

BRB No. 04-0877 BLA

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| HUGHIE HOSKINS |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| LEECO, INCORPORATED |) | DATE ISSUED: 05/25/2005 |
| |) | |
| 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 – Denial of Benefits of Daniel F. Solomon, 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 M. 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (03-BLA-6078) of Administrative Law Judge Daniel F. Solomon on a claim¹ 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 claimant with nineteen and one-quarter years of qualifying coal mine employment. Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis established by x-ray evidence under Section 718.202(a)(1). Claimant additionally contends that because the administrative law judge discredited the medical opinion of Dr. Hussain, a physician who examined him at the behest of the Department of Labor, the Director, Office of Workers' Compensation Programs, (the Director) failed to provide claimant with a complete and credible pulmonary examination sufficient to substantiate his claim as required by Section 413(b) of the Act, 30 U.S.C. §923(b). In response, employer urges affirmance of the denial of benefits arguing that: the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) is rational and supported by substantial evidence; the Director fulfilled his statutory obligation to provide claimant with a complete pulmonary evaluation based on Dr. Hussain's September 12, 2001 examination; and claimant waived his right to challenge the impropriety of Dr. Hussain's report because he did not raise any objections at or prior to the formal hearing. In addition, employer avers that if the Board agrees that remand of the case for a new pulmonary evaluation is appropriate, then the Board must dismiss employer from liability on the grounds that such action would constitute a violation of its due process rights. The Director has filed a response letter addressing arguments contained in claimant's brief, arguing that the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) is rational and supported by substantial evidence and that he satisfied his obligation to provide claimant with a complete, credible pulmonary evaluation as required by the Act. The Director also filed a subsequent reply letter addressing arguments contained in employer's response brief and asserting that employer's argument that it should be dismissed

¹ Claimant, Hughie Hoskins, filed an application for benefits on July 9, 2001, which is pending herein. Director's Exhibit 2. Previously, claimant filed an application for benefits on September 18, 2000. However, claimant subsequently requested that the September 2000 claim be withdrawn; accordingly, the district director granted claimant's withdrawal request in a Proposed Decision and Order dated February 26, 2001. Director's Exhibit 1.

on due process grounds in the event of a remand is wholly without merit.²

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).

In challenging the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1), claimant argues that the administrative law judge erred by placing substantial weight on the numerical superiority of the x-ray interpretations and by relying exclusively on the qualifications of the physicians providing the x-ray interpretations. Claimant contends that an administrative law judge is not required to defer to a physician with superior qualifications and may not selectively analyze the x-ray evidence.

Section 718.202(a)(1) provides, in pertinent part, "where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." 20 C.F.R. §718.202(a)(1). The administrative law judge considered the radiological expertise of the physicians and properly accorded greater weight to the negative interpretations of those physicians who were Board-certified radiologists and/or B-readers, namely Drs. Wiot, Sargent, Broudy, and Rosenberg, and permissibly accorded less weight to the sole positive interpretation rendered by Dr. Hussain, who possessed no demonstrated radiological expertise. 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 10-11; Director's Exhibits 14, 15, 30, 32, 33; Employer's Exhibit 4. Because the administrative law judge's determination to accord dispositive weight to the negative interpretations rendered by the physicians with superior, demonstrated radiological qualifications was rational and supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub*

² We affirm the administrative law judge's determinations regarding length of coal mine employment and pursuant to 20 C.F.R. §§718.202(a)(2)-(3) because these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 4, 9.

nom. Greenwich Collieries v. Director, OWCP, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). In addition, we reject claimant's contention that the administrative law judge "may have selectively analyzed" the x-ray evidence inasmuch as claimant has not provided any support for that assertion, nor does a review of the evidence and the administrative law judge's Decision and Order reveal selective analysis of the x-ray evidence. *See White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-4 (2004).

Claimant also contends that the administrative law judge discredited the opinion of Dr. Hussain, a physician who conducted claimant's pulmonary evaluation at the behest of the Department of Labor, because it was based on "an erroneous x-ray interpretation and an erroneous arterial blood gas study" and that therefore, the Director failed to provide him with a complete, credible pulmonary examination sufficient to substantiate his claim. Memorandum Brief in Support of Claimant's Petition for Review and Appeal at 4. The Director responds, asserting that he is only required to provide claimant with a complete and credible examination as required by the Act, not necessarily a dispositive one. The Director avers further that the fact that the administrative law judge found that physicians' opinions finding no evidence of pneumoconiosis were more persuasive does not demonstrate that he abdicated his statutory obligation to provide claimant with a complete pulmonary evaluation.

Although claimant is correct that the Department of Labor (DOL) has a statutory duty to arrange and pay for a miner's complete pulmonary examination pursuant to 30 U.S.C. §923(b), and that DOL must provide claimant with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate the claim, the Director's contention that the opinion of Dr. Hussain was complete and credible, notwithstanding the administrative law judge's finding that it was less persuasive, has merit. *See* 20 C.F.R. §§718.101, 725.405(b); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990) (*en banc*). The administrative law judge found that, although Dr. Hussain's opinion diagnosing the presence of pneumoconiosis was based on a thorough examination, the reliability of this opinion, *i.e.*, whether it was reasoned and documented, was called into question by Dr. Hussain's failure to indicate the duration of claimant's coal mine employment, upon which he relied, and to mention any physical findings he believed were consistent with the existence of pneumoconiosis. *See Creech v. Benefits Review Board*, 841 F.2d 706, 709, 11 BLR 2-86, 2-91 (6th Cir. 1988); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-81 (1993); *Fitch v. Director, OWCP*, 9 BLR 1-45, 1-46 (1986); Decision and Order at 10. The administrative law judge determined that the probative value of Dr. Hussain's opinion, which was based on x-ray findings and severe hypoxemia, was undermined because Dr. Hussain, whose medical qualifications are not contained in the record, relied on an x-ray interpretation that was subsequently reread as negative by a physician with superior radiological expertise and, relied on a finding of severe hypoxemia, demonstrated by claimant's low pO₂ values on blood gas study, that may have been based on a mistaken venous, rather than arterial blood collection. Hence, the administrative law judge's

determination that Dr. Hussain's opinion was insufficiently documented and unreasoned was rational. See *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226 (2002) (*en banc*) (administrative law judge must consider evidence which calls into question reliability of tests upon which physician's opinion is based in determining whether report is documented and reasoned); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order at 9-10. Although the administrative law judge determined that Dr. Hussain's opinion was entitled to less weight, this determination is not tantamount to a finding that Dr. Hussain's opinion was worthy of no weight, and thus, lacking credibility altogether. Inasmuch as Dr. Hussain clearly rendered a credible opinion addressing all issues of entitlement since he diagnosed whether claimant suffered from the existence of pneumoconiosis and assessed the presence of a respiratory or pulmonary impairment, we reject claimant's argument that the Director failed to provide claimant with a complete, credible pulmonary examination. See *Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1992), *alj decision summarily aff'd*, 972 F.2d 234, 16 BLR 2-137 (8th Cir. 1992)(court retained jurisdiction.); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984). Furthermore, because claimant has not otherwise challenged the administrative law judge's crediting of the opinions of Drs. Broudy and Rosenberg that claimant does not suffer from pneumoconiosis, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Based on the foregoing, we affirm the administrative law judge's determination that claimant failed to affirmatively establish the existence of pneumoconiosis pursuant to Section 718.202(a) as this finding is rational, contains no reversible error, and is supported by substantial evidence. Because claimant has failed to satisfy his burden to establish the existence of pneumoconiosis, a requisite element of entitlement under Part 718, we affirm the administrative law judge's denial of benefits. 20 C.F.R. §718.202(a); see *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge