

BRB No. 06-0902 BLA

BENNY R. HARRIS)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 03/27/2007
)	
SHAMROCK COAL COMPANY,)	
INCORPORATED)	
c/o JAMES RIVER COAL COMPANY)	
)	
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 Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

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

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

Rita Roppolo (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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (05-BLA-5039) of Administrative Law Judge Janice K. Bullard 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). The administrative law judge found, as stipulated to by the parties, that claimant had twenty-one years of qualifying coal mine employment and that employer is the responsible operator.¹ Decision and Order at 3. The administrative law judge adjudicated the claim, filed on December 23, 2003, under the regulations set forth in 20 C.F.R. Part 718. Decision and Order at 4. The administrative law judge found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or the presence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 5-13. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1) and in failing to find total disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant also asserts, with respect to the medical opinion evidence, that he was not provided a complete pulmonary evaluation as required by the Act and regulations. Employer responds urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), responds that he met his obligation to provide claimant with a complete pulmonary examination.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 into the

¹ The record indicates that claimant was last employed in the coal mine industry in Kentucky. Director's Exhibit 3. 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 (1989)(*en banc*).

² We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-one years of coal mine employment and that employer is the responsible operator, as well as his findings that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4) or a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Act 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 entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered the four readings of the two x-rays of record in light of the readers’ radiological qualifications.³ Decision and Order at 6. Only one reading was positive for pneumoconiosis, a “2/3” reading of the January 15, 2004 x-ray by Dr. Simpao who, the administrative law judge noted, was neither a B reader nor a Board-certified radiologist. *Id.*; Director’s Exhibit 10. The administrative law judge accorded more weight, however, to the interpretation by Dr. Halbert, a B reader and Board-certified radiologist, who read the January 15, 2004 x-ray as negative for pneumoconiosis. Because all of the other readings were negative, the administrative law judge found that claimant did not establish the existence of pneumoconiosis by a preponderance of the x-ray evidence. Decision and Order at 6-7.

The administrative law judge conducted a proper qualitative analysis of the conflicting x-ray readings. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Director’s Exhibits 10, 13; Employer’s Exhibits 1, 4; Decision and Order at 6-7. Consequently, claimant’s arguments that the administrative law judge improperly relied on the readers’ credentials, merely counted the negative readings, and “may have ‘selectively analyzed’” the readings, lack merit. Claimant’s Brief at 3-4. We therefore affirm the administrative law judge’s finding that claimant has not established the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Claimant has raised no additional allegations of error regarding the administrative law judge’s determination that the existence of pneumoconiosis, an essential element of entitlement, was not established under 20 C.F.R. §718.202(a). Thus, we affirm this finding and the denial of benefits under Part 718, and decline to reach claimant’s

³ Dr. Barrett interpreted the January 15, 2004 x-ray for quality purposes only. Director’s Exhibit 11.

arguments regarding the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2). *Anderson v. Valley Camp of Utah, Inc.* 12 BLR 1-111, 1-112 (1989); *Perry*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

As a final matter, we must address claimant's contention that because the administrative law judge did not fully credit Dr. Simpao's report of his examination of claimant, performed at the request of the Department of Labor, "the Director has failed to provide claimant with a complete, credible pulmonary examination sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 4. The Director responds that Section 413(b) has been satisfied, as Section 413(b) "...does not guarantee that the DOL-sponsored examination trumps all other evidence; the medical examination must be credible, not necessarily dispositive," and states that claimant has been provided the required medical examination, as required by the Act and regulations. 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), 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, Inc.*, 18 BLR 1-84 (1994); *see also Newman v. Director, OWCP*, 745 F. 2d 1162, 7 BLR 2-25 (8th Cir. 1984).

The record reflects that Dr. Simpao conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director's Exhibit 10. The administrative law judge found that Dr. Simpao performed a "complete OWCP pulmonary evaluation of the claimant and documented his findings." Decision and Order at 8. With respect to the issue of the existence of pneumoconiosis, the element which defeated entitlement in this case, the administrative law judge acted within her discretion in initially finding that Dr. Simpao's x-ray interpretation was outweighed by contrary x-ray readings by physicians with expert qualifications pursuant to Section 718.202(a)(1). Decision and Order at 6-7; *Clark*, 12 BLR at 1-155. Pursuant to Section 718.202(a)(4), the administrative law judge found that Dr. Simpao diagnosed legal pneumoconiosis based on claimant's pulmonary function study and work history, because the doctor stated claimant had a moderate cardiopulmonary impairment arising from multiple years of coal dust exposure. Decision and Order at 9. The administrative law judge, however, found that both Dr. Rosenberg and Dr. Vuskovich considered Dr. Simpao's pulmonary function study invalid based upon tracings showing incomplete effort by claimant. Ultimately, the administrative law judge accorded greater weight to the opinion of Dr. Rosenberg and concluded that the medical opinion evidence was

insufficient to establish the existence of clinical or legal pneumoconiosis.⁴ Decision and Order at 9-10.

Claimant contends that the Director failed to provide him a credible pulmonary evaluation because the administrative law judge found that Dr. Simpao's report was undermined by his reliance on an invalid pulmonary function study. *See* Decision and Order at 12; Claimant's Brief at 4. Claimant's contention is without merit. First, we agree with the Director that the administrative law judge incorrectly found that Dr. Simpao diagnosed legal pneumoconiosis.⁵ Decision and Order at 9-10. In his report, Dr. Simpao listed only "CWP 2/3" (recognized as clinical pneumoconiosis) under cardiopulmonary diagnoses and stated that the coal workers' pneumoconiosis resulted in a moderate impairment. Director's Exhibit 10. Second, the pulmonary function study, relied on by Dr. Simpao, was invalidated based on claimant's incomplete effort, and not for reasons within the control of Dr. Simpao or the Director. Hence, the invalidity of the study does not demonstrate claimant was denied a complete pulmonary evaluation. As Director argues, a remand is not required. *Gallaher v. Bellarie Corp.*, 71 Fed.Appx. 528, 2003 WL 21801463 (6th Cir. Aug. 4, 2003)(unpub.). We reject, therefore, claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. *See Hodges*, 18 BLR at 1-89-90; *Petry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990); *see also Newman*, 745 F. 2d 1162,1166, 7 BLR 2-25, 2-31.

⁴ The administrative law judge found the opinion of Dr. Rosenberg well-documented and reasoned, and entitled to greater weight based on his qualifications as Board-certified in Internal Medicine. The administrative law judge noted that Dr. Simpao's credentials are not contained in the record. Decision and Order at 10.

⁵ "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge