

BRB No. 07-0537 BLA

C.B.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
LESLIE RESOURCES, INCORPORATED)	DATE ISSUED: 02/29/2008
)	
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 – 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.

Carl M. Brashear (Hoskins Law Offices PLLC), Lexington, Kentucky, for employer.

Emily Goldberg-Kraft (Gregory F. Jacob, 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 Appeal Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (2004-BLA-6515) of Administrative Law Judge Larry S. Merck (the administrative law judge) 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). After finding that the

record supported the parties' stipulation to eight years of qualifying coal mine employment, the administrative law judge found that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and in finding the medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Additionally, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete credible pulmonary evaluation on the issues of pneumoconiosis and total disability sufficient to constitute an opportunity to substantiate his claim as required by the Act. 30 U.S.C. §923(b). Employer responds, urging that the denial of benefits be affirmed. The Director responds, arguing that Dr. Simpao provided claimant with a complete, credible pulmonary evaluation as to pneumoconiosis and that remand of the case on the issue of total disability would be futile as the administrative law judge found that the preponderance of the evidence failed to establish total disability.¹

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.² 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).

¹ The administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4), and total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

² We will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 3.

Claimant initially challenges the administrative law judge's weighing of the x-ray evidence of record at Section 718.202(a)(1), arguing that the administrative law judge erred because he "relied almost solely on the qualifications of the physicians providing the x-ray interpretations," "placed substantial weight on the numerical superiority of x-ray interpretations," and "may have selectively analyzed" the evidence. Claimant's Brief at 3. Contrary to claimant's arguments, however, we discern no error in the administrative law judge's weighing of this evidence. The administrative law judge accurately reviewed the x-ray evidence of record, and found that it contained three interpretations³ of a June 12, 2003 x-ray. The administrative law judge found that the x-ray was read by Drs. Kendall and West, Board-certified radiologists and B readers, as negative for pneumoconiosis, and as positive for pneumoconiosis by Dr. Simpao, a physician with no radiological qualifications. Employer's Exhibits 1, 2; Director's Exhibit 13.

In considering the x-ray evidence, the administrative law judge properly accorded greater weight to the interpretations of Drs. Kendall and West due to their superior qualifications and thus found, based on the quality and quantity of the x-ray evidence, that it failed to establish 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. 1993). Further, claimant has provided no support for his contention that the administrative law judge "may have selectively analyzed the x-ray evidence," nor does the record support such a contention. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The administrative law judge's finding that the x-ray evidence failed to establish pneumoconiosis is, therefore, affirmed.

Claimant also contends that the Director failed to provide him with a complete, credible pulmonary evaluation sufficient to substantiate his claim on the issues of pneumoconiosis and total disability, since the administrative law judge found (1) that Dr. Simpao's report was based solely on an erroneous x-ray interpretation, (2) that Dr. Simpao did not adequately explain his findings and (3) that Dr. Simpao made no findings

³ We reject claimant's assertion that the administrative law judge's consideration of both Dr. Kendall's and Dr. West's interpretations of the June 12, 2003 x-ray is in excess of the evidentiary limitations at 20 C.F.R. §725.414. Dr. West's interpretation was submitted as affirmative evidence in support of employer's case while Dr. Kendall's interpretation was submitted as rebuttal evidence. *See* Hearing Transcript at 8; Employer's Brief at 3. Thus, employer's submission of both interpretations comports with the evidentiary limitations. 20 C.F.R. §§725.414(a)(3)(i), (ii).

as to whether claimant could perform his usual coal mine employment.⁴ See 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990) (*en banc*). In response, the Director contends that claimant was provided a complete credible pulmonary evaluation on the issue of pneumoconiosis and that remand of the case for Dr. Simpao to address whether claimant could perform his usual coal mine employment would, as the administrative law judge found, be futile. The Director notes that the administrative law judge correctly found that, even if Dr. Simpao's opinion as to total disability had been complete, claimant would not prevail because the other evidence of record failed to establish total disability. Director's Brief at 4. We agree.

As the Director contends, the fact that the administrative law judge found that Dr. Simpao's finding of pneumoconiosis was based, in part, on a positive x-ray which was subsequently reread as negative by a better qualified physician does not mean that Dr. Simpao failed to perform a complete pulmonary evaluation regarding the issue of pneumoconiosis. In finding that pneumoconiosis was established, Dr. Simpao conducted a physical examination, obtained pulmonary function study and blood gas study results, and took claimant's symptoms and history. Nonetheless, the administrative law judge could reasonably accord his opinion less weight on the issue of pneumoconiosis because the x-ray relied on by Dr. Simpao was subsequently read as negative by a better qualified physician. See *Clark v. Karst Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n. 4 (1984).

Likewise, as the Director contends, the administrative law judge properly found that remand of this case on the issue of total disability would be futile, as the preponderance of the evidence failed to establish total disability. The administrative law judge found that no doctor found claimant to be "totally disabled," that the pulmonary function studies and blood gas study in the record were non-qualifying, that there was no evidence of cor pulmonale with right-sided congestive heart failure, and that, in a well-documented and well-reasoned report, Dr. Castle found that claimant did not have a totally disabling respiratory impairment based on his review of all the relevant medical data, including Dr. Simpao's opinion. The administrative law judge found that Dr. Castle's opinion was better reasoned than Dr. Simpao's. We, therefore, affirm the administrative law judge's finding that claimant failed to establish total disability at

⁴ Dr. Simpao noted that claimant's last coal mine employment was as an equipment operator and mechanic. The doctor assessed claimant's respiratory disability to be mild. Dr. Simpao conducted a physical examination, took claimant's symptoms and history, and conducted a pulmonary function study and blood gas study. The results of the pulmonary function study and blood gas study were normal. Director's Exhibit 13.

Section 718.204(b)(2)(iv). Director's Exhibit 13; Employer's Exhibit 3; Decision and Order at 9; 20 C.F.R. §718.204(b)(2)(i)-(iv); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1986); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Claimant's argument that the case must be remanded for a complete credible pulmonary evaluation is, therefore, rejected. *See Cline v. Director, OWCP*, 919 F.2d 9, 14 BLR 2-102 (8th Cir. 1990).

We, therefore, affirm the administrative law judge's finding that claimant failed to establish pneumoconiosis at Section 718.202(a)(1)-(4), and total disability at Section 718.204(b)(2)(i)-(iv), essential elements of entitlement. Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge