BRB No. 06-0683 BLA

TIMMY MITCHELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIAMOND MAY COAL COMPANY	)	DATE ISSUED: 02/28/2007
	)	
and	)	
	)	
ACORDIA EMPLOYERS SERVICE	)	
	)	
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 – Denial of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

David H. Neeley (Neeley Law Office, P.S.C.), Prestonsburg, Kentucky, for employer.

Jeffrey S. Goldberg (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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 – Denial of Benefits (04-BLA-6789) of Administrative Law Judge Larry S. Merck on a claim[1] 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 initially credited claimant with eleven years of qualifying coal mine employment. Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total respiratory disability pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis established by x-ray evidence under Section 718.202(a)(1) and in failing to find total respiratory disability established under Section 718.204(b)(2)(iv). Claimant additionally contends that the Director, Office of Workers' Compensation Programs (the Director), has failed to provide claimant with a complete and credible pulmonary evaluation to substantiate his claim as required by Section 413(b) of the Act, 30 U.S.C. §923(b). Claimant bases his argument on the administrative law judge's finding that the opinion of Dr. Simpao on the existence of pneumoconiosis, at Section 718.202(a)(4), was unreasoned and unexplained. In response, employer urges affirmance of the denial of benefits. The Director, as party-in-interest, also responds, arguing that he has satisfied his obligation to provide claimant with a complete, credible pulmonary evaluation, as required by the Act.[2]

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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In challenging the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1), claimant argues that the administrative law judge erred by placing substantial weight on the numerical superiority of the negative x-ray interpretations, and by relying exclusively on the

[1] Claimant, Timmy Mitchell, filed an application for benefits on September 3, 2003. Director's Exhibit 2.

[2] We affirm the administrative law judge's findings of eleven years of coal mine employment and that pneumoconiosis and total disability were not established, pursuant to 20 C.F.R. §§718.202(a)(2)-(a)(3) and 718.204(b)(2)(i)-(iii), because these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 7, 9-13.

qualifications of the physicians providing those x-ray interpretations. Claimant contends that the administrative law judge is not required either to defer to a physician with superior qualifications or to accept as conclusive the numerical superiority of x-ray interpretations. Claimant further contends that the administrative law judge "may have selectively analyzed" the x-ray evidence. Claimant does not otherwise challenge the administrative law judge's weighing of the evidence as to the existence of pneumoconiosis, except insofar as he avers that the Director failed to provide him with a complete and credible pulmonary evaluation, as required by the Act.

Contrary to claimant's argument, where x-ray evidence is in conflict, consideration shall be given to the readers' radiological qualifications. 20 C.F.R. §718.202(a)(1). The administrative law judge, within a proper exercise of his discretion, considered the radiological expertise of the physicians who interpreted the two x-ray films of record and found that the positive interpretation of Dr. Simpao, who possessed no radiological qualifications or expertise, was outweighed by the negative interpretation of Dr. Dahhan, who was a B reader.[3] This was rational. 20 C.F.R. §718.202(a)(1); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 6; Director's Exhibits 9, 13. Hence, the administrative law judge's analysis constitutes a qualitative and quantitative analysis of the x-ray evidence, and we affirm his weighing of the conflicting readings and his resultant finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See 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. 1994). In addition, we reject claimant's contention that the administrative law judge "may have selectively analyzed" the x-ray evidence because claimant has not provided any support for that assertion, nor does a review of the evidence and the administrative law judge's Decision and Order reveal that he engaged in a selective analysis of the x-ray evidence. *See White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-4 (2004).

Additionally, claimant contends that he was not provided with a complete, credible pulmonary evaluation on the existence of pneumoconiosis at Section 718.202(a)(4) because the administrative law judge discredited the opinion of Dr. Simpao, as it was based "merely upon an x-ray interpretation, and [the doctor] failed to explain how his other test results impacted his decision." Claimant's Brief at 4.[4] In

[3] Dr. Barrett read the November 10, 2003 film for quality only. Director's Exhibit 10.

[4] Although claimant does not expressly refer to 20 C.F.R. §718.202(a)(4), he refers to page 9 of the administrative law judge's Decision and Order discussing the medical opinion evidence at Section 718.202(a)(4). Claimant's Brief at 4.

response, the Director asserts that the administrative law judge properly found that, even if the claim were remanded for Dr. Simpao to provide a better reasoned opinion concerning the existence of pneumoconiosis, claimant could not prevail because both Drs. Broudy and Dahhan rendered credible opinions that claimant did not have pneumoconiosis. We agree.

In assessing the credibility of the medical opinion evidence pursuant to Section 718.202(a)(4), the administrative law judge found that Dr. Simpao's opinion, on pneumoconiosis, was unreasoned and unexplained because, notwithstanding his additional objective tests and clinical findings, Dr. Simpao expressly stated that he relied on claimant's positive x-ray reading and coal dust exposure to diagnose pneumoconiosis, while the better documented and reasoned opinions of Drs. Dahhan and Broudy did not support a finding of pneumoconiosis.[5] This was proper. Decision and Order at 9; Director's Exhibit 9; *see Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985). Thus, as the Director contends, because the administrative law judge found that the credible opinions of Drs. Broudy and Dahhan did not establish the existence of pneumoconiosis, the existence of pneumoconiosis could not be established in this case. Decision and Order at 9-10, n.6; *see Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

We affirm, therefore, the administrative law judge's determinations that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), an essential element of entitlement. Because claimant has failed to establish the existence of pneumoconiosis, an essential element of entitlement, we need not reach claimant's argument concerning total disability. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[5] The administrative law judge noted that Dr. Dahhan's opinion was based on negative x-ray, non-qualifying pulmonary function and blood gas studies, and the evidence of record that he reviewed, Director's Exhibit 13, while Dr. Broudy's opinion was based on negative x-ray, non-qualifying pulmonary function studies and blood gas study, and normal chest examinations, Employer's Exhibit 2.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge