

BRB No. 07-0398 BLA

M.S.)
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 Claimant-Petitioner)
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 v.)
)
 UNICORN MINING, INCORPORATED) DATE ISSUED: 01/31/2008
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 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 Stephen L. Purcell,
Administrative Law Judge, United States Department of Labor.

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

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer.

Rita Ropollo (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 Appeals Judge, HALL and
BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (04-BLA-6282) of
Administrative Law Judge Stephen L. Purcell 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 April 18, 2002 filing date, the

administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718.¹ Addressing the elements of entitlement, the administrative law judge found that the medical evidence was insufficient to establish both the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), and (c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in permitting employer to submit “two rebuttal” readings of Dr. Simpao’s July 25, 2000 x-ray. Claimant’s Brief at 4. Claimant also argues that the administrative law judge erred in finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Claimant’s Brief at 2-4. Claimant further asserts that the Director, Office of Workers’ Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b), since the administrative law judge “concluded that Dr. Simpao’s report was based merely upon an erroneous x-ray interpretation, that he relied upon non-qualifying test results, and that as a result his [opinion] was not well reasoned.” Claimant’s Brief at 4, citing Decision and Order at 8. Additionally, claimant contends that the administrative law judge erred in finding that he was not totally disabled pursuant to 20 C.F.R. §718.204(b)(2).² Claimant’s Brief at 5-6. Employer responds, urging affirmance of the denial of benefits. The Director has filed a limited response, asserting that claimant has received a complete pulmonary evaluation as required by the Act and regulations.

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,

¹ This case was originally assigned to Administrative Law Judge Richard Huddleston, who presided over the formal hearing on February 2, 2006. Subsequent to the hearing, but prior to issuing a decision, Judge Huddleston retired from the Office of Administrative Law Judges. By Order dated May 2, 2006, the parties were afforded the opportunity to request a decision on the record or request a new hearing. By consent of the parties, it was ordered that the matter would be assigned to a new administrative law judge. This case was thereafter reassigned to Administrative Law Judge Stephen L. Purcell. Decision and Order at 2.

² We affirm, as unchallenged on appeal, the administrative law judge’s finding that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and in accordance with applicable law.³ 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).

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. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. 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 one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Initially, we reject claimant’s assertion that the administrative law judge erred in his consideration of the x-ray evidence for pneumoconiosis because he permitted employer to submit two rebuttal readings of Dr. Simpao’s chest x-ray in violation of the evidentiary limitations at 20 C.F.R. §725.414. The record contains four readings of one x-ray dated July 25, 2002. Director’s Exhibits 12-14; Employer’s Exhibit 1. Dr. Simpao read the July 25, 2002 x-ray as positive for pneumoconiosis, while Dr. Barrett performed a quality only reading, and Drs. Spitz and Wiot read the x-ray as negative for pneumoconiosis. Contrary to claimant’s contention, on the “Proposed Evidence Summary Form” submitted by employer on January 5, 2006, the readings by Drs. Spitz and Wiot were designated by employer as affirmative case evidence. Because employer is entitled to submit two x-ray readings in support of its affirmative case under the evidentiary limitations,⁴ the administrative law judge committed no error in considering those readings in his analysis of the x-ray evidence at 20 C.F.R. §718.202(a)(1).

Furthermore, in weighing the conflicting x-ray evidence at Section 718.202(a)(1), the administrative law judge permissibly determined that the positive x-ray reading for pneumoconiosis by Dr. Simpao was outweighed by the negative readings by Drs. Spitz and Wiot since the latter physicians are more qualified. As noted by the administrative

³ As 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. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

⁴ The revised regulation at 20 C.F.R. §725.414 provides that each party may submit two x-ray readings, one autopsy report, one biopsy report, two pulmonary function studies, two blood gas studies, and two medical reports as its affirmative case. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). Each party may then submit one piece of evidence in rebuttal of each piece of evidence submitted as the opposing party’s case. 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii).

law judge, Dr. Simpao holds no radiological qualifications, while Drs. Spitz and Wiot are dually qualified Board-certified radiologists and B readers. Decision and Order at 7; *see* 20 C.F.R. §718.202(a)(1); *Dixon v. North Camp Coal Co.*, 8 BLR 1-31, 1-37 (1991). Therefore, contrary to claimant's assertions, the administrative law judge properly based his finding at Section 718.202(a)(1) on a qualitative analysis of the x-ray evidence. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 320, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, merely counted the negative readings, and may have selectively analyzed the readings, lack merit. Claimant's Brief at 2-4; Decision and Order at 7. We, therefore, affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) as supported by substantial evidence.

