BRB Nos. 06-0968 BLA and
06-0968 BLA-A

JULIUS CALDWELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 06/28/2007
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	
c/o ACORDIA EMPLOYERS SERVICE	)	
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Helen H. Cox (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, and employer cross-appeals, the Decision and Order – Denying Benefits (04-BLA-6213) of Administrative Law Judge Joseph E. Kane 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). In a Decision and Order dated July 19, 2006, the administrative law judge credited the miner with 10.37 years of coal mine employment,[1] and found that employer is the properly designated responsible operator. The administrative law judge further found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4), and erred in his evaluation of the medical opinion evidence relevant to the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv). Claimant further asserts that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary evaluation as required by 20 C.F.R. §725.406(a). Employer responds, urging affirmance of the administrative law judge's denial of benefits. Employer also cross-appeals, challenging the administrative law judge's length of coal mine employment determination, and the designation of employer as the responsible operator. The Director has submitted a combined response, asserting that a remand is not necessary for claimant to receive a new pulmonary evaluation, and urging affirmance of the designation of employer as the responsible operator.[2]

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

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[1] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibits 3, 21. Accordingly, 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*).

[2] The administrative law judge's findings that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) or (3), are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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 a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant asserts that the administrative law judge erred in relying almost solely on the qualifications of the interpreting physicians and the numerical superiority of the x-ray interpretations in evaluating the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). Claimant's Brief at 3. Claimant's assertion lacks merit. In finding the x-ray evidence was not sufficient to establish the existence of pneumoconiosis, the administrative law judge properly noted that the relevant x-ray evidence of record consists of six readings of four x-rays.[3] Decision and Order at 9, 14. The administrative law judge permissibly found that the sole positive reading of record, that of a June 11, 2001 x-ray by Dr. Baker, a physician with no specialized qualifications for the reading of x-rays, was outweighed by the negative reading of the same x-ray by Dr. Halbert, who is B reader, and thus possesses superior qualifications to Dr. Baker. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc*); Decision and Order at 9, 14; Director's Exhibit 14; Employer's Exhibit 6. Contrary to claimant's arguments, the administrative law judge properly considered both the quantity and the quality of the x-ray readings of record, and permissibly found that the preponderance of negative readings by B readers and dually qualified readers outweighs the sole positive x-ray reading by a lesser qualified physician. *See Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Cranor*, 22 BLR at 1-7; Decision and Order at 14. In addition, we reject claimant's assertion that the administrative law judge "may have selectively analyzed" the x-ray evidence. Claimant's Brief at 3. Claimant has not provided any support for that assertion, nor does a review of the evidence and the administrative law judge's Decision and Order reveal a selective analysis of the x-ray evidence. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-5 (2004). Consequently, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1), as it is supported by substantial evidence.

Claimant also challenges the administrative law judge's finding that pneumoconiosis was not established by medical opinion evidence at 20 C.F.R. §718.202(a)(4), asserting that the administrative law judge improperly accorded diminished weight to Dr. Baker's opinion. Claimant's Brief at 4-5. Claimant's argument is without merit.

[3] The record contains an additional reading for quality only (Quality 3), by Dr. Sargent, of the June 11, 2001 x-ray. Director's Exhibit 15.

In considering the medical opinion evidence,[4] the administrative law judge properly noted that in an April 28, 2001 report, Dr. Baker opined that claimant did not suffer from clinical pneumoconiosis, but did suffer from chronic bronchitis and mild resting hypoxemia, resulting in a Class I respiratory impairment. The administrative law judge also considered Dr. Baker's conclusion that coal dust exposure "may be part of the etiology" of claimant's resting hypoxemia and chronic bronchitis. Decision and Order at 11, 15; Director's Exhibit 14. The administrative law judge credited, as reasoned and documented, Dr. Baker's opinion as to the absence of clinical pneumoconiosis, but permissibly found Dr. Baker's additional diagnosis of legal pneumoconiosis to be equivocal and vague, and thus entitled to little weight. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

Considering the opinion of Dr. Simpao, the administrative law judge accurately noted that the physician diagnosed clinical pneumoconiosis, resulting in a mild respiratory impairment, but did not diagnose legal pneumoconiosis. Decision and Order at 11, 15; Director's Exhibit 15. The administrative law judge permissibly accorded Dr. Simpao's opinion little weight, as unreasoned, because the physician's diagnosis was inadequately explained and unsupported by the objective evidence of record. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 15; Director's Exhibit 15. Additionally, the administrative law judge found that even if Dr. Simpao's opinion were reasoned and documented, the preponderance of the evidence did not establish the existence of pneumoconiosis. Decision and Order at 15 n.11.

Specifically, the administrative law judge acted within his discretion in according greater weight to the opinions of Drs. Dahhan and Rosenberg, that claimant does not suffer from either clinical or legal pneumoconiosis, because he found their conclusions to be better reasoned and better documented than the opinions of Drs. Baker and Simpao. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; Director's Exhibit 18; Employer's Exhibit 1.

It is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129.

[4] The relevant medical opinion evidence consists of the opinions of Drs. Baker and Simpao, who diagnosed of pneumoconiosis, and Drs. Dahhan and Rosenberg, who found no evidence of pneumoconiosis or any coal dust related lung disease. Director's Exhibits 14, 15, 18; Employer's Exhibit 1.

Because the administrative law judge examined each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103, and explained whether the diagnoses contained therein constituted reasoned medical judgments under 20 C.F.R. §718.202(a)(4), we affirm the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000). Consequently, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a).

We also reject claimant's assertion that because the administrative law judge found the opinion of Dr. Simpao to be unreasoned, claimant is entitled to have the denial of benefits vacated, and the case remanded for the Director to provide him with a new pulmonary evaluation pursuant to 20 C.F.R. §725.406.[5] As the Director correctly notes, the administrative law judge specifically acknowledged claimant's right to a complete pulmonary evaluation, but found that, even if Dr. Simpao's diagnosis of clinical pneumoconiosis were reasoned and documented, the physician's opinion would still be outweighed by the contrary, probative opinions of Drs. Baker, Dahhan, and Rosenberg. Decision and Order at 15 n. 11; Director's Brief at 2-3. Thus, the administrative law judge acted within his discretion in concluding that a remand to provide claimant with a reasoned, documented opinion from Dr. Simpao would be futile, as claimant could not prevail. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order at 15 n.11. Therefore, there is no merit to claimant's argument that he is entitled to a new pulmonary evaluation pursuant to 20 C.F.R. §725.406.

Because we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a), we need not address claimant's challenge to the administrative law judge's finding that the evidence fails to establish a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(iv). A finding of entitlement to benefits is precluded in this case. *See Trent*, 11 BLR at 1-27. Finally, because we affirm the denial of benefits, we need not address employer's arguments raised on cross-appeal concerning the administrative law judge's length of coal mine employment determination, and the designation of employer as the responsible operator.

[5] The Department of Labor has a statutory duty to, upon request, provide a miner with a complete pulmonary examination sufficient to constitute an opportunity to substantiate the claim. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 184 (1994).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge