

BRB No. 05-0459 BLA

EARL PENNINGTON)	
)	
Claimant-Petitioner)	
v.)	
)	
MOUNTAIN CLAY INCORPORATED)	DATE ISSUED: 12/29/2005
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS’)	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	

Appeal of the Decision and Order – Denying Claim of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Sarah M. Hurley (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 – Denying Claim (2003-BLA-0211) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) rendered on a request for modification 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 no mistake in a determination of fact was made in the prior denial of benefits nor had claimant established a change in his physical condition since

the last decision denying benefits as the evidence of record failed to establish the existence of pneumoconiosis. Accordingly, the administrative law judge denied the request for modification and the claim for benefits.

On appeal, claimant challenges the administrative law judge's findings that the x-ray interpretation evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Claimant also asserts that the administrative law judge erred when he found that the medical opinion evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Additionally, claimant contends that inasmuch as the administrative law judge discounted Dr. Hussain's opinion regarding the existence of pneumoconiosis, the Department of Labor (DOL) failed to provide him with a complete and credible pulmonary evaluation pursuant to Section 413(b) of the Act. 30 U.S.C. §923(b). Employer responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director) responds, asserting that even if Dr. Hussain's opinion regarding the existence of pneumoconiosis is flawed, remand for further development of evidence on the issue of pneumoconiosis is unwarranted as Dr. Hussain found no disabling pulmonary impairment. *See* 20 C.F.R. §718.1.

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 applicable law, 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant first contends that the administrative law judge erred in failing to find that the x-ray interpretation evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Claimant asserts that the administrative law judge improperly relied upon the numerical superiority of the negative x-ray readings, noting that the Board has held that an administrative law judge is not required to accept as conclusive the numerical superiority of the x-ray interpretations, nor defer to the interpretation of a physician with superior qualifications. Claimant's Brief at 2-3.

Contrary to claimant's argument, while the administrative law judge is not required to defer to the numerical superiority of x-ray interpretations or accord greatest weight to an interpretation based on the reader's superior qualifications, these are relevant factors to be considered in weighing the x-ray evidence. 20 C.F.R. §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); *see* Decision and Order at 7-8. Accordingly, the administrative law judge properly considered these factors in weighing the x-ray evidence and properly found that claimant failed to establish the existence of

pneumoconiosis.

In addition, contrary to claimant's contention, there is no evidence that the administrative law judge "may" have "selectively analyzed" the x-ray evidence. Claimant's Brief at 3. Claimant cites to nothing in the record to support his speculation. *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *White v. New White Coal Co.*, 23 BLR 1-1, 1-5 (2004). We, therefore, affirm that the administrative law judge's finding that the x-ray evidence fails to establish the existence of pneumoconiosis at Section 718.202(a)(1).

Claimant next challenges the administrative law judge's finding that the medical opinion evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Claimant asserts that Dr Baker diagnosed the existence of coal workers' pneumoconiosis and bronchitis, attributing the etiology of claimant's respiratory disease, at least in part, to coal dust exposure. Claimant asserts that the administrative law judge should have credited Dr. Baker's opinion as reasoned because it was based on a physical examination, medical and work histories, a pulmonary function study, an arterial blood gas study, and x-ray. Claimant's Brief at 4-5.

Upon consideration of Dr. Baker's opinion the administrative law judge stated:

Dr. Baker rendered an opinion that since Claimant had x-ray evidence of pneumoconiosis and a long history of coal dust exposure, he had no other condition that could account for these changes, and therefore, his disease was the result of his coal dust exposure. Dr. Baker also reasoned that Claimant's pulmonary impairment was a result of his coal dust exposure, because although he noted Claimant's eighteen pack year history of smoking, he wrote, it is thought that any pulmonary impairment is caused at least in part by his coal dust exposure.

Decision and Order at 8.

In addressing the medical opinion evidence pursuant to Section 718.202(a)(4), the administrative law judge found that Drs. Baker and Hussain¹ opined that claimant suffered from pneumoconiosis whereas Drs. Rosenberg and Broudy opined that claimant did not have

¹ Claimant does not challenge the administrative law judge's accordance of less weight to Dr. Hussain's opinion pursuant to Section 718.202(a)(4). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

pneumoconiosis. Decision and Order at 9; Director's Exhibits 54, 61; Employer's Exhibits 1, 3. In sum, the administrative law judge concluded that claimant failed to establish the presence of pneumoconiosis pursuant to Section 718.202(a)(4) as the opinions of Drs. Rosenberg and Broudy were better supported than the opinion of Drs. Baker and Hussain, Decision and Order at 9. The administrative law judge found that Dr. Baker's diagnosis of coal workers' pneumoconiosis was based solely on x-ray and coal mine employment history and that Dr. Baker did not consider the effects of claimant's obesity and smoking history in finding that claimant's respiratory impairment was due to coal mine employment. Decision and Order at 9; Director's Exhibit 61. This was proper. *See Eastover Mining Co. v. Williams*, 338 F.2d 501, 22 BLR 2-625 (6th Cir. 2003); *Cornett v. Benham Coal Co.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); *Duke v. Director, OWCP*, 6 BLR 1-673 (1983); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). We reject, therefore, claimant's contentions and we affirm the administrative law judge's finding that the evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Finally, claimant asserts that because the administrative law judge did not credit Dr. Hussain's September 5, 2001 medical opinion, which was provided by the DOL, "the Director has failed to provide claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act," Claimant's Brief at 5-6, and the case should therefore be remanded. The Director responds that remand for further development of Dr. Hussain's opinion on pneumoconiosis would not change the outcome of the case because Dr. Hussain found no disabling pulmonary impairment and therefore remand is unwarranted. Director's Brief at 2-3. We agree. We affirm, therefore, the administrative law judge's finding that the evidence fails to establish a basis for modification of the prior denial of benefits. 20 C.F.R. §725.310(a).

Accordingly, the administrative law judge's Decision and Order - Denying Claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge