUTUAL)
 INSURANCE)
)
 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 – 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.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 – Denial of Benefits (04-BLA-5505) of Administrative Law Judge Robert L. Hillyard with respect to 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 his Decision and Order, the administrative law judge accepted the parties’ stipulation to thirty-three years of coal mine employment and considered the claim, filed on June 19, 2002, pursuant to the regulations set forth in 20 C.F.R. Part 718. The administrative law judge determined that claimant did not establish that he has pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) or that he is totally disabled under 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge’s finding that the evidence of record is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1) and total disability under Section 718.204(b)(2)(iv). Claimant also argues that remand is required because the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers’ Compensation Programs (the Director), has also responded and maintains that a remand for a complete pulmonary evaluation is not warranted in this case.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 supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 pursuant to 20 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. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *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); *Gee v. W.G. Moore and*

¹ The parties do not challenge the administrative law judge’s decision to credit claimant with thirty-three years of coal mine employment, or his findings pursuant to 20 C.F.R. §§725.414(a)(3), 718.202(a)(2)-(a)(3), and 718.204(b)(2)(i)-(iii). We therefore affirm these findings as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Sons, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

The record contains three interpretations of three x-rays. The administrative law judge found that the August 21, 2002 film was interpreted as positive by Dr. Simpao, who holds no special radiological qualifications. Decision and Order at 8; Director's Exhibit 16. The administrative law judge determined that the December 12, 2002 x-ray was read as negative by Dr. Broudy, a B-reader. *Id.*; Director's Exhibit 18. The administrative law judge found that the May 5, 2004 film was interpreted as negative by Dr. Dahhan, also a B-reader. *Id.*; Employer's Exhibit 1. The administrative concluded that because the preponderance of readings by physicians with special radiological qualifications was negative, claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *Id.*

Claimant argues that the administrative law judge's finding must be vacated, as the administrative law judge erred in relying upon the physicians' qualifications and the numerical superiority of the negative x-ray interpretations. Claimant also contends that the administrative law judge selectively analyzed the x-ray evidence. Claimant's allegations of error are without merit. The administrative law judge acted within his discretion as fact-finder in finding that the x-ray evidence did not establish the existence of pneumoconiosis based upon the preponderance of negative readings performed by physicians with superior qualifications. Decision and Order at 8; *see Staton v. Norfolk & Western Railroad 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); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). We affirm, therefore, the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), the administrative law judge weighed the medical reports of Drs. Lockey, Simpao, Broudy, and Dahhan. The administrative law judge determined that the opinion in which Dr. Lockey diagnosed pneumoconiosis was entitled to little weight because the doctor relied solely upon a positive x-ray reading. Decision and Order at 10; Director's Exhibits 18, 19. The administrative law judge determined that Dr. Simpao's diagnosis of pneumoconiosis was well-reasoned, but was outweighed by the contrary opinions of Drs. Broudy and Dahhan, whose conclusions were supported by more extensive documentation and were more consistent with the objective evidence of record. *Id.*; Director's Exhibits 16, 18, 20; Employer's Exhibit 1. Accordingly, the administrative law judge found that claimant did not establish the existence of pneumoconiosis under Section 718.202(a)(4). *Id.* Because claimant has not challenged the administrative law judge's determination under Section 718.202(a)(4), it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant alleges, however, that because the administrative law judge found that Dr. Simpao's opinion, which was provided at the request of the Department of Labor, was entitled to "less weight" as to the existence of pneumoconiosis pursuant to Section 718.202(a)(4), the Director failed to provide claimant with a complete, credible pulmonary evaluation as is required under the Act. The Director responds that he is required to give claimant a complete and credible examination, not one that results in an award of benefits. The Director states that he met his statutory obligation because Dr. Simpao provided a credible diagnosis of pneumoconiosis.

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).

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 16; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). As indicated, with respect to the issue of pneumoconiosis, the administrative law judge found that Dr. Simpao's diagnosis was well-reasoned, but was entitled to less weight than the opinions of Drs. Broudy and Dahhan, which were better supported by the objective data and were based upon more extensive documentation. Decision and Order at 11. Because Dr. Simpao's opinion was merely found outweighed on the issue of pneumoconiosis, there is no merit to claimant's argument that the administrative law judge's treatment of Dr. Simpao's opinion establishes that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. 20 C.F.R. §725.406(a); *Hodges*, 18 BLR at 1-93.

Because we have affirmed the administrative law judge's findings that the medical evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement, we affirm the denial of benefits. *Trent*, 11 BLR at 1-27. We need not reach, therefore, claimant's arguments concerning the administrative law judge's weighing of the evidence under Section 718.204(b)(2).

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

JUDITH S. BOGGS
Administrative Appeals Judge