

BRB No. 05-0638 BLA

BILLIE TIPTON BRUNER)
)
 Claimant-Petitioner)
)
 v.)
)
 JACKSON & JACKSON COAL)
 COMPANY, INCORPORATED)
) DATE ISSUED: 02/28/2006
 and)
)
 OLD REPUBLIC INSURANCE COMPANY)
)
 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 of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-6704) of Administrative Law Judge Janice K. Bullard denying benefits 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). This case involves a claim filed on July 10, 2002. After noting that the parties did not dispute the district director's determination that claimant established eight years of coal mine employment, 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). Although the administrative law judge found that the evidence was sufficient to establish the existence of a totally disabling pulmonary impairment, she found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis. Accordingly the administrative law judge denied benefits. On appeal, claimant contends 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). Claimant also argues that the administrative law judge erred in finding that claimant was not totally disabled.¹ Claimant also contends 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 his claim. Employer responds in support of the administrative law judge's denial of benefits. The Director has filed a limited response, requesting that the Board reject claimant's request that the case be remanded based upon the Director's failure to provide claimant 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 contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).² The x-ray evidence consists of interpretations of three x-rays taken on

¹The administrative law judge found that the pulmonary function study and medical opinion evidence was sufficient to establish that claimant suffers from a total pulmonary disability. 20 C.F.R. §718.204(b); *see* Decision and Order at 9-11. Consequently, the basis for claimant's contention that the administrative law judge "erred in resolving that claimant was not totally disabled" is not clear. *See* Claimant's Brief at 6.

²Because 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), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

September 7, 2002, October 4, 2002, and May 7, 2004. Although Dr. Baker, a B reader, interpreted claimant's September 7, 2002 x-ray as positive for pneumoconiosis, Director's Exhibit 11, Dr. Kendall, a Board-certified radiologist and B reader, interpreted this x-ray as negative for the disease. Director's Exhibit 19. The administrative law judge acted within her discretion in crediting Dr. Kendall's negative interpretation of claimant's September 7, 2002 x-ray over Dr. Baker's positive interpretation of this film based upon Dr. Kendall's superior qualifications. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 5. Although Dr. Simpao, a reader with no special radiological qualifications, interpreted claimant's October 4, 2002 x-ray as positive for pneumoconiosis, Director's Exhibit 9, Dr. Poulos, a B reader and a Board-certified radiologist, interpreted this x-ray as negative for the disease.³ Director's Exhibit 19. The administrative law judge acted within her discretion in crediting Dr. Poulos's negative interpretation of claimant's October 4, 2002 x-ray over Dr. Simpao's positive interpretation of this film based upon Dr. Poulos's superior qualifications. *See Sheckler, supra*; Decision and Order at 5. The only other x-ray interpretations of record are negative for pneumoconiosis.⁴ Because it is based upon substantial evidence,⁵ we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

³Dr. Barrett interpreted claimant's October 4, 2002 x-ray for quality purposes only. *See* Director's Exhibit 10.

⁴Dr. West, a B reader and Board-certified radiologist, and Dr. Dahhan, a B reader, interpreted claimant's May 7, 2004 x-ray as negative for pneumoconiosis. *See* Employer's Exhibits 2, 6.

⁵In challenging the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis, claimant asserts that an administrative law judge "need not defer to a doctor with superior qualifications" and that an administrative law judge "need not accept as conclusive the numerical superiority of the x-ray interpretations." Claimant's Brief at 3. Claimant also asserts that the administrative law judge "may have 'selectively analyzed' the x-ray evidence." *Id.* In this case, the administrative law judge permissibly considered both the quality and the quantity of the x-ray evidence in finding it insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Staton v. Norfolk & Western Ry. 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). Moreover, claimant has provided no support for his assertion that the administrative law judge "may have 'selectively analyzed' the x-ray evidence."

Claimant also 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). The record contains four medical opinions. While Drs. Baker and Simpao opined that the claimant suffered from pneumoconiosis, Director's Exhibits 9, 11, Drs. Dahhan and Broudy opined that claimant did not suffer from the disease. Employer's Exhibits 1, 5. In considering whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge accorded less weight to the opinions of Drs. Baker and Simpao, that claimant suffered from pneumoconiosis, because they relied upon inaccurate coal mine employment histories. Decision and Order at 6-8. The administrative law judge, therefore, found that the medical opinion evidence was insufficient to establish that existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.* at 9.

