BRB No. 07-0684 BLA

C.W.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GREEN RIVER COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 05/29/2008
	)	
SECURITY INSURANCE COMPANY OF HARTFORD	)	
	)	
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 – Denial of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

Michelle S. Gerdano (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (2004-BLA-6134) 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 found this case to be a subsequent claim filed on September 9, 2002.[1] Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited claimant with fifteen years of coal mine employment, based on a stipulation by the parties, and found this claim was timely filed. The administrative law judge found the medical evidence submitted since the prior denial was sufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, sufficient to establish a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309(d). However, the administrative law judge found the medical evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and also insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the record contains "sufficient information to make a finding that the Claimant suffers from coal workers' pneumoconiosis and has a pulmonary impairment causally related to his coal mine employment." Claimant's Brief at 3. Claimant also contends that the administrative law judge erred in finding that Dr. Forehand's x-ray interpretation exceeded the evidentiary limitations. 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). In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, in a limited response, asserts that the Board should reject claimant's argument that the Director failed to provide him with a complete pulmonary evaluation. In addition, the Director argues that the administrative law judge should reject claimant's contention that the administrative law

[1] Claimant filed his first claim for benefits with the Social Security Administration on May 21, 1973, which was ultimately denied by the Department of Labor on May 14, 1980, based on the finding that claimant failed to establish any of the essential elements of entitlement. Director's Exhibit 1.

judge erred in excluding Dr. Forehand's interpretation of the December 3, 2002 x-ray.[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.[3] 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *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 one 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 considered the eight interpretations of five x-rays, dated January 18, 2002, December 3, 2002, May 1, 2003, August 11, 2004 and August 25, 2004, submitted since the prior denial.[4] Director's Exhibits 13, 16-19; Claimant's Exhibit 2; Employer's Exhibits 1, 11. Dr. Sundaram, whose qualifications are not a part of the record, read the January 18, 2002 x-ray as positive for pneumoconiosis; however, Dr. Wiot, dually qualified as a B reader and Board-certified radiologist, read this x-ray as negative for pneumoconiosis. Director's Exhibits 18, 19. Dr. Baker, a B reader, read the December 3, 2002 x-ray as positive for pneumoconiosis; whereas, Dr. Wiot, read it as negative.[5] Director's Exhibits 13, 17. Dr.

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[2] We affirm, as unchallenged on appeal, the administrative law judge's decision to credit claimant with fifteen years of coal mine employment, his finding that the medical evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R §718.204(b)(2), and his finding that the medical evidence 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).

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit as claimant's last coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 4.

[4] An additional reading by Dr. Barrett was obtained solely to assess the quality of the December 3, 2002 x-ray. Director's Exhibit 14.

[5] The file also contains a positive interpretation of the December 3, 2002 film by Dr. Forehand, Claimant's Exhibit 2, and a negative interpretation by Dr. Rosenberg,

Forehand, a B reader, read the August 25, 2004 x-ray as positive for pneumoconiosis and Dr. Wiot read this x-ray as negative for pneumoconiosis. Claimant's Exhibit 2; Employer's Exhibit 11. The two remaining x-rays, dated May 1, 2003 and August 11, 2004, were only read by Dr. Rosenberg, a B reader, as negative for pneumoconiosis. Director's Exhibit 16; Employer's Exhibit 1. Weighing these readings in light of the readers' radiological qualifications, the administrative law judge found that "all five x-rays were interpreted as negative by the most highly qualified physicians[,]" Decision and Order at 10, and, therefore the evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Decision and Order at 11.

On appeal, claimant contends that the administrative law judge erred in failing to consider an x-ray interpretation by Dr. Forehand contained in Claimant's Exhibit 2. Specifically, claimant contends that the Evidence Summary Form shows that he "intended to rely on the medical reports of Dr. Forehand dated August 25, 2004 and September 15, 2004 and his x-ray interpretations." Claimant's Brief at 3-4. Claimant therefore contends that the administrative law judge erred in finding that claimant exceeded the evidentiary limitations. Claimant's Brief at 4. Employer and the Director respond, arguing that error, if any, in the administrative law judge's exclusion of Dr. Forehand's additional x-ray reading is harmless as the administrative law judge properly found the weight of the x-ray readings by the better qualified physicians was negative for pneumoconiosis.

Contrary to claimant's contention, Dr. Forehand's February 24, 2004 interpretation of the December 3, 2002 x-ray, while attached to his August 31, 2004 medical report, was not designated on claimant's June 28, 2006 Evidence Summary Form as part of its affirmative or rebuttal evidence. Rather, the administrative law judge properly found that claimant designated Dr. Forehand's reading of the August 25, 2004 x-ray and Dr. Sundaram's reading of the January 18, 2002 x-ray as his affirmative x-ray evidence pursuant to 20 C.F.R. §725.414(a)(2)(i). Decision and Order at 10.

However, as employer correctly contends, the regulations permit the parties the opportunity to submit evidence in response to the evidence submitted by the Director pursuant to 20 C.F.R. §725.406. 20 C.F.R. §§725.406, 725.414(a)(2)(ii), (a)(3)(ii). Consequently, claimant could have designated Dr. Forehand's re-reading of the December 3, 2002 x-ray as rebuttal evidence to the Director's submission of Dr. Baker's original reading of that x-ray under Section 725.406. 20 C.F.R. §725.414(a)(2)(ii); *see Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*). Error, if any, in the administrative law judge's decision to exclude Dr. Forehand's x-ray reading is harmless,

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Employer's Exhibit 4, which the administrative law judge excluded as exceeding the evidentiary limitations. Decision and Order 10.

however, because the administrative law judge reasonably exercised his discretion in relying on the superior radiological qualifications of Dr. Wiot, in finding that the December 3, 2002 x-ray was negative for pneumoconiosis. Since Dr. Forehand is a B reader and not a dually qualified radiologist, the administrative law judge's rationale is still valid. *See Staton v. Norfolk & Western Ry. 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); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 9, 11.

Since claimant does not otherwise challenge the administrative law judge's findings pursuant to Section 718.202(a)(1), we affirm his determination that the preponderance of the x-ray readings, by the most highly qualified physicians, failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Baker, Forehand, Rosenberg and Fino and the hospital records and medical treatment notes of Dr. Chaney. Director's Exhibit 13; Claimant's Exhibits 1-3; Employer's Exhibits 1-9, 12. Drs. Baker and Forehand opined that claimant was suffering from clinical and legal pneumoconiosis, whereas Drs. Rosenberg and Fino opined that claimant's respiratory impairment was due to emphysema and hyperactive airways disease and that claimant's coal mine employment was not a substantially contributing factor. Director's Exhibit 13; Claimant's Exhibit 2; Employer's Exhibits 1-9. The hospital records and medical treatment notes of Dr. Chaney included diagnoses of chronic obstructive pulmonary disease (COPD), but did not relate any respiratory condition to claimant's coal mine employment. Claimant's Exhibits 1, 3; Employer's Exhibit 12.

Weighing the medical opinion evidence, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), based on his finding that the opinions of Drs. Rosenberg and Fino were entitled to the greatest probative weight. Decision and Order at 19. The administrative law judge found that the opinion of Dr. Baker was unreasoned and entitled to little weight because "he failed to explain how his physical findings and symptomatology were supportive of his findings of clinical pneumoconiosis and two of his three diagnoses of legal pneumoconiosis."[6] Decision and Order at 14 n.5; Director's Exhibit 13. In

[6] The administrative law judge found that a portion of Dr. Baker's diagnosis of legal pneumoconiosis, that claimant's chronic obstructive pulmonary disease (COPD) was due to both coal dust exposure and cigarette smoking was well-reasoned and well-documented because Dr. Baker relied on claimant's qualifying pulmonary function study, which was validated by Dr. Mettu. Decision and Order at 13; Director's Exhibit 13. However, the administrative law judge found that the remainder of Dr. Baker's opinion, that claimant suffers from legal pneumoconiosis, was not well-reasoned or well-

addition, the administrative law judge found that Dr. Forehand's diagnoses of coal workers' pneumoconiosis and that claimant was totally and permanently disabled from a "work limiting respiratory impairment" were not well-reasoned or well-documented because Dr. Forehand failed to explain the reasons for his diagnosis of clinical pneumoconiosis. Decision and Order at 15; Claimant's Exhibit 2. The administrative law judge also found Dr. Forehand's opinion entitled to little probative weight because Dr. Forehand relied on a smoking history that is questionable.[7] *Id.* In addition, the administrative law judge found claimant's hospital records and treatment notes were insufficient to establish pneumoconiosis pursuant to Section 718.202(a)(4), because none of the records related claimant's COPD, or other respiratory conditions, to claimant's coal mine employment. Decision and Order at 18-19; Claimant's Exhibits 1, 3; Employer's Exhibit 12. Rather, the administrative law judge accorded determinative weight to the opinions of Drs. Rosenberg and Fino, that claimant was not suffering from pneumoconiosis, noting the medical evidence relied on by the physicians and their discussions of why claimant's respiratory impairment was not due to coal dust exposure, but rather, was the result of a hyperactive airways disease and, therefore, found these

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documented because Dr. Baker failed to explain how the underlying documentation supported his diagnosis, particularly, that Dr. Baker failed to provide objective data to support his diagnosis of chronic bronchitis. Decision and Order at 13-14. In addition, he found that Dr. Baker's diagnosis of hypoxemia due to cigarette smoking and coal dust exposure, was inadequate to establish legal pneumoconiosis because legal pneumoconiosis is defined as any chronic lung disease or impairment arising out of coal mine employment. 20 C.F.R. §718.201; Decision and Order at 14.