Under Section 718.202(a)(4), the administrative law judge considered two medical opinions by Drs. Simpao and Broudy as to whether claimant had pneumoconiosis. Director's Exhibit 14; Employer's Exhibit 2. The administrative law judge rejected Dr. Simpao's opinion, that claimant suffered from pneumoconiosis, because he determined that Dr. Simpao based his diagnosis primarily upon his own positive x-ray interpretation, which had been read as negative by more qualified Board-certified radiologists and B readers. Decision and Order at 8. In addition, the administrative law judge discounted Dr. Simpao's opinion because the doctor failed to explain how the miner's symptoms, physical findings, and objective test results supported his conclusion. *Id.* In contrast, the administrative law judge determined that Dr. Broudy's opinion that claimant did not have pneumoconiosis was persuasive as Dr. Broudy explained the basis for his diagnosis in view of the objective evidence. *Id.*

Claimant does not specifically challenge the weight accorded the opinions of either Dr. Simpao or Dr. Broudy at Section 718.202(a)(4). Instead, claimant asserts that he did not receive a complete pulmonary evaluation because the administrative law judge determined that Dr. Simpao's opinion was not well-reasoned as to the existence of pneumoconiosis. Because claimant does not assign specific error to the administrative law judge's credibility determinations at Section 718.202(a)(4), *see Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987), we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis based on the medical opinion evidence.

We also reject claimant's assertion that the Director failed to fulfill his statutory obligation to provide a complete, credible pulmonary evaluation pursuant to Section

413(b) of the Act.⁵ The record reflects that Dr. Simpao conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor (DOL) examination form. Director's Exhibit 12; *see* 20 C.F.R. §§718.101(a), 718.104. The administrative law judge did not find, nor does claimant contend in this appeal, that Dr. Simpao's opinion was incomplete because it failed to address one of the essential elements of entitlement. Rather, claimant asserts that the Director failed to provide a complete, credible pulmonary evaluation because the administrative law judge ultimately found Dr. Simpao's diagnosis unpersuasive. Claimant's Brief at 4. The Director maintains that "the fact that Dr. Simpao's disease and disability diagnoses were outweighed by the contrary evidence does not result in a [S]ection 413(b) violation" since "the Act does not guarantee that the DOL-sponsored examination [will] trump all other evidence." Director's Brief at 1.

In *Gallaher v. Bellaire Corp.*, No. 03-3066, 71 Fed. Appx. 528, 531, 2003 WL 21801463 (6th Cir. Aug. 4, 2003) (unpub.), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that the Director had discharged his responsibility because the doctor's report at issue addressed the essential elements of entitlement, even though the administrative law judge had discredited the doctor's diagnosis of pneumoconiosis as unexplained and based on a questionable x-ray interpretation. In keeping with the reasoning of *Gallaher*, which involves facts essentially identical to those presented in the instant case, and given the fact that Dr. Simpao's opinion addressed all of the essential elements of entitlement, Director's Exhibit 12, we reject claimant's argument that the Director failed to provide him with a full pulmonary evaluation. *Cf. Hodges v. BethEnergy Mines*, 18 BLR at 1-89-90.

Consequently, in this case, since claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement, benefits are precluded.⁶ *Trent*, 11 BLR at 1-26; *Perry*, 9 BLR at 1-1.

⁵ The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director, Office of Workers' Compensation Programs, has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

⁶ Because we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, we need not address claimant's argument that

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

the administrative law judge erred in his consideration of the evidence on total disability. Claimant's Brief at 5-6.