

BRB No. 05-0723 BLA

EUGENE BROCK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STRAIGHT CREEK RESOURCES	)	DATE ISSUED: 11/30/2005
CORPORATION	)	
	)	
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 – Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Sarah M. Hurley (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, McGRANERY and HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Claimant appeals the Decision and Order (2003-BLA-6248) of Administrative Law Judge Joseph E. Kane denying benefits 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 twenty-one years of qualifying coal mine employment, as stipulated by the parties and supported by the record, and adjudicated this claim, filed on July 23, 2001, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found that the weight of the evidence of record was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to enforce the evidentiary limitations at 20 C.F.R. §725.414(a)(3)(ii) with regard to the x-ray evidence of record, and in finding the evidence insufficient to establish either the existence of pneumoconiosis at Section 718.202(a)(1), or total respiratory disability. Claimant alternatively asserts that because the administrative law judge accorded little weight to the opinion of Dr. Simpao on the issue of the existence of pneumoconiosis, the Director, Office of Workers' Compensation Programs (the Director), failed to provide claimant with a complete, credible pulmonary evaluation as required pursuant to 30 U.S.C. §923(b), 20 C.F.R. §725.406(a). Employer responds, urging affirmance of the denial of benefits. The Director has filed a limited response, asserting that any error in the administrative law judge's failure to enforce the evidentiary limitations at 20 C.F.R. §725.414(a)(3)(ii) was harmless, and urging the Board to reject claimant's argument that the Director failed to provide claimant with a pulmonary examination that complies with the requirements of Section 413(b) of the Act.<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.<sup>2</sup> 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).

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<sup>1</sup> We affirm, as unchallenged on appeal, the administrative law judge's finding with regard to the length of claimant's coal mine employment and his finding that the evidence of record did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4). *See Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<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 the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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 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 challenges the administrative law judge's weighing of the x-ray evidence of record at Section 718.202(a)(1), arguing that the administrative law judge "relied almost solely on the qualifications of the physicians providing the x-ray interpretations," "placed substantial weight on the numerical superiority of x-ray interpretations," and "may have selectively analyzed" the evidence. Claimant's Brief at 3-4. Contrary to claimant's arguments, however, we can discern no error in the administrative law judge's weighing of this evidence. The administrative law judge accurately determined that the film dated September 27, 2001 was interpreted as positive by a reader with no special radiological qualifications, and was reread as negative by two dually-qualified Board-certified radiologists and B readers, while the film dated December 4, 2001 was interpreted as negative by a B reader. Based on the preponderance of negative interpretations by the best qualified readers, the administrative law judge acted within his discretion in finding that the evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1). Decision and Order at 5, 8-9; *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); *White v. New White Coal Co.*, 23 BLR 1-1 (2004). The administrative law judge's findings are supported by substantial evidence, and thus are affirmed.

Claimant also maintains that the administrative law judge improperly permitted employer to exceed the evidentiary limitations on x-ray evidence at Section 725.414(a)(3)(ii). Specifically, while noting that employer is entitled to submit, in rebuttal of the case presented by claimant, no more than one physician's interpretation of each x-ray submitted by claimant and the Director, *see* Decision and Order at 4, the administrative law judge allowed employer to submit two x-ray interpretations in rebuttal of the September 27, 2001 film, *see* Director's Exhibit 15, Employer's Exhibit 1.<sup>3</sup> Claimant therefore asserts that this case must be remanded for the administrative law judge either to strike one of the interpretations from the record or find that employer has demonstrated good cause for the admission of both interpretations pursuant to 20 C.F.R.

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<sup>3</sup> Although employer argues that claimant failed to object to the admission of this evidence into the record at the hearing, claimant indicated on his evidence summary form that he objected to "any evidence submitted by the employer or Director that is in excess to the guidelines set forth in Section 725.414," and thus did not waive the issue.

§725.456(b)(1). Claimant's Brief at 3-4. We disagree. Although employer acknowledges that both interpretations were "inadvertently" listed as rebuttal evidence, employer correctly maintains that one of those interpretations could instead have been offered as one of the two x-ray interpretations which employer is entitled to submit in support of its affirmative case pursuant to 20 C.F.R. §725.414(a)(3)(i). Employer's Brief at 3. Further, we agree with the Director's argument that any error in the admission of this evidence is harmless, as it does not affect the disposition of this case. Director's Brief at 4; *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Based on the administrative law judge's reasonable rationale of according greater weight to the better qualified readers, the sole positive interpretation would still be outweighed even if one of employer's negative interpretations were excluded. Decision and Order at 8-9; *see Staton*, 65 F.3d 55, 19 BLR 2-271. Consequently, we hold that a remand of this case is not warranted.

Claimant next contends that, because Dr. Simpao's diagnosis of pneumoconiosis was discounted as unreasoned, the Director did not fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation sufficient to substantiate the claim.<sup>4</sup> Claimant's Brief at 4; *see* 30 U.S.C. §923(b), 20 C.F.R. §725.406(a). Claimant's arguments are without merit.

After finding that Dr. Simpao's positive x-ray interpretation was outweighed by the negative interpretations of better qualified readers at Section 718.202(a)(1), the administrative law judge also considered Dr. Simpao's diagnosis of pneumoconiosis with the medical opinions of record at Section 718.202(a)(4). The administrative law judge found that, despite Dr. Simpao's excellent pulmonary credentials and the fact that his opinion was well-documented, Dr. Simpao's diagnosis did not constitute a well reasoned medical opinion sufficient to meet claimant's burden at Section 718.202(a)(4), as it was based merely on the physician's positive x-ray interpretation and claimant's coal mine employment history. Decision and Order at 10; Director's Exhibit 12. The Director correctly maintains, however, that Dr. Simpao's opinion does not purport to be anything other than a restatement of the physician's x-ray interpretation, thus the administrative law judge erred in considering the diagnosis at Section 718.202(a)(4). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson*, 12 BLR at 1-113. Moreover, we agree with the Director's assertion that Dr. Simpao's diagnosis of clinical pneumoconiosis based on a

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<sup>4</sup> On its face, Dr. Simpao's opinion is complete, as the physician conducted a physical examination, recorded claimant's symptoms as well as his employment, medical and social histories, obtained x-rays, EKG, pulmonary function studies and blood gas studies, and addressed all of the elements of entitlement. Decision and Order at 6-7; Director's Exhibit 12.

positive x-ray was neither unreasoned nor undocumented, but rather was facially credible. In these circumstances, where the physician's pulmonary evaluation was complete, documented, and inherently credible, but his diagnosis of clinical pneumoconiosis was found to be outweighed by the conflicting x-ray evidence of record, the Director's statutory obligation is discharged. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.406(a); *see generally Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984).

As claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement, we affirm the administrative law judge's denial of benefits. *See Anderson*, 12 BLR 1-111. Consequently, we need not reach claimant's arguments on the issue of total respiratory disability.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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REGINA C. McGRANERY  
Administrative Appeals Judge

I concur.

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BETTY JEAN HALL  
Administrative Appeals Judge

I concur in the result only.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge