

BRB No. 07-0410 BLA

W.W. )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 TENNESSEE CONSTRUCTION )  
 COMPANY )  
 )  
 and )  
 )  
 OLD REPUBLIC INSURANCE COMPANY ) DATE ISSUED: 02/26/2008  
 )  
 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 Denying Claim of Pamela Lakes Wood,  
Administrative Law Judge, United States Department of Labor.

Billy J. Moseley (Webster Law Offices), Pikeville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for  
employer/carrier.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals  
Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Claim (2004-BLA-6826) of Administrative Law Judge Pamela Lakes Wood 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). Based on claimant's June 12, 2003 filing date, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718 and found that claimant established seventeen years of coal mine employment. Addressing the merits of entitlement, the administrative law judge found the medical evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in her weighing of the x-ray and medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). In addition, claimant contends that the administrative law judge erred in finding claimant's testimony insufficient to support a finding of the existence of pneumoconiosis. In response, employer argues that the administrative law judge's denial of benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not submit a response brief on the merits of this appeal.<sup>1</sup>

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling.<sup>2</sup> See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co.*

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<sup>1</sup> The administrative law judge's decision to credit claimant with seventeen years of coal mine employment and her findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(a)(3) are affirmed as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

<sup>2</sup> Because claimant's coal mine employment occurred in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit.

*v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant generally argues under Section 718.202(a)(1) that he established the existence of pneumoconiosis based on the positive x-ray reading by Dr. Fisher, a Board-certified radiologist and B reader. Claimant's Brief at 4-5. Claimant contends that the record contains two positive x-ray readings, one by Dr. Simpao of the July 23, 2003 x-ray and one by Dr. Fisher of the June 6, 1995 film. Based on Dr. Fisher's qualifications, claimant contends that the administrative law judge erred in finding this positive reading "cancelled out" merely because employer submitted a negative reading by a physician who is also a B reader. Claimant's Brief at 4. We disagree.

The administrative law judge properly noted that the record consists of six interpretations of four x-rays taken on June 6, 1995, July 25, 2003, August 25, 2005, and September 13, 2005.<sup>3</sup> Decision and Order at 3, 7; Director's Exhibit 12; Claimant's Exhibit 1; Employer's Exhibits 1, 2, 4, 6. Weighing these readings in light of the readers' radiological qualifications, the administrative law judge found that Dr. Simpao, who possesses no specific radiological qualifications, read the July 25, 2003 x-ray as positive for pneumoconiosis; whereas Dr. Wiot, who is both a B reader and Board-certified radiologist, read it as negative for pneumoconiosis. Decision and Order at 7; Director's Exhibit 12; Employer's Exhibit 4. In addition, the administrative law judge found that the June 6, 1995 x-ray was read as positive by Dr. Fisher and as negative by Dr. Wiot, both of whom are B readers and Board-certified radiologists, and, therefore, found the evidence regarding this film to be in equipoise. Decision and Order at 7; Claimant's Exhibit 1; Employer's Exhibit 6. The administrative law judge further found that Dr. Broudy and Dr. Rosenberg, both of whom are B readers, read the August 25, 2005 and September 13, 2005 x-rays, respectively, as negative for pneumoconiosis. Decision and Order at 7; Employer's Exhibits 1, 2.

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Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-201 (1989) (*en banc*).

<sup>3</sup> An additional reading by Dr. Barrett was obtained solely to assess the quality of the July 25, 2003 x-ray. Director's Exhibit 13. The record also contains a reading by Dr. Ramakrishnan of an April 27, 2004 x-ray film; however, because neither party designated this reading as part of their evidence, the administrative law judge stated that she was not weighing it as part of the x-ray evidence. Decision and Order at 6 n.5.

Based upon this review, the administrative law judge acted within her discretion as fact-finder in according greater weight to the negative readings of the July 25, 2003, August 25, 2005, and September 13, 2005 x-rays, as they were performed by physicians who are B readers or both B readers and Board-certified radiologists. Decision and Order at 6-7; 20 C.F.R. §718.202(a)(1); *see Dixon v. North Camp Coal Co.*, 8 BLR 1-31, 1-37 (1991). Moreover, when considering the evidence regarding the June 6, 1995 x-ray, Dr. Wiot's negative reading and Dr. Fisher's positive reading, the administrative law judge rationally found the interpretations to be in equipoise. Therefore, contrary to claimant's assertions, the record indicates that the administrative law judge based her finding on a proper qualitative analysis of the x-ray evidence. *See Staton v. Norfolk & Western Railway 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); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). We, therefore, affirm the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) as it is supported by substantial evidence.

Claimant argues that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4). Claimant contends that the reasoned opinions of Drs. Wright and Simpao are sufficient to establish that he suffers from pneumoconiosis and were based not only upon their x-ray reports, but also on pulmonary function studies, arterial blood gas studies, as well as personal physical examinations. Claimant's Brief at 5-6. In particular, claimant contends that Dr. Simpao was well aware of claimant's smoking history and that the administrative law judge erred in discrediting the doctor's opinion for failing to discuss whether claimant's smoking history would affect his diagnosis. Claimant's Brief 6. Claimant also contends that the administrative law judge erred in giving less weight to the opinion of Dr. Wright because she considered it to be based on a positive x-ray reading which was not a part of the record. Claimant's Brief at 5. We disagree.

Contrary to claimant's contention, the administrative law judge acknowledged that both Drs. Wright and Simpao examined claimant and that their opinions recorded claimant's occupational history, the results of claimant's physical examination, x-ray, pulmonary function and blood gas studies. Decision and Order at 3, 8-9. However, she permissibly gave greater weight to the opinions of Drs. Broudy and Rosenberg, that claimant is not suffering from pneumoconiosis, on the basis that as Board-certified pulmonologists, they have superior qualifications, and that their opinions were better explained and based on a more thorough review of the evidence. Decision and Order at 11; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Wetzel v.*

*Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

In addition to finding that Dr. Simpao did not possess professional qualifications superior to those of, Drs. Broudy and Rosenberg, the administrative law judge also permissibly gave less weight to Dr. Simpao's opinion, finding that the physician failed to "sufficiently articulate the basis for his determination" that claimant suffers from either clinical or legal pneumoconiosis. Decision and Order at 10-11; Director's Exhibit 12; *see Williams*, 338 F.3d at 514, 22 BLR at 2-649; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Similarly, the administrative law judge also permissibly accorded little weight to the opinion of Dr. Wright because the physician gave no explanation for his diagnosis of coal workers' pneumoconiosis other than his own positive x-ray reading, which was against the weight of the x-ray evidence, and the opinion was significantly older than the other medical opinions of record. Decision and Order at 10; *see Williams*, 338 F.3d at 514, 22 BLR at 2-649; *Clark*, 12 BLR at 1-155; *Wetzel*, 8 BLR at 1-139; *Lucostic*, 8 BLR at 1-47. Consequently, because it is based upon substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Claimant also contends that his credible hearing testimony that he could not breathe properly is further evidence that he suffers from pneumoconiosis. We disagree. The administrative law judge specifically found that "[t]aking into consideration all of the evidence on the issue of the existence of pneumoconiosis, I find that the [c]laimant cannot establish either clinical or legal pneumoconiosis." Decision and Order at 12. In addition, in a living miner's case, lay testimony alone is insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(c); *see Madden v. Gopher Mining Co.*, 21 BLR 1-122, 1-125 (1999); *Trent*, 11 BLR at 1-28.

In light of our affirmance of the administrative law judge's finding that claimant did not 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 Part 718. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, the administrative law judge's Decision and Order Denying Claim 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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JUDITH S. BOGGS  
Administrative Appeals Judge