

BRB No. 07-0557 BLA

H.P.)
)
 Claimant-Petitioner)
)
 v.)
)
 ARCH ON THE NORTH FORK,)
 INCORPORATED c/o ARCH COAL)
 INCORPORATED)
)
 and) DATE ISSUED: 03/20/2008
)
 ARCH COAL CORPORATION c/o)
 UNDERWRITERS SAFETY & CLAIMS)
)
 Employer/Carrier-Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
) DECISION and ORDER
 Party-in-Interest

Appeal of the Decision and Order – Denial of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

Emily Goldberg Kraft (Gregory F. Jacob, 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 the Decision and Order – Denial of Benefits (2006-BLA-5182) of Administrative Law Judge Larry S. Merck (the administrative law judge) 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 credited claimant with sixteen years of coal mine employment, based on a stipulation by the parties, and adjudicated this claim, filed on October 4, 2004, pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and insufficient to establish a totally disabling respiratory 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 when he found that claimant did not establish the existence of pneumoconiosis. Claimant also contends that the administrative law judge erred in finding that claimant did not establish that he is totally disabled. In addition, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b). Employer has not filed a response brief in this appeal. In a limited response, the Director asserts that the Board should reject claimant's argument that the Director failed to provide him with a complete pulmonary evaluation.¹

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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the

¹ We affirm, as unchallenged on appeal, the administrative law judge's decision to credit claimant with sixteen years of coal mine employment and his finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling.² See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to Section 718.202(a)(1), the administrative law judge found that the x-ray evidence of record consists of four interpretations of four x-rays, dated January 17, 2002, April 17, 2002, October 29, 2004 and January 15, 2005.³ Director's Exhibits 9, 10, 12-14. Dr. Baker, a B reader, read the January 15, 2005 x-ray as positive for pneumoconiosis. Director's Exhibits 9, 12. Dr. Westerfield, a B reader, read the October 29, 2004 x-ray as negative for pneumoconiosis, and Dr. Jarboe, also a B reader, read the April 17, 2002 x-ray as negative for pneumoconiosis. Director's Exhibits 10, 14. Dr. Wiot, a dually qualified Board-certified radiologist and B reader, interpreted the January 17, 2002 x-ray as negative for pneumoconiosis. Director's Exhibit 13. Weighing these readings in light of the readers' radiological qualifications, the administrative law judge found that based on the preponderance of negative readings by qualified physicians, the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Decision and Order at 6.

In challenging the administrative law judge's weighing of the x-ray evidence pursuant to Section 718.202(a)(1), claimant argues that the administrative law judge erred in relying upon the physicians' qualifications and the numerical superiority of the negative x-ray interpretations. Claimant also contends that the administrative law judge selectively analyzed the x-ray evidence. These contentions lack merit.

The administrative law judge based his finding on a proper qualitative and quantitative analysis of the x-ray evidence. See *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004); *Woodward v. Director, OWCP*, 991 F.2d 314, 320, 17 BLR 2-77, 2-87 (6th Cir. 1993); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984). Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, merely counted the negative readings, and that he may have

² As claimant's coal mine employment occurred in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. Director's Exhibit 3; see *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

³ An additional reading by Dr. Barrett was obtained solely to assess the quality of the October 29, 2004 x-ray. Director's Exhibit 11.

selectively analyzed the readings, lack merit.⁴ Claimant's Brief at 2-4; Decision and Order at 5-6. We therefore affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) as supported by substantial evidence.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Simpao, Baker and Jarboe. Dr. Simpao examined claimant on October 29, 2004 and, in addition to performing a physical examination, obtained a chest x-ray, a pulmonary function study, a blood gas study, and an EKG. Director's Exhibit 10. Dr. Simpao opined that claimant has "CWP as evident by pulmonary function test,⁵ EKG, arterial blood gas, physical findings and symptomatology" which he attributed to claimant's multiple years of coal dust exposure. *Id.* Dr. Baker examined claimant on January 15, 2005, and procured a chest x-ray, a pulmonary function study, and a blood gas study.⁶ Director's Exhibit 12. Dr. Baker diagnosed coal workers' pneumoconiosis, based on his 1/0 x-ray interpretation and claimant's history of coal dust exposure; chronic bronchitis by history; and minimal hypoxemia, based on the results of the blood gas study. He opined that each of these diagnoses was related to claimant's coal dust exposure. *Id.* Dr. Jarboe examined claimant on April 17, 2002, and obtained a chest x-ray, a pulmonary function study, a blood gas study, and an EKG. Director's Exhibit 14. In addition, Dr. Jarboe reviewed claimant's medical records prior to participating in an October 26, 2005 deposition. Director's Exhibit 15a. Based upon this data, Dr. Jarboe opined that there was insufficient medical evidence to make a diagnosis of coal workers' pneumoconiosis or a dust induced lung disease. Director's Exhibits 14, 15, 15a.

Weighing these medical opinions, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order at 12. Specifically, the administrative law judge accorded little weight to the opinion of Dr. Simpao, finding his diagnosis of pneumoconiosis not well-reasoned because his conclusion, as set forth in his interpretation of the pulmonary function study, that claimant "may" suffer from a small airway disease, was equivocal. Decision and Order at 8-9; Director's Exhibit 10.

⁴ Claimant has provided no support for his assertion that the administrative law judge "may have 'selectively analyzed' the x-ray evidence." Claimant's Brief at 4.

⁵ Dr. Simpao interpreted the October 29, 2004 pulmonary function study as having a normal FVC, but that the FEV1/FVC ratio and the mid-flows were reduced. Dr. Simpao stated that "[t]his test may indicate small airway disease." Director's Exhibit 10.

⁶ The record also contains a letter from Dr. Baker referencing the objective test results from an examination of claimant dated May 16, 2001. Director's Exhibit 9.

Likewise, the administrative law judge accorded little weight to Dr. Baker's opinion because Dr. Baker relied on his own positive x-ray reading and claimant's history of coal dust exposure in diagnosing clinical pneumoconiosis without providing any additional explanation for his diagnosis. Decision and Order at 10. In addition, the administrative law judge accorded Dr. Baker's diagnosis of legal pneumoconiosis little weight because Dr. Baker failed to explain how his conclusions were supported by the underlying documentation. *Id.* Rather, the administrative law judge found Dr. Jarboe's opinion that claimant is not suffering from pneumoconiosis or a dust induced lung disease to be well-reasoned and well-documented because it is supported by the objective evidence of record. Decision and Order at 12. Consequently, based on his crediting of Dr. Jarboe's opinion, the administrative law judge found that claimant has not established the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order at 12.

Claimant contends that the administrative law judge erred in discounting Dr. Baker's opinion as "merely an x-ray interpretation." Claimant's Brief at 4. In addition, claimant contends that Dr. Baker's opinion was documented and reasoned, and that the administrative law judge provided an invalid reason for discounting Dr. Baker's diagnosis of pneumoconiosis. Claimant's Brief at 4-5. We disagree.

Contrary to claimant's contention, the administrative law judge permissibly found that Dr. Baker's diagnosis of pneumoconiosis did not constitute a documented and reasoned medical opinion because the physician relied primarily upon his own positive x-ray interpretation, which was contrary to the administrative law judge's finding at Section 718.202(a)(1), and also on claimant's history of coal dust exposure. Decision and Order at 10; Director's Exhibit 12; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003); *Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985). In addition, the administrative law judge properly discounted Dr. Baker's opinion because Dr. Baker failed to otherwise explain his conclusion that claimant suffers from pneumoconiosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Consequently, we affirm the administrative law judge's finding that Dr. Baker's opinion is insufficient to establish the existence of clinical pneumoconiosis.

Moreover, the administrative law judge permissibly found that Dr. Baker's opinion is insufficient to establish the existence of legal pneumoconiosis because Dr. Baker failed to explain how his opinion was supported by the underlying documentation, specifically, how the objective evidence supported his diagnosis. Decision and Order at 10; Director's Exhibit 12; *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155. In addition, the administrative law judge reasonably found that Dr. Baker's finding of "minimal hypoxemia" was insufficient to establish legal pneumoconiosis

because Dr. Baker failed to explain how this finding meets the regulatory definition of legal pneumoconiosis set forth at Section 718.201(a)(2). Decision and Order at 10; Director's Exhibit 12; *see* 20 C.F.R. §718.201(a)(2); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155. Consequently, we affirm the administrative law judge's finding that Dr. Baker's opinion is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Because claimant does not otherwise challenge the administrative law judge's specific findings pursuant to Section 718.202(a)(4), we affirm his finding that claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a).

Finally, claimant asserts that because the administrative law judge found that Dr. Simpao's diagnosis of pneumoconiosis was based upon non-qualifying test results; that Dr. Simpao was equivocal in finding that the claimant suffered from small airway disease; and that Dr. Simpao rendered no express finding regarding total disability, the Director failed to provide claimant with a complete pulmonary evaluation sufficient to substantiate his claim. Claimant's Brief at 5-6. The Director, however, asserts that "the administrative law judge did not find Dr. Simpao's pneumoconiosis opinion to be wholly without weight" and, therefore, that there has been no violation of the Director's statutory duty. Director's Brief at 4. The Director acknowledges that while Dr. Simpao failed to fully address whether claimant has a totally disabling respiratory or pulmonary impairment, "[t]his flaw does not necessarily require a remand" because "if the Board affirms the [administrative law judge's] finding that claimant failed to establish pneumoconiosis, then Dr. Simpao's failure to address disability will not matter." *Id.*

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); *see also Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). The record reflects that Dr. Simpao conducted an examination and the full range of testing required by the regulations. Director's Exhibit 10; 20 C.F.R. §§718.101(a), 718.104, 725.406(a).

As noted by the Director, claimant's argument that he did not receive a complete pulmonary evaluation, on the issue of the existence of pneumoconiosis, is without merit. Contrary to claimant's assertion, the administrative law judge did not completely discredit Dr. Simpao's diagnosis of pneumoconiosis on the ground that it was equivocal; rather, he chose to accord it "little weight" in comparison to Dr. Jarboe's contrary opinion that claimant did not have pneumoconiosis. Decision and Order at-9. Because we have affirmed the denial of benefits based on the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis, it is not necessary for us to remand this case in order for Dr. Simpao to offer a more specific opinion on the issue of total disability, as such an opinion, even if provided, would not assist claimant in establishing his entitlement to benefits.

Because claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), a requisite element of entitlement in a miner's claim under Part 718, entitlement to benefits is precluded. *Hill*, 123 F3d at 415-16, 21 BLR at 2-196-7; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. We, therefore, need not address claimant's allegations of error with the administrative law judge's Section 718.204(b)(2) findings.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge