BRB No. 04-0726 BLA

CLARENCE JOE CRUSE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 03/25/2005
	)	
MOUNTAIN CLAY, INCORPORATED)		
	)	
and	)	
	)	
TRANSCO ENERGY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Barry H. Joyner (Howard Radzely, Solicitor of Labor; Donald S. Shire, 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, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (2003-BLA-5897) of Administrative Law Judge Rudolf L. Jansen 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). Claimant filed his application for benefits on March 5, 2001. Decision and Order at 3; Director's Exhibit 1. The administrative law judge credited claimant with twenty-four years of coal mine employment and adjudicated this claim pursuant to 20 C.F.R. Part 718.[1] The administrative law judge found that claimant failed to establish either the existence of pneumoconiosis or that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a) and 718.204(b)(2). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in admitting x-ray readings and medical reports into the record in excess of the regulatory limitations set forth at 20 C.F.R. §725.414, and that on the merits, the administrative law judge erred in his analysis of the medical evidence pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.204(b)(2)(iv). Claimant alleges further that the Department of Labor (DOL) failed to provide him with a complete and credible pulmonary evaluation sufficient to substantiate his claim. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds that the evidence submitted in excess of the evidentiary limitations would not affect the outcome of this case, and asserts that he met his obligation to provide claimant with a complete and credible pulmonary evaluation.

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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must prove 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, 718.201, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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[1] The record indicates that claimant's coal mine employment occurred in the Commonwealth of Kentucky. Director's Exhibit 2. 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*).

After consideration of the administrative law judge's Decision and Order, the arguments of the parties and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence contains no reversible error.

Claimant contends that the administrative law judge erred in failing to find that the x-ray evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Specifically, claimant argues that the administrative law judge erred because he relied upon the interpretations by physicians with superior credentials and the numerical superiority of the negative x-ray readings, noting that the Board has held that he is not required to defer to the doctors with superior qualifications, nor to accept as conclusive the numerical superiority of x-ray interpretations. Claimant's Brief at 3. We reject claimant's assertions. The administrative law judge considered the seven interpretations of four x-rays, in conjunction with the readers' radiological qualifications, and noted that there were five negative interpretations and two positive interpretations. Decision and Order at 5, 9. Additionally, the administrative law judge noted that there were five negative x-ray readings, three by physicians who were Board-certified radiologists and B-readers and two by B-readers. Decision and Order at 5-9; Director's Exhibits 10, 21, 23-24; Employer's Exhibit 6. The administrative law judge observed that the record contained only two positive x-ray readings, both by physicians who possessed no special radiological qualifications. Decision and Order at 9; Director's Exhibits 9, 11. In weighing the conflicting evidence, the administrative law judge permissibly exercised his discretion, as trier-of-fact, in giving greater weight to the interpretations by the physicians who possessed superior radiological qualifications than to physicians who possessed no special radiological qualifications. This was a proper qualitative and quantitative analysis of the x-ray evidence. *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, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc)*; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Decision and Order at 9.

We also reject claimant's contention that employer's submission of three x-ray readings from Drs. Dahhan, Broudy and Wiot, which exceeds the evidentiary limitations set forth in Section 725.414 by one x-ray reading, necessitates remand of this case.[2] Before the administrative law judge, claimant objected "to any evidence submitted by the employer that is in excess of the guidelines set forth in §725.414." Claimant's Post-Hearing Brief at 3. The administrative law judge accepted into the record all proffered evidence with no further

[2] In support of its affirmative case, employer submitted x-ray interpretations from Dr. Dahhan of the October 27, 2003, x-ray, Employer's Exhibit 6, and from both Drs. Broudy and Wiot of the July 19, 2001, x-ray, Director's Exhibits 21, 24.

discussion and, upon review of the medical evidence included in the record, incorrectly found no violations of the evidentiary limitations. Decision and Order at 4. Although the administrative law judge accepted into the record one extra x-ray interpretation in employer's affirmative case, without rendering the requisite finding of whether there was good cause for admitting it in excess of the Section 725.414 limitations, we agree with the Director that even if one of employer's affirmative case readings were excluded, the majority of the x-ray evidence, including all of the readings by highly credentialed readers, would still be negative. Director's Brief at 2. Because substantial evidence supports the administrative law judge's determination, his admission of x-ray evidence in excess of the regulatory limitation at Section 725.414 is harmless. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Staton*, 65 F.3d 55, 19 BLR 2-271; *Woodward*, 991 F.2d 314, 17 BLR 2-77; *Edmiston*, 14 BLR 1-65; *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *Cregger v. United States Steel Corp.*, 6 BLR 1-1259 (1984). In addition, we reject claimant's general contention that the administrative law judge may have "selectively analyzed" the x-ray evidence. Claimant's Brief at 4. Claimant cites nothing in the record to support this speculation, nor does a review of the evidence together with the administrative law judge's Decision and Order reveal a selective analysis of the x-ray evidence. We, therefore, affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Claimant next contends that the administrative law judge erred in failing to find that the medical opinion evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) based upon Dr. Baker's report. Claimant asserts that Dr. Baker attributed claimant's respiratory disease to coal dust exposure and based his diagnosis on a physical examination, medical and work histories, a pulmonary function study, a blood gas study and a chest x-ray. Claimant's Brief at 4-5. Upon consideration of Dr. Baker's opinion, the administrative law judge stated that:

> Glen R. Baker, M.D., examined Claimant on February 21, 2001 and issued an examination report on that date. (DX 11). He administered a chest x-ray, a pulmonary function study and an arterial blood gas study. He considered accurate work and smoking histories. Dr. Baker diagnosed Claimant with pneumoconiosis, chronic obstructive pulmonary disease (COPD) and chronic bronchitis. He based his diagnosis of pneumoconiosis on Claimant's history of coal dust exposure and a positive chest x- ray. He diagnosed COPD based on the results of the pulmonary function study and chronic bronchitis based on Claimant's history. Dr. Baker determined that Claimant has a mild respiratory impairment and should avoid further dust exposure. Dr. Baker is board-certified in Internal Medicine and Pulmonary Medicine.
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> Decision and Order at 7.
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> In addressing the medical opinions at Section 718.202(a)(4), the administrative law

judge noted that Drs. Baker and Hussain diagnosed claimant with pneumoconiosis whereas Drs. Broudy, Rosenburg and Dahhan opined that claimant did not have pneumoconiosis. Decision and Order at 6-8, 10-11; Director's Exhibits 6, 11, 24; Employer's Exhibits 1, 6. In weighing the opinions of Drs. Baker and Hussain, the administrative law judge stated:

> Drs. Baker and Hussain diagnosed Claimant with pneumoconiosis based on a positive chest x-ray and Claimant's history of coal dust exposure. A diagnosis of pneumoconiosis based on a positive chest x-ray and history of dust exposure alone is not a well documented and reasoned opinion. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000). As neither physician provided another basis for his diagnosis, I find their opinions to be poorly documented and reasoned and entitled to less weight. Dr. Baker also diagnosed Claimant with COPD and bronchitis. He did not address the etiology of either ailment. I find Dr. Baker's opinion to be vague regarding the diagnoses of COPD and chronic bronchitis assign his opinion less weight. Dr. Hussain also diagnosed Claimant with COPD, but stated that it was due to smoking.
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> Decision and Order at 10.