Claimant argues that the administrative law judge erred in her consideration of Dr. Baker's opinion. The administrative law judge discredited Dr. Baker's opinion, that claimant suffered from pneumoconiosis, because the doctor relied upon an inaccurate coal mine employment history. Decision and Order at 7. While Dr. Baker relied upon a coal mine employment history of fourteen to sixteen years, *see* Director's Exhibit 11, the administrative law judge credited claimant with only eight years.⁶ Decision and Order at 3. An administrative law judge may give less weight to a doctor's opinion that is based upon an inaccurate length of coal mine employment. *See generally Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Long v. Director, OWCP*, 7 BLR 1-254 (1984). Because claimant does not specifically challenge the administrative law judge's decision to discredit Dr. Baker's opinion on this basis, we affirm the administrative law judge's finding.⁷ *See Skrack v. Island Creek Coal Co.*, 6

⁶In a proposed Decision and Order dated July 11, 2003, the district director credited claimant with eight years of coal mine employment based upon his review of claimant's Social Security earnings record. Director's Exhibit 20. When the case was forwarded to the Office of Administrative Law Judges, the district director noted that the parties did not contest the fact that claimant "worked at least 08 years in or around one or more coal mines." Director's Exhibit 32.

In her decision, the administrative law judge noted that neither party disputed the district director's finding that claimant established eight years of coal mine employment. *See* Decision and Order at 3. Because no party challenges the administrative law judge's finding of eight years of coal mine employment, this finding is affirmed. *Skrack, supra*.

⁷The administrative law judge noted that it "appear[ed] from Dr. Baker's report that he made a diagnosis of both legal and clinical pneumoconiosis." Decision and Order at 7. The administrative law judge noted that Dr. Baker attributed claimant's chronic obstructive airway disease and chronic bronchitis to his coal dust exposure. *Id.* at 6-7.

BLR 1-710 (1983).

Claimant's remaining statements neither raise any substantive issue nor identify any specific error on the part of the administrative law judge in determining that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

In light of our affirmance of 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)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

However, contrary to the administrative law judge's finding, Dr. Baker did not address the etiology of these diseases. Although Dr. Baker indicated, by checking a box, that claimant's "disease" was the result of coal dust exposure, his explanation for that opinion only references "pneumoconiosis." *See Director's Exhibit 11*. Dr. Baker further opined that "any pulmonary impairment" was "caused at least in part by [claimant's] history of coal dust exposure and [the] presence of coal workers' pneumoconiosis." However, this aspect of Dr. Baker's opinion focuses on the cause of claimant's pulmonary disability. Dr. Baker did not opine that either claimant's chronic obstructive airway disease or his chronic bronchitis was attributable to his coal dust exposure. Consequently, Dr. Baker's diagnoses of chronic obstructive airway disease and chronic bronchitis do not constitute "legal" pneumoconiosis. *See 20 C.F.R. §718.201(a)(2)*.

Claimant finally contends that 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. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990) (*en banc*); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). In this case, claimant selected Dr. Simpao to perform his Department of Labor sponsored pulmonary evaluation. *See* Director's Exhibit 9. Dr. Simpao examined claimant on October 4, 2002. In a report dated October 4, 2002, Dr. Simpao diagnosed coal workers' pneumoconiosis 1/1. *Id.* In a supplemental questionnaire dated October 4, 2002, Dr. Simpao indicated that claimant suffered from an occupational lung disease caused by his coal mine employment. *Id.* Dr. Simpao based his diagnosis on a positive x-ray interpretation, physical findings, EKG and pulmonary function test results and symptomatology. *Id.*

We agree with the Director, whose duty it is to ensure the proper enforcement and lawful administration of the Act, *see Hodges, supra; Pendley v. Director, OWCP*, 13 BLR 1-23 (1989) (*en banc*), that he provided claimant him with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate his claim. Claimant argues that the Director failed to provide him with a credible pulmonary evaluation because the administrative law judge discredited Dr. Simpao's diagnosis of pneumoconiosis. Claimant's Brief at 5. However, the administrative law judge, in considering whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis, did not completely reject Dr. Simpao's opinion. After acknowledging that Dr. Simpao's opinion was "thorough and detailed," the administrative law judge accorded it less weight because it was based upon an inaccurate coal mine employment history and because Dr. Simpao did not have the benefit of reviewing all of the x-ray evidence of record.⁸ Consequently, we reject claimant's contention that the Director failed to provide him with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate his claim.

⁸Dr. Simpao, in diagnosing pneumoconiosis, relied upon his positive interpretation of an October 4, 2002 x-ray. *See* Director's Exhibit 9. However, Dr. Poulos interpreted this x-ray as negative for pneumoconiosis. *See* Director's Exhibit 19. As previously discussed, the administrative law judge acted within her discretion in crediting Dr. Poulos's negative interpretation of claimant's October 4, 2002 x-ray over Dr. Simpao's positive interpretation of this film based upon Dr. Poulos's superior qualifications.

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