BRB No. 04-0724 BLA

LARRY F. HOWARD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LONE MOUNTAIN PROCESSING COMPANY	)	
	)	
	)	DATE ISSUED: 03/18/2005
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 Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, PSC), Hyden, Kentucky, for claimant.

Alison C. Wells (Barret, Haynes, May, & Carter), Hazard, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (03-BLA-5304) of Administrative Law Judge Mollie W. Neal 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). In a Decision and Order dated May 17, 2004, the administrative law judge credited the miner with twenty-five and one-quarter years of coal mine employment,[1] and found that the evidence failed to establish the existence of

[1] The record indicates that claimant's coal mine employment occurred in Virginia. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United

pneumoconiosis at 20 C.F.R. §718.202(a) and failed to establish total disability at 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in her analysis of the x-ray and medical opinion evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (4), and erred in her evaluation of the medical opinion evidence relevant to the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[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).

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 initially contends the administrative law judge erred in evaluating the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). We disagree. In finding the x-ray evidence insufficient to establish the existence of pneumoconiosis, the administrative law

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States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] The administrative law judge's finding of twenty-five and one-quarter years of coal mine employment and her findings that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) or (3), and further failed to establish the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(i)-(iii) 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).

judge properly noted that the relevant x-ray evidence of record consists of nine readings of three x-rays.[3] Decision and Order at 4.

A November 26, 2001 x-ray was read once as positive by Dr. Simpao, a physician with no specialized qualifications for the reading of x-rays. Director's Exhibit 4; Decision and Order at 4. The November 26, 2001 x-ray was also read three times as negative: once by Dr. Park, a Board-certified radiologist; and twice by Drs. Wiot and Spitz, both dually qualified B-readers and Board-certified radiologists who read the x-ray on behalf of employer. Director's Exhibits 4, 7, 8; Decision and Order at 4. A February 23, 2002 x-ray was read once as positive by Dr. Baker,[4] a B-reader, and was twice read as negative by Drs. Wiot and Spitz. Director's Exhibits 6, 7, 8; Decision and Order at 4. Finally, a January 3, 2002 x-ray was read twice as negative, once by Dr. Jarboe, a B-reader, and once by Dr. West, whose qualifications are unknown. Employer's Exhibits 1, 2; Decision and Order at 4. 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 accorded greatest weight to the readings by dually qualified readers. *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc on recon*.); Decision and Order at 4. In addition, while, as claimant asserts, the administrative law judge did err in considering Dr. Spitz's rebuttal readings of the November 26, 2001 and February 23, 2002 x-ray, initially submitted into evidence by employer but later withdrawn from the record, *see* 725.414(a)(3)(ii), this error is harmless as the inclusion of the extra rebuttal readings does not affect the disposition of the case. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Even excluding the extra rebuttal readings from consideration, the administrative law judge's determination to accord greater probative weight to the more numerous negative interpretations rendered by the most highly qualified physicians is still supported by substantial evidence in the record. Consequently, we reject claimant's contention that the administrative law judge committed reversible error in weighing the x-ray evidence of record, and affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Claimant also challenges the administrative law judge's evaluation of the medical opinion evidence on the existence of pneumoconiosis pursuant to 20 C.F.R.

[3] The November 26, 2001 x-ray was also read for quality only (Quality 2) by Dr. Sargent, a Board-certified radiologist and B-reader. Director's Exhibit 4.

[4] The administrative law judge took judicial notice of Dr. Baker's status as a B-reader, as published in the NIOSH B-Reader Certified list. Decision and Order at 4. We note, however, that on the x-ray reading itself, Dr. Baker checked a box indicating he is not a B-reader. Director's Exhibit 6.

§718.202(a)(4), specifically asserting that the administrative law judge erred in failing to accord greater weight to the opinions of Drs. Baker and Simpao. We disagree.

In considering the medical opinion evidence, the administrative law judge properly found that Drs. Baker and Simpao diagnosed the existence of pneumoconiosis, while Dr. Jarboe found that claimant did not have pneumoconiosis. Director's Exhibits 4, 6, 20, 23; Decision and Order at 5-6. The administrative law judge properly acknowledged, but did not rely on, the fact that Drs. Baker and Simpao each based their opinions on a positive x-ray which was contrary to her own findings, *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997), and permissibly accorded little weight to their opinions because she found their opinions were not well reasoned. Decision and Order at 6. By contrast, the administrative law judge permissibly found the opinion of Dr. Jarboe, that claimant does not have pneumoconiosis, to be more persuasive and convincing because it is better supported by the preponderance of the negative x-ray results, and the normal pulmonary function and blood gas studies. *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Further, the determination of whether an opinion is reasoned and documented is within the province of the administrative law judge. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000). Finally, contrary to claimant's arguments, the administrative law judge was not required to accord controlling weight to the opinion of Dr. Baker on the grounds that he treated claimant. The United States Court of Appeals for the Fourth Circuit has held that that there is no rule that a treating or examining physician must be accorded greater weight than the opinions of other physicians. *Akers*, 131 F.3d at 438, 21 BLR at 2-269; *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993).

The administrative law judge has exclusive power to make credibility determinations and resolve inconsistencies in the evidence, *Grizzle*, 994 F.2d at 1096, and the Board will not substitute its inferences for those of the administrative law judge, *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). As the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a) is supported by substantial evidence, it is hereby affirmed.

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 findings in determining that the evidence fails to establish the existence of 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.

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