In the "DIAGNOSIS" section of Dr. Baker's report, he stated "1. Coal Workers' Pneumoconiosis, Category 1/0, on the basis of 1980 ILO Classification – based on history of coal dust exposure and abnormal x-ray." Director's Exhibit 11. Because Dr. Baker did not identify any evidentiary basis for his diagnosis of pneumoconiosis, beyond his own positive x-ray interpretation and claimant's coal mine employment history, the administrative law judge did not err in discounting the doctor's diagnosis for that reason particularly since the administrative law judge found that the doctor's positive x-ray interpretation was outweighed by contrary readings by doctors with superior radiological credentials. Decision and Order at 10; Director's Exhibit 11; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); *Worhach*, 17 BLR at 1-110; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). In addition, the administrative law judge also discounted Dr. Baker's opinion as "vague" regarding the etiology of the COPD and chronic bronchitis he diagnosed, Decision and Order at 10, yet claimant raises no specific argument explaining why the administrative law judge's reading of Dr. Baker's opinion should be deemed erroneous. By challenging these findings on the basis that "the report and opinion of Dr. Baker [is] well reasoned," Claimant's Brief at 5, claimant merely requests a reweighing of the evidence, which we cannot do. *Anderson*, 12 BLR at 1-113.

We also reject claimant's contention that employer's submission of three medical reports from Drs. Dahhan, Broudy and Rosenburg, which exceeds the evidentiary limitations

set forth in Section 725.414 by one medical report, necessitates remand of this case.[3] Although the administrative law judge accepted one extra affirmative case medical report into the record without rendering the requisite finding of whether there was good cause for admitting it in excess of the Section 725.414 limitations, he also gave less weight to Dr. Broudy's opinion. Decision and Order at 10. We note further that the administrative law judge found, within his discretion, that the opinions of Drs. Dahhan and Rosenburg were "better-reasoned" and entitled to "full weight." Decision and Order at 11; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Because substantial evidence supports the administrative law judge's determination to accord less weight to the medical opinions that were supportive of claimant's case based on their reasoning, any error the administrative law judge may have committed in considering medical reports in excess of the regulatory limitation at Section 725.414 is harmless. *Larioni*, 6 BLR at 1-1278. Consequently, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Claimant also contends that because the administrative law judge did not credit Dr. Hussain's June 27, 2001, medical opinion provided by the DOL, "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 6. The Director responds that he "is only required to provide claimant with a complete and credible examination, not a dispositive one."[4] Director's Brief at 4. The record reflects that Dr. Hussain conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the DOL examination form. 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director's Exhibits 6-9. The administrative law judge did not find, nor does claimant allege, that Dr. Hussain's report was incomplete. The administrative law judge did find Dr. Hussain's report outweighed by "better-reasoned" medical opinions, Decision and Order at 11; the administrative law judge did not reject Dr.

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[3] In support of its affirmative case, employer submitted three medical reports; one, each from Dr. Dahhan, Employer's Exhibit 6, Dr. Broudy, Director's Exhibit 24, and Dr. Rosenburg, Employer's Exhibits 1, 8.

[4] 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 Director fails to meet this duty 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).

Hussain's opinion. The administrative law judge found that to the extent Dr. Hussain diagnosed clinical pneumoconiosis based on x-ray, his diagnosis was against the weight of the evidence. *See Williams*, 338 F.3d at 514, 22 BLR at 2-644. The administrative law judge accepted Dr. Hussain's diagnosis of COPD due to tobacco smoking. Director's Exhibit 6 at 4. Decision and Order at 10. As the Director asserts, the mere fact that the administrative law judge found other opinions more persuasive does not mean that the Director failed to satisfy his statutory obligation. S*ee, e.g., Gray v. SLC Coal Co*., 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999)(explaining that "ALJ's may evaluate the relative merits of conflicting physicians' opinions and choose to credit one . . . over the other"). Only where the examination provided by the Director is either not complete or not credible, *i.e.*, not entitled to any weight at all, has the Director failed to meet his obligation. Because Dr. Hussain's report was complete and the administrative law judge did not find that it lacked any credibility, there is no merit to 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.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element of entitlement. *See Trent*, 11 BLR at 1-27; *White v. Director, OWCP*, 6 BLR 1-368 (1983). Furthermore, the administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *Anderson*, 12 BLR at 1-113; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987). Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a miner's claim under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112; *Perry*, 9 BLR at 1-2.

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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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge