

BRB No. 06-0951 BLA

P. H.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
JERICOL MINING, INCORPORATED)	
)	DATE ISSUED: 07/31/2007
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 of William S. Colwell, Administrative Law Judge, United States Department of Labor.

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

Rodney E. Buttermore, Jr. (Buttermore & Boggs), Harlan, 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 (04-BLA-5704) of Administrative Law Judge William S. Colwell denying benefits 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). This case involves a claim filed on October 3, 2002. Director's Exhibit 2. After crediting claimant with twelve years of coal mine employment, the administrative law judge found that the evidence did not establish the existence of

pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary evaluation sufficient to substantiate his claim. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director has filed a limited response, urging the Board to reject claimant's request that the case be remanded based upon the Director's alleged failure to provide claimant with a complete, credible pulmonary evaluation.¹

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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, 363 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4, 1-5 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

Claimant contends that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The x-ray evidence consists of four interpretations of three x-rays taken on May 12, 2003, July 14, 2003, and July 29, 2003.² Director's Exhibits 9, 16, 17, 18. Dr. Simpao, who has no special radiological qualifications, interpreted claimant's May

¹ Because no party challenges the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(a)(4), those findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

² Dr. Barrett, B reader and Board-certified radiologist, provided a fifth x-ray interpretation, but he interpreted the May 12, 2003 x-ray for quality purposes only. Director's Exhibit 10.

12, 2003 x-ray as positive for pneumoconiosis, and Dr. Poulos, B reader and Board-certified radiologist, provided a negative interpretation. Director's Exhibits 9, 16.

The administrative law judge acted within his discretion in crediting the negative interpretation of claimant's May 12, 2003 x-ray over Dr. Simpao's positive interpretation, based upon Dr. Poulos's superior qualifications. 20 C.F.R. §718.202(a)(1); *see Dixon v. North Camp Coal Co.*, 8 BLR 1-31, 1-37 (1991); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984); Decision and Order at 10. The remaining x-ray interpretations of record were interpreted by B readers as negative for pneumoconiosis.³ Therefore, the administrative law judge reasonably found that claimant did not establish the existence of pneumoconiosis by the preponderance of the x-ray evidence, pursuant to 20 C.F.R. §718.202(a)(1). *Woodward v. Director, OWCP*, 991 F.2d 314, 320, 17 BLR 2-77, 2-87 (6th Cir. 1993); *Sheckler*, 7 BLR at 1-131.

Contrary to claimant's assertions, the record indicates that the administrative law judge based his finding on a proper 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); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004); *Woodward*, 991 F.2d at 321, 17 BLR at 2-87.⁴ Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, merely counted the negative readings, and that he may have selectively analyzed the readings, lack merit.⁵ Claimant's Brief at 3; Decision and Order at 9-10. We therefore affirm the administrative law judge's finding that the evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) as supported by substantial evidence.

In light of our affirmance of the administrative law judge's findings that the evidence 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 20 C.F.R. Part 718. *See Trent*, 11 BLR at 1-27; *Gee*, 9 BLR at 1-5; *Perry*, 9 BLR at 1-2. Consequently, we need not address claimant's contentions regarding the administrative law judge's finding that the medical opinion

³ Drs. Broudy and Dahhan are both B readers. Dr. Broudy provided a negative interpretation in reviewing the July 14, 2003 x-ray, and Dr. Dahhan interpreted the July 29, 2003 x-ray as negative for pneumoconiosis. Claimant offered no contrary interpretations of these films. Director's Exhibits 17, 18.

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant was last employed in the coal mine industry in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 202 (1989)(*en banc*); Director's Exhibit 5.

⁵ Claimant has provided no support for his assertion that the administrative law judge "may have 'selectively analyzed' the x-ray evidence." Claimant's Brief at 3.

evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Claimant contends that because the administrative law judge did not credit Dr. Simpao's diagnosis of pneumoconiosis contained in the May 12, 2003 medical report provided by the Department of Labor, "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 4. The Director responds that Dr. Simpao has provided a reasoned and documented opinion regarding the presence of pneumoconiosis and the administrative law judge acted within his discretion in crediting the contrary opinions. Consequently, the Director asserts that remand is unnecessary. Director's Brief at 2.

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), as implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director 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).

The record reflects that Dr. Simpao conducted an examination and the full range of testing required by the regulations. Dr. Simpao diagnosed claimant with coal workers' pneumoconiosis based on multiple years of coal dust exposure that resulted in a mild impairment. Director's Exhibit 9. On the issue of the existence of pneumoconiosis, the administrative law judge did not find that Dr. Simpao's report was incomplete, but stated that it was "poorly documented" and "poorly reasoned." Decision and Order at 12. The administrative law judge found that Dr. Simpao's diagnosis of "CWP 1/1" was based primarily on a positive x-ray reading, and that the physician cited claimant's coal dust exposure as the cause of claimant's lung condition. Decision and Order at 11-12; Director's Exhibit 9. The administrative law judge accorded less weight to Dr. Simpao's opinion because he did not otherwise explain the basis for his diagnosis other than his reference to the x-ray interpretation that the administrative law judge determined was outweighed by the contrary interpretations provided by better-qualified physicians. Decision and Order at 11-12.

Additionally, the administrative law judge accorded "greater weight" to the well-documented and well-reasoned medical opinions of Drs. Broudy and Dahhan. Decision and Order at 12, 13; *see Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999)(explaining that administrative law judges "may evaluate the relative

merits of conflicting physicians' opinions and choose to credit one . . . over the other"). Because the administrative law judge merely found that Dr. Simpao's opinion was outweighed by the contrary opinions of record on the existence of pneumoconiosis, we must reject claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. *Cf. Hodges*, 18 BLR at 1-93. Thus, remand to the district director is not required.⁶

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

⁶ The Director, Office of Workers' Compensation Programs, acknowledges that Dr. Simpao's report lacked an opinion regarding whether claimant is totally disabled, and is therefore incomplete. Director's Brief at 2. However, because the administrative law judge found the evidence was insufficient to establish the existence of pneumoconiosis, remand pertaining to the issue of total disability would not affect the outcome of this claim. *Youghioghney & Ohio Coal Co. v. Webb*, 49 F.3d 244, 249, 19 BLR 2-123, 2-133 (6th Cir. 1995).