

BRB No. 08-0444 BLA

P.H.)
(Widow of J.H.))
)
Claimant-Petitioner)
)
v.)
)
TESORO COAL COMPANY) DATE ISSUED: 03/26/2009
)
and)
)
OLD REPUBLIC INSURANCE COMPANY)
)
Employer/Carrier-Respondents)
)
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 Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Emily Goldberg-Kraft (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, 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 (2006-BLA-06105 and 2006-BLA-06106) of Administrative Law Judge Ralph A. Romano, with respect to a miner’s claim and a survivor’s 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).¹ The administrative law judge credited the miner with six years of coal mine employment, based upon the parties’ stipulation, and adjudicated the claims pursuant to 20 C.F.R. Part 718. The administrative law judge indicated that the miner’s claim, filed on February 25, 2002, was a subsequent claim pursuant to 20 C.F.R. §725.309.² The administrative law judge initially determined, however, that the evidence submitted in conjunction with the prior claim was entitled to “significantly diminished weight” because it was at least twenty years older than the evidence submitted in conjunction with the subsequent claim. Decision and Order at 4. The administrative law judge then considered the miner’s claim on the merits and found that the evidence was insufficient to establish any of the requisite elements of entitlement under 20 C.F.R. Part 718. With respect to the survivor’s claim, the administrative law judge found that claimant did not prove that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or that his death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in both claims.

On appeal, claimant raises allegations of error regarding the administrative law judge’s consideration of the x-ray and medical opinion evidence in the miner’s claim. In addition, claimant argues that the Department of Labor (DOL) failed to provide him with a complete pulmonary evaluation as required under the Act. Employer responds, urging

¹ Claimant is the surviving spouse of the deceased miner. In addition to pursuing the miner’s claim on behalf of his estate, she is pursuing her own claim for survivor’s benefits, which she filed on October 7, 2005. Director’s Exhibit 54.

² The miner filed his first application for benefits on February 8, 1979, which was denied by Administrative Law Judge Reno E. Bonfanti, as the miner did not establish any of the elements of entitlement. The Board affirmed the denial of benefits. [*J.H.*] v. *Tesoro Coal Co.*, BRB No. 84-1315 BLA (Nov. 19, 1986) (unpub.); Director’s Exhibit 1. Upon consideration of the miner’s appeal, the United States Court of Appeals for the Sixth Circuit affirmed the denial of benefits in a decision issued on January 19, 1988. [*J.H.*] v. *Tesoro Coal Co.*, No. 87-3057 (6th Cir. Jan. 19, 1988); Director’s Exhibit 1. The miner filed a subsequent claim on February 25, 2002. Director’s Exhibit 2. The miner died on September 16, 2005, while the claim was pending before the Office of Administrative Law Judges. The claim was remanded to the district director and consolidated with the claim filed by claimant on October 7, 2005. Director’s Exhibit 54.

affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has also responded and maintains that DOL met its obligation to provide claimant with a complete pulmonary evaluation.³

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.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in the miner's claim, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*). Failure to establish any one of these elements precludes 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 that the administrative law judge erred in finding that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis in the miner's claim at Section 718.202(a)(1). Specifically, claimant asserts that "the administrative law judge "relied almost solely on the qualifications" of the interpreting physicians, that he "placed substantial weight on the numerical superiority of x-ray interpretations," and "may have 'selectively analyzed' the x-ray evidence." Claimant's Brief at 2-3. Claimant's arguments are without merit.

³ Claimant has not challenged the administrative law judge's finding that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, we affirm the denial of benefits in the survivor's claim. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 15. We also affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had six years of coal mine employment and that claimant did not establish the existence of pneumoconiosis in the miner's claim pursuant to 20 C.F.R. §718.202(a)(1)-(3). *See Skrack*, 6 BLR at 1-711; Decision and Order at 4, 8.

⁴ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 2.

An administrative law judge must consider the quantity of the x-ray evidence in light of the qualifications of the interpreting physicians. *Staton v Norfolk & Western Railroad Co.*, 65 F.3d 55, 58, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Moreover, Section 718.202(a)(1) requires that when two or more x-ray interpretations are in conflict, consideration shall be given to the relative radiological qualifications of the interpreting physicians. 20 C.F.R. §718.202(a)(1). Readings by physicians who are qualified as B readers and Board-certified radiologists are validly accorded greater weight than interpreting physicians without such qualifications. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211, 1-213 (1985).

In the present case, the administrative law judge considered five readings of two x-rays and rationally determined that the single positive interpretation, rendered by Dr. Simpao, who has no special radiological qualifications, was outweighed by the negative reading performed by Dr. Wiot, a Board-certified radiologist and B reader. *See Staton*, 65 F.3d at 58, 19 BLR at 2-279; *Woodward*, 991 F.2d at 320, 17 BLR at 2-87; *White v. New White Coal Co., Inc.*, 23 BLR 1-1 (2004); Decision and Order at 7; Director's Exhibits 13, 18. We reject claimant's assertion that the administrative law judge "may have" selectively analyzed the x-ray evidence, as claimant has provided no support for her assertion. Claimant's Brief at 3; *see White*, 23 BLR at 1-5. We affirm, therefore, the administrative law judge's finding that claimant did not establish that the miner had pneumoconiosis pursuant to Section 718.202(a)(1).

Claimant also challenges the administrative law judge's determination that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) in the miner's claim. The administrative law judge considered the newly submitted medical opinions of Drs. Jarboe and Simpao. Dr. Jarboe examined the miner on July 1, 2002. Based upon the miner's employment, smoking and medical histories, a chest x-ray, a pulmonary function study, a blood gas study and an EKG, Dr. Jarboe diagnosed significant coronary artery disease. Director's Exhibits 15, 16. Dr. Jarboe indicated that the miner's condition was unrelated to coal dust exposure. *Id.* Dr. Simpao examined the miner on June 2, 2003 at the request of DOL. Director's Exhibit 13. Dr. Simpao recorded the miner's employment, smoking and medical histories and obtained a chest x-ray, a pulmonary function study, a blood gas study and an EKG. *Id.* Based upon this data, Dr. Simpao diagnosed "coal workers' pneumoconiosis 1/1," a moderate pulmonary impairment, slight hypoxia, and an atrioventricular block with sinus bradycardia. *Id.* Dr. Simpao identified coal dust exposure as a significant cause of the miner's pulmonary impairment. *Id.*

The administrative law judge determined that Dr. Jarboe's opinion was entitled to "sufficient weight," as "the reasoning and explanation in support of his conclusions" was "complete and thorough." Decision and Order at 9. The administrative law judge found that Dr. Simpao's opinion was "less than well-reasoned and entitled to less weight"

because he “render[ed] conclusions without fully explaining what his opinion is based on.” *Id.* at 10. The administrative law judge concluded that the evidence of record, when considered as a whole, did not establish that the miner suffered from pneumoconiosis. *Id.*

Claimant challenges the administrative law judge’s findings at Section 718.202(a)(4), generally asserting that the administrative law judge improperly interpreted medical tests and substituted his opinion for that of a physician. Claimant’s Brief at 3-4. Claimant’s arguments are without merit. Rather than relying upon his own interpretation of the objective evidence of record, the administrative law judge properly performed his role as fact-finder by determining whether the medical opinions of Drs. Jarboe and Simpao were reasoned and documented in light of the evidence they referenced in their reports and the rationales they provided for their diagnoses. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); Decision and Order at 9-10; Director’s Exhibits 13, 15, 16. In so doing, the administrative law judge rationally determined that because Dr. Jarboe provided a more complete explanation of how the evidence supported his conclusion that the miner did not have pneumoconiosis, his opinion outweighed Dr. Simpao’s opinion to the contrary. *Id.* We affirm, therefore, the administrative law judge’s finding that claimant did not prove that the miner had pneumoconiosis pursuant to Section 718.202(a)(4).

Because we have affirmed the administrative law judge’s determination on the merits that claimant did not satisfy her burden of proving that the miner suffered from pneumoconiosis under Section 718.202(a), an essential element of entitlement, we must also affirm the denial of benefits in the miner’s claim. *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). Accordingly, we decline to address any of the allegations that claimant has made concerning the administrative law judge’s findings pursuant to Sections 718.203, 718.204(b)(2), and 718.204(c). *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Lastly, however, we must address claimant’s contention that remand of this case to the district director is required because the DOL did not provide the miner with a complete and credible pulmonary examination. Under Section 413(b) of the Act, DOL has a statutory obligation to give each miner who files a claim for benefits an opportunity to substantiate his claim by means of a complete pulmonary evaluation. *See* 30 U.S.C. §923(b), as implemented by 20 C.F.R. §725.406; *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). Claimant contends that because the administrative law judge did not credit the diagnosis of pneumoconiosis contained in the medical report provided by Dr. Simpao at the request of 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 4. The Director responds and maintains that DOL fulfilled its statutory obligation in this case. In support of his position, the Director notes that Dr. Simpao conducted an examination and the full range of testing required by the regulations and addressed each element of entitlement on the DOL examination form. The Director further notes that the administrative law judge did not reject Dr. Simpao’s opinion, but rather merely found it outweighed by Dr. Jarboe’s opinion.

As the promulgator of the Black Lung regulations and the administrator of the Act, it is the Director’s duty to ensure the proper enforcement and fair administration of the Black Lung program. *See* 20 C.F.R. §725.465(d); *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989) (*en banc* order); *Capers v. The Youghiogheny and Ohio Coal Co.*, 6 BLR 1-1234, 1-1237 n.4 (1984). Based on the facts of this case, we defer to the Director on the issue of whether the statutory obligation of DOL to provide claimant with a complete and credible pulmonary evaluation has been fulfilled. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *Newman*, 745 F.2d at 1166, 7 BLR at 2-31; *Hodges*, 18 BLR at 1-89-90. We decline, therefore, to remand this case for a complete pulmonary evaluation.⁵

⁵ This result is consistent with the holding of the Sixth Circuit in *Gallaher v. Bellaire Corp.*, No. 03-3066, 71 Fed. Appx. 528, 531, 2003 WL 21801463 (6th Cir. Aug. 4, 2003), that a doctor’s report that addresses the essential elements of entitlement is sufficient to satisfy the obligation of the Director, Office of Workers’ Compensation Programs, even though the administrative law judge discredited the doctor’s diagnosis of pneumoconiosis as unexplained and based on a questionable x-ray interpretation

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

JUDITH S. BOGGS
Administrative Appeals Judge