

BRB No. 04-0685 BLA

TOMMY HUFF)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
APOGEE COAL COMPANY)	
)	DATE ISSUED: 02/23/2005
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 Mollie M. Neal, Administrative Law Judge, United States Department of Labor.

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

Ralph D. Carter (Barret, Haynes, May & Carter), Hazard, Kentucky, for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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 - Denying Benefits (03-BLA-5449) of Administrative Law Judge Mollie M. Neal 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). Claimant filed his application for benefits on

March 13, 2001. Director's Exhibit 2. The administrative law judge credited claimant with twenty-seven years of coal mine employment.¹ The administrative law judge found that claimant failed to establish either the existence of pneumoconiosis or that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in her analysis of the medical evidence. Claimant alleges further that 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 administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds that the administrative law judge properly denied benefits and that the Director met his obligation to provide claimant with a complete and credible pulmonary evaluation.

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'Keefe 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 one of these elements precludes a finding of entitlement. *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).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered five readings of three x-rays in light of the readers' radiological qualifications. Only one reading was positive for pneumoconiosis, Dr. Baker's "1/0" reading of a February 3, 1992 x-ray taken in connection with claimant's state workers' compensation claim. Claimant's Exhibit 2; Director's Exhibit 20 at 6-7. Because of the unexplained conflict between Dr. Baker's 1992 positive reading and Dr. Baker's later, negative reading of the September 4, 2001 x-ray taken for claimant's federal claim, Director's Exhibit 16, the administrative law judge gave less weight to the positive reading. Because all of the

¹ The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

other readings were negative, the administrative law judge found that claimant did not establish the existence of pneumoconiosis by a preponderance of the x-ray evidence. This was a proper qualitative analysis of the x-ray evidence. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). Claimant's arguments that the administrative law judge improperly relied on the readers' credentials, merely counted the negative readings, and selectively analyzed the readings, lack merit. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered three medical opinions. In a February 5, 1992 examination report prepared for claimant's state claim, Dr. Baker diagnosed "[c]oal workers' pneumoconiosis, category 1/0," by x-ray. Claimant's Exhibit 2 at 5. The administrative law judge explained that she rejected this diagnosis "as unsupported by" the x-ray evidence. Decision and Order at 6. Claimant alleges error in this determination. We disagree, because "an ALJ may not rely on a doctor's opinion that a patient has medical pneumoconiosis when the physician bases his opinion entirely on x-ray evidence the ALJ has already discredited." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003). As just discussed, the administrative law judge discounted Dr. Baker's "1/0" reading of the February 3, 1992 x-ray.

In a September 4, 2001 examination report prepared on behalf of the Department of Labor (DOL), Dr. Baker reported that claimant's chest x-ray was negative for pneumoconiosis and diagnosed chronic bronchitis and mild hypoxemia related to coal dust exposure. Director's Exhibit 16 at 6-7. The administrative law judge recognized that Dr. Baker diagnosed legal pneumoconiosis. See 20 C.F.R. §718.201(a). However, she gave "greater weight" to the third opinion of record, Dr. Lockey's medical report and deposition submitted by employer, stating that claimant has no occupational pulmonary disorder based on a physical examination and testing on July 26, 2001. Decision and Order at 6; Director's Exhibits 11, 13 at 12. Specifically, the administrative law judge permissibly found Dr. Lockey's opinion "more persuasive" because it was "better supported by the objective medical evidence of record." Decision and Order at 6; see *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). The administrative law judge also found that Dr. Lockey's opinion merited greater weight because he is Board-certified in Internal Medicine and Pulmonary Disease, whereas Dr.

Baker's credentials were not of record.² See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-154 (1989)(*en banc*).

Claimant challenges these findings on the basis that “the reports and opinions of Dr. Baker are well reasoned” and should not have been discounted. Claimant’s Brief at 5. Claimant merely requests reweighing of the evidence, which we cannot do. *Anderson*, 12 BLR at 1-113. Consequently, we affirm the administrative law judge’s finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Claimant contends that because the administrative law judge did not credit Dr. Baker’s September 4, 2001 opinion provided by DOL, “it must be concluded that the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act.” Claimant’s Brief at 6. The Director responds that he “is only required to provide claimant with a complete and credible examination, not a dispositive one.” Director’s Brief at 1-2.

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 Director fails to meet this duty 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, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

The record reflects that Dr. Baker conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the DOL examination form. Director’s Exhibit 16 at 4-8; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). The administrative law judge did not find nor does claimant allege that Dr. Baker’s report was incomplete. The administrative law judge did find Dr. Baker’s report outweighed by a more persuasive medical opinion, but, contrary to claimant’s allegation, that was not the same as finding Dr. Baker’s report incredible. The administrative law judge regarded Dr. Baker’s opinion as believable, but found it outweighed. See, e.g., *Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999)(explaining that “ALJ’s may evaluate the relative merits of conflicting physicians’

² Claimant states that Dr. Baker is Board-certified in Internal Medicine and Pulmonary Disease. Claimant’s Brief at 4. Review of the record, however, does not disclose these credentials.

opinions and choose to credit one . . . over the other”). Because Dr. Baker’s report was complete and the administrative law judge did not find that it lacked credibility, there is no merit to claimant’s argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. *Cf. Hodges*, 18 BLR at 1-93.

Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a miner’s claim under Part 718, we affirm the administrative law judge’s denial of benefits. *Anderson*, 12 BLR at 1-112; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

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