

BRB No. 07-0474 BLA

L.W.N.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
HOBET MINING, INCORPORATED)	DATE ISSUED: 02/21/2008
)	
Employer-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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Donald C. Wandling (Avis, Witten & Wandling L.C.), Logan, West Virginia, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Sarah M. Hurley (Gregory F. Jacob, Solicitor of Labor; 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 Denying Benefits (2005-BLA-6207) of Administrative Law Judge Richard A. Morgan rendered 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). The administrative law judge credited claimant with twenty-two years of qualifying coal mine employment, and adjudicated this claim, filed on August 23, 2004, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of a totally disabling pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv), but insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202. Accordingly, benefits were denied.

On appeal, claimant asserts that the administrative law judge erred in excluding Dr. Ranavaya's interpretation of the November 23, 2004 x-ray from the record pursuant to 20 C.F.R. §725.414, and in failing to weigh the totality of the evidence together in determining whether the existence of pneumoconiosis was established at Section 718.202(a). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to vacate the administrative law judge's findings pursuant to Section 718.202(a) and remand this case to the administrative law judge for further analysis, taking into account that Dr. Ranavaya's x-ray interpretation was properly admissible as part of claimant's affirmative case pursuant to Section 725.414(a)(2)(i).

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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 entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Claimant initially contends, and the Director agrees, that the administrative law judge erred in excluding from the record Dr. Ranavaya's interpretation of the November 23, 2004 x-ray, offered as affirmative evidence, on the ground that the film was originally obtained as part of the Department of Labor's (DOL) complete pulmonary evaluation of

¹ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mining industry in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

the claimant pursuant to 30 U.S.C. §923(b).² Claimant asserts that Dr. Ranavaya's interpretation is admissible as one of claimant's two affirmative readings under Section 725.414(a)(2)(i). We agree. The regulatory limitations on evidence permit no more than two x-ray interpretations in a party's affirmative case, but there is no restriction on the source of those interpretations. *See* 20 C.F.R. §725.414(a)(2)(i), (3)(i). Furthermore, the administrative law judge's concern, that allowing claimant to submit a rereading of the DOL x-ray as affirmative evidence would potentially result in multiple rebuttal readings in contravention of the regulatory scheme, is unfounded, as it is each individual x-ray *interpretation*, as opposed to the x-ray *film*, that is subject to rebuttal by the parties under 20 C.F.R. §725.414(a)(2)(ii), (3)(ii). *See Elm Grove Coal Co. v. Director, OWCP [Blake]*, 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007); *Ward v. Consolidation Coal Co.*, 23 BLR 1-151 (2006). Accordingly, we hold that the administrative law judge erred in finding that Dr. Ranavaya's reading of the November 23, 2004 x-ray was inadmissible under Section 725.414(a)(2)(i), but conclude such error is harmless, as it would have no impact on the outcome of this case, as set forth below. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Turning to the merits, claimant asserts that the administrative law judge failed to weigh all types of relevant evidence together in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), when considering whether claimant had established the existence of pneumoconiosis at Section 718.202(a). Claimant's Brief at 3. Contrary to claimant's arguments, however, we can discern no error in the administrative law judge's weighing of the evidence on this issue.

At Section 718.202(a)(1), the administrative law judge initially found the November 23, 2004 x-ray to be inconclusive for pneumoconiosis, as two equally qualified physicians submitted conflicting interpretations of this film. Decision and Order at 5, 12. The administrative law judge concluded, however, that the weight of the x-ray evidence was negative for pneumoconiosis, as x-rays obtained on August 3, 2005 and January 9, 2006 were interpreted as negative for pneumoconiosis, without contradiction, by two dually qualified readers. Decision and Order at 13; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). The administrative law judge further permissibly found that if Dr. Ranavaya's positive interpretation had been admitted into evidence, he would have found the 2004 film to be positive for pneumoconiosis, rather than inconclusive, but the film would still have been outweighed by the 2005 and 2006 negative interpretations, and the weight of the x-ray evidence as a whole would remain negative for pneumoconiosis. Decision and Order at 4, n.4; *see*

² Section 413(b) of the Act, 30 U.S.C. §923(b), as implemented by 20 C.F.R. §725.406, requires the Director to provide miners with a complete pulmonary evaluation.

White v. New White Coal Co., 23 BLR 1-1 (2004). As substantial evidence supports the administrative law judge's findings pursuant to Section 718.202(a)(1), they are affirmed. We also affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(2) or (3), as he accurately determined that the record contained no biopsy evidence or evidence of complicated pneumoconiosis. Decision and Order at 12.

In evaluating the conflicting medical opinions of record at Section 718.202(a)(4), the administrative law judge determined that Drs. Rasmussen and Ranavaya diagnosed pneumoconiosis, while Drs. Zaldivar and Crisalli found no pneumoconiosis but diagnosed emphysema related to smoking. Decision and Order at 8-10. The administrative law judge properly reviewed the relative qualifications of the physicians and the documentation underlying their opinions, and acted within his discretion in finding that the opinions of Drs. Zaldivar, Crisalli and Rasmussen were all well reasoned and entitled to full credit, but that Dr. Ranavaya's diagnosis of pneumoconiosis was entitled to significantly diminished weight because it was premised largely on the doctor's own positive x-ray interpretation that had been excluded from the record. Decision and Order at 8-10, 13; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). The administrative law judge further found that even if Dr. Ranavaya's x-ray reading were admitted into the record, his opinion would still be entitled to diminished weight when compared with the remaining medical opinions, because it was based on comparatively less extensive medical evidence. Decision and Order at 13 n.18; *see generally Hall v. Director, OWCP*, 8 BLR 1-193 (1985). Thus, the administrative law judge permissibly concluded that claimant failed to meet his burden of establishing pneumoconiosis by a preponderance of both the medical opinion evidence at Section 718.202(a)(4) and the combined weight of all the evidence at Section 718.202(a)(1)-(4), and we affirm his findings thereunder as supported by substantial evidence. Decision and Order at 13; *Compton*, 211 F.3d 203, 22 BLR 2-162.

Because claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement, we affirm the administrative law judge's denial of benefits. *See Anderson*, 12 BLR at 1-112.

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