

BRB No. 06-0117 BLA

DONALD LIPPS)
)
 Claimant-Petitioner)
)
 v.)
)
 INDEPENDENCE TIPPLE COMPANY) DATE ISSUED: 02/28/2006
)
 and)
)
 KY COAL PRODUCERS)
 SELF-INSURANCE FUND)
)
 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 – Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

Rita Roppolo (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 Benefits (04-BLA-5282) of Administrative Law Judge Rudolf L. Jansen 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 an application for benefits on February 19, 2002. Director's Exhibit 2. The district director issued a Proposed Decision and Order denying benefits on August 18, 2003. Director's Exhibit 30. At claimant's request, a formal hearing was held on November 17, 2003. Director's Exhibit 25. The administrative law judge subsequently issued his decision, finding that claimant failed to establish either the existence of pneumoconiosis or that he was totally disabled due to coal workers' pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in weighing the x-ray and medical opinions relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4). Claimant further asserts that, because the administrative law judge discredited the opinion of Dr. Simpao, the Department of Labor's examining physician, as insufficiently reasoned since the physician offered no explanation supporting his diagnosis of total disability, the Department of Labor failed to provide claimant with a complete, credible pulmonary evaluation as required by Section 413(b) of the Act, 30 U.S.C. §923(b). Claimant further argues that the administrative law judge erred in resolving that claimant was not totally disabled. Employer has not responded to claimant's appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief, arguing that the Department of Labor has satisfied its obligation to provide claimant with a complete, 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.¹ 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 asserts on appeal that the administrative law judge "may have" selectively analyzed the x-ray evidence at 20 C.F.R. §718.202(a)(1) to find that he failed to establish the existence of pneumoconiosis.² Claimant's Brief at 3. We disagree. The

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner was employed in the coal mine industry in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

² Because there was no biopsy evidence of record, the administrative law judge found that claimant was unable to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2). Decision and Order at 12. He also determined that claimant was unable to avail himself of any of the presumptions for establishing the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3). *Id.* The administrative law judge's

administrative law judge correctly noted that the record contained nine interpretations of four x-rays dated May 14, 2002, July 23, 2002, April 24, 2003, and May 10, 2003. Director's Exhibits 13, 14, 16, 27, 28, 29; Claimant's Exhibits 2, 3; Employer's Exhibit 2; Decision and Order at 11. The administrative law judge properly considered the relative qualifications of the readers, *see Woodward v. Director, OWCP*, 991 F.3d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993), and determined that "the readings by the dually-qualified readers are in equipoise as to the existence of pneumoconiosis and the B-readings weigh slightly in favor of finding the x-ray evidence as negative for the disease." Decision and Order at 12. Thus, contrary to claimant's assertion, the administrative law judge did not place undue weight on the numerical superiority of the negative x-rays, as he found the x-ray evidence by the most qualified readers to be equally balanced and therefore insufficient to satisfy claimant's burden of proof. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990). Consequently, because substantial evidence supports the administrative law judge finding at 20 C.F.R. §718.202(a)(1), we affirm his determination that claimant failed to establish the existence of pneumoconiosis based on the x-ray evidence.

We also reject claimant's argument that the administrative law judge erred in his consideration of Dr. Baker's opinion at 20 C.F.R. §718.202(a)(4) relevant to the existence of pneumoconiosis. Claimant's Brief at 4-5. The administrative law judge permissibly assigned less probative weight to Dr. Baker's opinion, that claimant had coal workers' pneumoconiosis and chronic obstructive pulmonary disease, hypoxemia and bronchitis due to coal dust exposure as the administrative law judge found that Dr. Baker offered no explanation for his diagnosis compared to the better supported and more complete and extensive reports of Drs. Broudy and Dahhan, that claimant did not have coal workers' pneumoconiosis or a respiratory impairment arising out of coal mine employment. Director's Exhibits 16, 27, 28; Decision and Order at 13; *see* 20 C.F.R. §718.101(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).³

findings with respect to Section 718.202(a)(2), (3) are affirmed as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ Claimant does not challenge the weight accorded Dr. Simpao's opinion at 20 C.F.R. §718.202(a)(4). The administrative law judge noted that Dr. Simpao's diagnosis of pneumoconiosis was documented but simply outweighed by the more comprehensive

Additionally, we reject claimant's assertion that he is entitled to a new pulmonary evaluation pursuant to 20 C.F.R. §725.406 because the administrative law judge discredited Dr. Simpao's opinion on total disability. The administrative law judge found that the medical opinion evidence did not establish the existence of pneumoconiosis because the opinions of Drs. Dahhan and Broudy outweighed the opinions of Drs. Baker and Simpao. Claimant alleges only that he is entitled to another pulmonary evaluation because the administrative law judge discredited Dr. Simpao's opinion on the issue of total disability. Because claimant does not contend that the administrative law judge erred in according less weight to the opinion of Dr. Simpao regarding the existence of pneumoconiosis, we affirm the administrative law judge's finding thereunder and we need not address claimant's argument regarding total disability or whether claimant received a complete, credible pulmonary evaluation at to the issue of total disability. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).⁴ Claimant's Brief at 5-6.

Further, contrary to claimant's contention, the Director's obligation to provide him with a complete and credible pulmonary evaluation is not tantamount to an obligation to provide claimant with an examining physician's opinion that is given controlling weight by the administrative law judge. Claimant is not entitled to a new pulmonary examination simply because the administrative law judge found that Dr. Simpao's opinion on the existence of pneumoconiosis was outweighed by the contrary and better reasoned opinions of Drs. Broudy and Dahhan, who opined that claimant did not have pneumoconiosis. Director's Exhibits 13, 16, 27; Decision and Order at 13. We thus hold that the Director satisfied his obligation under the Act to provide claimant with a complete and credible pulmonary evaluation. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Cline v. Director, OWCP*, 917 F.2d 9, 14 BLR 2-102 (8th Cir. 1992); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994).

Because claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement, benefits are precluded. *See* 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

and better supported opinions of Drs. Broudy and Dahhan concerning the existence of pneumoconiosis. Decision and Order at 13-14.

⁴ The Department of Labor has a statutory duty to provide a miner with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate the claim. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994).

Accordingly, the Decision and Order – Denying Benefits of the administrative law judge is hereby affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge