

BRB No. 06-0119 BLA

DENNIS SWAFFORD )  
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 Claimant-Petitioner )  
 )  
 v. )  
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 MOUNTAIN CLAY, INCORPORATED ) DATE ISSUED: 05/25/2006  
 )  
 and )  
 )  
 JAMES RIVER COAL COMPANY )  
 )  
 Employer/Carrier- )  
 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 William S. Cowell, 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 (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 Denying Benefits (2003-BLA-6608) of Administrative Law Judge William S. Cowell 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 that the parties' stipulation to twenty-one years of coal mine employment was supported by substantial evidence. In considering entitlement, the administrative law judge found that the evidence failed to establish the existence of coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 4-12. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in not finding the existence of pneumoconiosis established based on x-ray evidence and erred in not finding total respiratory disability established based on medical opinion evidence. In addition, claimant contends that because the administrative law judge found Dr. Simpao's opinion to be outweighed, 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 30 U.S.C. §923(b). Employer responds, urging that the denial of benefits be affirmed. The Director responds, asserting that the Board should reject claimant's argument that the Director failed to provide him with a complete pulmonary evaluation. The Director contends that he is only required to provide claimant with a complete and credible examination, not a dispositive one and that the fact that the administrative law judge declined to rely on Dr. Simpao's diagnosis of pneumoconiosis and instead credit Dr. Rosenberg's opinion as more credible and persuasive does not mean that the administrative law judge accorded no weight to Dr. Simpao's opinion or that he found Dr. Simpao's opinion to be incredible. Thus the Director contends that Dr. Simpao's opinion satisfied the Department's obligation to provide claimant with a complete, credible pulmonary evaluation.<sup>1</sup>

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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<sup>1</sup> We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination and the finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3), (4) or total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 element of entitlement precludes an award of benefits. *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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.<sup>2</sup> Contrary to claimant's assertion, the administrative law judge may rely upon the qualifications of the physicians in weighing the x-ray evidence and determining the weight to be assigned the interpretations and may consider the numerical superiority of the negative x-ray evidence. The administrative law judge considered all of the x-ray evidence of record and accorded greater weight to a negative interpretation of a June 24, 2002 x-ray, Director's Exhibit 11, because the physician rendering the interpretation, Dr. Poulos, possessed both B-reader and a board-certified radiologist<sup>3</sup> credentials, and his negative reading was entitled to more weight than the positive reading of the same x-ray by Dr. Simpao, Director's Exhibit 10, a physician who possessed no special radiological qualifications. Decision and Order at 17. Moreover, the administrative law judge found that the x-rays of August 29, 2002 and February 18, 2004, were also read as negative by Dr. Rosenberg, who was a B-reader at the time he read the films. The administrative law judge thus permissibly found that claimant failed to establish the existence of pneumoconiosis because the preponderance of x-ray readings by physicians with superior qualifications was negative. Decision and Order at 9-10; 20 C.F.R. §§718.102(c), 718.202(a)(1); *Staton v. Norfolk & Western Railway 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); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149

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<sup>2</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

<sup>3</sup> A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. See 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

(1989) (*en banc*); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Likewise, claimant's contention that the administrative law judge "may have selectively analyzed" the x-ray evidence is rejected as claimant points to no evidence in the record or finding made by the administrative law judge which supports this contention. *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). Accordingly, the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) is affirmed.

Claimant next argues that because the administrative law judge determined that Dr. Simpao's diagnosis of pneumoconiosis, Director's Exhibit 9, was outweighed by the contrary opinions of Drs. Rosenberg and Repsher, Employer's Exhibits 1, 3, 5, pursuant to Section 718.202(a)(4), the Director failed to perform his statutory obligation of providing claimant a complete, credible pulmonary examination. Claimant argues that he selected Dr. Simpao, a physician "under contract with the Department of Labor," to provide such an evaluation, but that the physician did not do so. Claimant's Brief at 4.<sup>4</sup>

In determining that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge reviewed all of the medical opinion evidence of record and properly considered the quality of the evidence in determining whether the opinions were supported by their underlying documentation and were adequately explained. The administrative law judge found that the opinion of Dr. Rosenberg, as buttressed by the opinion of Dr. Repsher, was best supported by the underlying documentation of record. This was proper. Decision and Order at 10-11; *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Worhach*, 17 BLR at 1-108; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 n.4 (1993) (administrative law judge must consider each report to determine if that report's underlying documentation supports its conclusion); *Clark*, 12 BLR at 1-155; *Dillon v. Director, OWCP*, 11 BLR 1-113, 1-114 (1988); *Kuchwara*, 7 BLR at 1-170. Further, the administrative law judge acted within his discretion, as fact-finder, in concluding that Dr. Simpao's opinion was outweighed and thus insufficient to support a finding of pneumoconiosis because Dr. Simpao's opinion was primarily based upon a positive x-ray reading which was subsequently read negative by a better qualified physician. Decision and Order at 18; Director's Exhibit 10; Employer's Exhibit 1; 20 C.F.R. §718.104(d)(1)-(5); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *see also Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Island Creek Coal Co. v.*

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<sup>4</sup> While claimant does not render a specific challenge to the administrative law judge's finding at Section 718.202(a)(4), *see fn. 1*, the challenge regarding the credibility of Dr. Simpao's examination requires review of such findings.

*Compton*, 211 F.3d 203, 211, 22 BLR 1-62, 1-175 (4th Cir. 2000); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Contrary to claimant's contention, the Director did not fail to provide claimant with a complete pulmonary evaluation. The mere fact that the administrative law judge found Dr. Simpao's opinion outweighed is an insufficient basis to demonstrate such an allegation. See 30 U.S.C. §923(b); 20 C.F.R. §§725.405, 406; *Barnes v. ICO Corp.*, 31 F.3d 673, 18 BLR 2-319 (8th Cir. 1994); *Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25, 2-31 (8th Cir. 1984). We thus hold that remand for a complete, credible pulmonary evaluation is unwarranted.

We, therefore, affirm the administrative law judge's finding that the evidence fails to establish the existence of pneumoconiosis and because the evidence fails to establish the existence of pneumoconiosis, an essential element of entitlement, we need not consider claimant's argument concerning total respiratory disability. *Anderson*, 12 BLR 1-111; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

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