BRB No. 05-0824 BLA

ESMOND BURKE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TRAVELLER COAL CORPORATION	)	
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	DATE ISSUED: 02/22/2006
	)	
Employer/Carrier-Respondent	)	
	)	
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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan P.S.C.), South Williamson, Kentucky, for claimant.

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

Barry H. Joyner (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (04-BLA-5424) of Administrative Law Judge Daniel J. Roketenetz 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). In a Decision and Order dated June 10, 2005, the administrative law judge credited the miner with twenty-four years of coal mine employment,[1] and found that the evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). The administrative law judge further found that claimant established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b), but failed to establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in his application of the evidentiary limitations set forth at 20 C.F.R. §725.414. Claimant further asserts that the administrative law judge erred in his analysis of the x-ray and biopsy evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (2), and, consequently, erred in finding claimant failed to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Employer responds, urging affirmance of the administrative law judge's evidentiary rulings under Section 725.414 and the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's denial of benefits.[2]

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).

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[1] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 3. 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*).

[2] The administrative law judge's findings that the claim was timely filed, that claimant established twenty-four years of coal mine employment, and claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3) or (4) are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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).

Claimant initially asserts that the administrative law judge erred in allowing employer to submit rebuttal evidence to three x-rays and a biopsy conducted during claimant's 2003 hospitalization and submitted by claimant pursuant to revised 20 C.F.R. §725.414.[3] We disagree.

At the hearing, held on July 14, 2004, claimant submitted into the record, as part of his affirmative case, hospital records dating from April 17, 2003 through May 11, 2003, generated during an admission for treatment of respiratory distress. Hearing Transcript at 6. In response, employer sought to submit re-readings of three chest x-rays, and a review of biopsy slides, developed during that hospitalization. Hearing Transcript at 6. Claimant objected to employer' submission of rebuttal evidence to the hospitalization records, and the administrative law judge stated he would review the relevant law and issue an Order prior to his decision. Hearing Transcript at 10, 12.

In his Order dated July 22, 2004, the administrative law judge properly applied the revised regulation at 20 C.F.R. §725.414(a)(4), and initially determined that the medical records developed at Our Lady of the Way Hospital dating from April 17, 2003 through May 11, 2003, were hospitalization records, admissible pursuant to 20 C.F.R. §725.414(a)(4), which provides that "notwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "any record of a miner's hospitalization for . . . or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-53 (2004); Order dated July 22, 2004, at 2. The administrative law judge further properly found that while Section 725.414(a)(3)(ii) does not contain any specific provision governing the rebuttal of medical treatment or hospitalization notes, medical evidence that exceeds the limitations of 20 C.F.R. §725.414 may be admitted into the record for good cause. 20 C.F.R. §§725.414(a)(3)(ii); 725.456(b)(1); Order dated July 22, 2004, at 3. After carefully considering and discussing the good cause provision and its historical application, the administrative law judge concluded that because, as the fact-finder, he was incapable of *medically* evaluating the validity of the proffered evidence, including the highly probative biopsy evidence, it was appropriate to allow employer to submit

[3] Revised 20 C.F.R. §725.414 applies to this claim which was filed on June 11, 2001, after the effective date of the revised regulations. 20 C.F.R. §725.2(c).

medical evidence in rebuttal of these hospitalization records under the good cause provision of 20 C.F.R. §725.456(b)(1).

We hold that the administrative law judge acted within his discretion in allowing employer's rebuttal evidence pursuant to 20 C.F.R. §725.456(b)(1). While, as claimant correctly contends, the revised regulations at 20 C.F.R. §725.414 do not contain any specific provisions for the rebuttal of evidence contained in hospitalization records, the comments to the regulations indicate that the department contemplated that "any evidence that predates a miner's claim for benefits may be addressed in the two medical reports permitted each side in the regulation. If additional evidence is generated as the result of a hospitalization or treatment that takes place after the parties have completed their evidentiary submission, the administrative law judge has the discretion to permit the development of additional evidence under the 'good cause' provision of §725.456." 64 Fed. Reg. 54996 (Oct. 8, 199). Thus, contrary to claimant's argument, the administrative law judge acted within his discretion in admitting the employer's rebuttal evidence to the hospitalization records submitted by claimant. Moreover, claimant does not contest the administrative law judge's finding of good cause. Accordingly, we affirm the administrative law judge's admission into the record of the August 14, 2004 medical report of Dr. Naeye, reviewing the biopsy slides originally interpreted by Dr. Faber, and the July 6, 2004 x-ray re-readings by Dr. Hayes of the April 17, May 9, and May 10, 2003 x-rays originally read by Dr. Sola, developed during claimant's hospitalization at Our Lady of the Way Hospital. 20 C.F.R. §§725.414(a)(3)(ii); 725.456(b)(1); Employer's Exhibits 8, 9, 10, 13; Order dated July 22, 2004, at 5.