[7] The administrative law judge found that he was unable to render a specific finding regarding claimant's smoking history because the relevant evidence in the record was contradictory. Decision and Order at 4. Initially, the administrative law judge found that claimant testified that he smoked one-half pack of cigarettes per day for fifteen years, but has not smoked regularly for ten years. Decision and Order at 4; Hearing Transcript at 19-20. However, the administrative law judge found that the medical reports contained varied smoking histories ranging from an extensive history of one pack of cigarettes per day for twenty years, quitting either in 1964 or 1974 as reported by Drs. Fino and Baker, respectively, to a lesser three year smoking history, quitting in approximately 1973, as reported by Dr. Rosenberg, and a four year smoking history, quitting in 1974, as reported by Dr. Forehand. Decision and Order at 4; Director's Exhibit 13; Claimant's Exhibit 2; Employer's Exhibits 1, 6.

opinions were well-reasoned and well-documented. Decision and Order at 15-17; Employer's Exhibits 1-9.

In challenging the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), claimant generally asserts that the opinion of Dr. Forehand, and the hospital records and treatment notes of Dr. Chaney are sufficient to satisfy his burden of proof. Claimant's Brief at 2-3. In so doing, claimant is essentially asking the Board to reweigh the evidence, which we cannot do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Moreover, "a party challenging an ALJ's decision must do more than recite evidence favorable to his case, but must demonstrate with some degree of specificity the manner in which substantial evidence precludes the denial of benefits or why the ALJ's decision is contrary to law." *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47 (6th Cir. 1986); *see Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Because claimant does not allege any specific error with the administrative law judge's weighing of this evidence, we affirm the administrative law judge's finding that Dr. Forehand's opinion is entitled to little probative weight because Dr. Forehand failed to adequately explain the bases for his diagnosis of pneumoconiosis. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); Decision and Order at 15; Claimant's Exhibit 2. In addition, the administrative law judge rationally found that the diagnoses of COPD in the hospital records and treatment notes of Dr. Chaney were insufficient to establish pneumoconiosis because none of the relevant records related claimant's COPD to his coal mine employment. 20 C.F.R. §§718.201; 718.202(a)(4); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139 (1999); Decision and Order at 18-19; Claimant's Exhibits 1, 3; Employer's Exhibit 12.

Because claimant does not otherwise challenge the administrative law judge's findings or raise any issues arising from the administrative law judge's weighing of the medical opinion evidence, we affirm his finding that the evidence is insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(4); *see Cox*, 791 F.2d at 446, 9 BLR at 2-47; *Sarf*, 10 BLR at 1-120; *Fish*, 6 BLR at 1-109. Accordingly, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a).

Claimant also contends that "the ALJ found that Dr. Glen Baker's report and diagnosis was neither well-reasoned nor well-documented. Under such circumstances a remand is required in that the ALJ essentially found that the Department of Labor failed to provide a complete pulmonary evaluation." Claimant's Brief at 4. In response, the Director contends that there is no violation of the Director's duty under Section 413(b) because Dr. Baker's opinion is "at least minimally reasoned and documented."

Director's Letter Brief at 2. The Director notes that: 1) Dr. Baker provided claimant with a complete evaluation, based on an examination, x-ray, pulmonary function study, blood gas study, and electrocardiogram; and 2) that the administrative law judge accorded some weight to Dr. Baker's opinion, finding that one of Dr. Baker's diagnoses of legal pneumoconiosis was well-reasoned, but was outweighed by the better reasoned opinions of Drs. Rosenberg and Fino. Director's Letter Brief at 2-3. Consequently, the Director contends that because the administrative law judge merely found Dr. Baker's opinion less credible than the other medical opinions, there is no violation of the Director's duty to provide claimant with a complete and credible examination.[8] *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), as 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. Baker 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 13. The administrative law judge did not find, nor does claimant allege, that Dr. Baker's report was incomplete. With respect to the issue of the existence of pneumoconiosis, one of the elements which defeated entitlement in this case, the administrative law judge found that Dr. Baker's opinion was ultimately outweighed by the contrary evidence of record. Decision and Order at 14 n.5, 19. Accordingly, we agree with the Director that he fulfilled his statutory obligation to provide claimant with a complete and credible pulmonary evaluation, and reject claimant's argument to the contrary. *See Cline v. Director, OWCP*, 972 F.2d 234, 14 BLR 2-102 (8th Cir. 1992);

[8] The Director, Office of Workers' Compensation Programs (the Director), notes that the administrative law judge stated that even if Dr. Baker's opinion were found to be well-documented and reasoned in all respects, it would still not be sufficient to establish pneumoconiosis in light of the contrary probative evidence. Director's Letter Brief at 3, citing Decision and Order at 14 n.5. Therefore, the Director argues that a remand for Dr. Baker to issue a supplemental decision would be futile. Director's Letter Brief at 3.

Pettry v. Director, OWCP, 14 BLR 1-98 (1990)(*en banc*); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990).

Because claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement, an award of benefits is precluded on this claim. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge