

BRB No. 06-0598 BLA

GERALD THORNSBERRY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLEDSOE COAL CORPORATION	)	DATE ISSUED: 03/28/2007
	)	
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 - Denying Benefits of Larry Price, Administrative Law Judge, United States Department of Labor.

Leroy Lewis (Law Office of Phillip Lewis), Hyden, Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, 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 (04-BLA-6107) of Administrative Law Judge Larry Price on a claim<sup>1</sup> 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). The administrative law judge initially credited the parties' stipulation that claimant worked in qualifying coal mine employment for twenty-seven years. Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law

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<sup>1</sup> Claimant filed his application for benefits on May 8, 2002. Director's Exhibit 2.

judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4), and, accordingly, denied benefits.<sup>2</sup>

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On appeal, claimant challenges the administrative law judge's finding that he failed to establish the existence of pneumoconiosis by x-ray<sup>3</sup> and medical opinion evidence.<sup>4</sup> Claimant asserts that Dr. Wicker read an x-ray as positive for pneumoconiosis, Director's Exhibit 13, and that he opined that claimant's respiratory impairment was caused, at least, in part, by coal dust exposure. Director's Exhibit 13. Claimant asserts that because Dr. Wicker is claimant's treating physician his opinion is entitled to special consideration. Claimant also asserts that the opinion of Dr. Ammisetty, diagnosing chronic bronchitis and chronic obstructive pulmonary disease due, in part, to coal dust exposure establishes the existence of pneumoconiosis. Employer responds,

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<sup>2</sup> The administrative law judge found that the only means of establishing the existence of pneumoconiosis in this case was by x-ray evidence at 20 C.F.R. §718.202(a)(1) and medical opinion evidence at 20 C.F.R. §718.202(a)(4). Claimant has not challenged that finding and it is, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>3</sup> Other than asserting that Dr. Wicker read an x-ray as positive, claimant does not challenge the administrative law judge's finding that the preponderance of the x-ray evidence was read negative by better qualified readers and did not, therefore, establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). The administrative law judge's finding that the existence of pneumoconiosis was not established at Section 718.202(a)(1) is, therefore, affirmed. *See* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-49 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

<sup>4</sup> Claimant also asserts that the evidence establishes total disability due to pneumoconiosis at 20 C.F.R. §718.204(b), (c) and that he is entitled to the presumptions that his pneumoconiosis arose out of coal mine employment, based on his twenty-seven years of coal mine employment. 20 C.F.R. §718.203(b). Because the administrative law judge found that claimant failed to establish the existence of pneumoconiosis, however, he did not consider the other elements of entitlement. *See* Decision and Order at 5.

urging that the administrative law judge's denial of benefits be affirmed. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not to participate in this appeal.

In assessing the probative value of the medical opinion evidence pursuant to Section 718.202(a)(4), the administrative law judge found that the opinions of Drs. Rosenberg and Dahhan, attributing claimant's lung disease to his extensive cigarette smoking history and not coal workers' pneumoconiosis, were more persuasive than the opinions of Drs. Wicker and Ammisetty. The administrative law judge found that Drs. Rosenberg and Dahhan provided detailed narrative reports and deposition testimonies as to their findings, explaining the results of claimant's pulmonary testing and delineating why the studies demonstrated the presence of a pulmonary condition caused by cigarette smoking and not coal dust inhalation. Decision and Order at 4-5. Regarding the opinions of Drs. Wicker and Ammisetty, the administrative law judge found that they filed form reports, in which they simply concluded that claimant's lung disease or impairment was due to both smoking and coal dust exposure, without providing a rationale to support their conclusions. Further, while the administrative law judge acknowledged that the opinions of treating physicians can be entitled to special consideration, the administrative law judge concluded that the single report from Dr. Wicker, reporting his finding on one examination of claimant, fell short of the documentation required to entitle the doctor's opinion to special consideration as a treating physician, citing to 20 C.F.R. §718.104(d).<sup>5</sup> Moreover, the administrative law judge found that the opinion of Dr. Wicker, along with that of Dr. Ammisetty, was not adequately reasoned, citing 20 C.F.R. §718.104(d)(5).

Thus, relying on the more persuasive opinions of Drs. Rosenberg and Dahhan, the administrative law judge concluded that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See* Decision and Order at 5;

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<sup>5</sup> Section 718.104(d) provides that the adjudication officer shall take into consideration the following factors in weighing the opinion of the miner's treating physician:

- 1) Nature of relationship.
- 2) Duration of relationship.
- 3) Frequency of treatment.
- 4) Extent of treatment.

20 C.F.R. §718.104(d)(1)-(4). The regulation also requires, however, that the administrative law judge consider the treating physician's opinion "in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

Director's Exhibits 10, 13; Employer's Exhibits 1, 3. This was proper. 20 C.F.R. §§718.104(d)(1)-(5); 718.202(a)(4); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 n.4 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 155 (1989)(*en banc*). Further, as the administrative law judge properly found that the existence of pneumoconiosis was not established at Section 718.202(a), the administrative law judge found that claimant failed to establish an essential element of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*).<sup>6</sup>

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge 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

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<sup>6</sup> We further note that, other than stating that the opinions of Drs. Wicker and Ammisetty establish the existence of pneumoconiosis, claimant does not challenge the administrative law judge's finding that the opinions of Drs. Rosenberg and Dahhan are better reasoned and documented and, therefore, more persuasive. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *see also* 20 C.F.R. §802.211(b); *Cox*, 791 F.2d 445, 446, 9 BLR 2-46, 2-49 (6th Cir. 1986); *Sarf*, 10 BLR 1-119; *Fish v. Director, OWCP*, 6 BLR 1-107.