We further affirm the administrative law judge's evaluation of the x-ray evidence at 20 C.F.R. §718.202(a)(1). In finding the x-ray evidence insufficient to establish the existence of pneumoconiosis, the administrative law judge properly noted that the relevant x-ray evidence of record consists of nine readings of five 5 x-rays.[4] Decision and Order at 8-9. A September 12, 2001 x-ray was read once as positive by Dr. Hussain, a physician with no specialized qualifications for the reading of x-rays, and once as negative by Dr. Wiot, a dually qualified B-reader and Board-certified radiologist. Director's Exhibit 6; Employer's Exhibit 5. The administrative law judge permissibly found this x-ray to be negative based on Dr. Wiot's superior qualifications. *Staton v. Norfolk & Western Railway Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc on recon.*); Decision and Order at 8. In addition, x-rays dated April 17, May 9 and May 10, 2003 taken during the miner's hospitalization were read as showing chronic obstructive pulmonary disease and other changes, but were not classified as positive for the existence of pneumoconiosis.

[4] The record contains an additional reading for quality only (Quality 3), by Dr. Sargent, of the September 12, 2001 x-ray. Director's Exhibit 12.

Claimant's Exhibit 1. All three x-rays were re-read as negative by Dr. Hayes, a dually qualified B-reader and Board-certified radiologist, and the administrative law judge permissibly found this x-ray to be negative based on Dr. Hayes' superior qualifications. *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Cranor*, 22 BLR at 1-7; Employer's Exhibits 8, 9, 10; Decision and Order at 8-9. Finally, an April 3, 2003 x-ray was read once as negative by Dr. Wiot, a dually qualified B-reader and Board-certified radiologist.[5] Employer's Exhibit 1. The administrative law judge permissibly found this x-ray to be negative because the reading was uncontradicted and the reader was highly qualified. *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Cranor*, 22 BLR at 1-7; Decision and Order at 12. Considering both the quantity and the quality of the x-ray readings of record, the administrative law judge permissibly concluded that as all five x-rays were read as negative by the most highly qualified readers, the preponderance of negative x-rays and x-ray readings by B-readers and dually qualified readers failed to establish the existence of pneumoconiosis. *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Cranor*, 22 BLR at 1-7; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); Decision and Order at 9-10. Consequently, we affirm the administrative law judge's weighing of the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1) as it is supported by substantial evidence.

We further affirm the administrative law judge's finding that the biopsy evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). In a pathology report dated May 12, 2003, following a lung biopsy at Our Lady of the Way Hospital, Dr. Faber diagnosed benign lung parenchyma associated with a few intra-alveolar hemosiderin laden macrophages and focal anthracotic pigment, with no evidence of malignancy. Claimant's Exhibit 1. Noting that the regulations at 20 C.F.R. §718.202(a)(2) specifically provide that a biopsy finding of anthracotic pigmentation shall not be sufficient, by itself, to establish the existence of pneumoconiosis, the administrative law judge permissibly concluded that Dr. Faber's biopsy report did not constitute a diagnosis of pneumoconiosis. Noting that the only other biopsy evidence of record consisted of an August 4, 2004 report by Dr. Naeye, who reviewed slides taken from the same biopsy and opined that they contained none of the findings required to make a diagnosis of coal workers' pneumoconiosis, the administrative law judge permissibly found that claimant failed to establish the existence

[5] We note that the administrative law judge appears to have identified this x-ray, read by Dr. Wiot on April 4, 2003, as being read by Dr. Lockey. However, Dr. Wiot read it on behalf of Dr. Lockey. Employer's Exhibit 1; Decision and Order at 8. The administrative law judge's exclusion of a May 19, 2003 second reading by Dr. Wiot of this same x-ray, is unchallenged on appeal. *See Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-711; Decision and Order at 8 n.5.

of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Claimant's Exhibit 1; Employer's Exhibit 13; Decision and Order at 10.

It is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *see Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983). Because the administrative law judge examined all of the relevant medical evidence, and acted within his discretion in finding that the evidence of record failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), his findings are hereby affirmed.

Because we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a), a critical element of entitlement, we need not address the administrative law judge's additional findings at 20 C.F.R. §718.204(b), (c), regarding the issues of total disability and total disability causation. A finding of entitlement to benefits is precluded in this case. *See Trent*, 11 BLR at 1-27.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge