BRB No. 06-0510 BLA

RONALD E. GROVES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 11/29/2006
	)	
and	)	
	)	
PEABODY INVESTMENTS	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Ronald E. Groves, Somerset, Ohio, *pro se*.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order-Denying Benefits (04-BLA-6427) of Administrative Law Judge Joseph E. Kane rendered 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).[1] The administrative law judge credited claimant with twenty-one years of coal mine employment, as stipulated, and found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(4).[2] Even if pneumoconiosis were established, the administrative law judge found that while claimant could establish total disability at 20 C.F.R. §718.204(b), he could not establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 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).

The administrative law judge first found that the x-ray evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). The x-ray evidence consists of four readings of three x-rays taken on August 29, 2003, December 17, 2003, and June 9, 2004. Dr. Noble, a Board-certified radiologist and B reader, interpreted the August 29, 2003 x-ray as positive for pneumoconiosis. Director's Exhibits 14, 15. On the other hand, Dr. Wiot, also a Board-certified radiologist and B reader, interpreted this x-ray as negative for pneumoconiosis. Director's Exhibit 17. Drs. Rosenberg and Renn, both B readers, interpreted the December 17, 2003, and June 9, 2004 x-rays, respectively, as negative for pneumoconiosis. Director's Exhibit 33; Employer's Exhibit 1. In considering the x-ray evidence, the administrative law judge accorded greater weight to the readings by Drs. Noble and Wiot because they are dually qualified as both Board-certified radiologists and B readers. Decision and Order at 9. An administrative law judge may accord greater weight to the readings of Board-certified radiologists and B readers. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*,

[1] The instant case is governed by the regulations that took effect on January 19, 2001, as it involves a claim filed on May 6, 2003. Decision and Order at 3; Director's Exhibit 2.

[2] The administrative law judge found moot the issue of causality at 20 C.F.R. §718.203(b), after finding that claimant did not establish pneumoconiosis at 20 C.F.R. §718.202(a). Decision and Order at 12.

991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). The administrative law judge then found the x-ray evidence evenly balanced because the "equally credible readings by the highly qualified physicians" reached opposite results. Decision and Order at 9. Where the evidence is evenly balanced, claimant has not met his burden of establishing the existence of pneumoconiosis at Section 718.202(a)(1). *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *see also Abshire v. D&L Coal Co.*, 22 BLR 1-202 (2002)(*en banc*)(pneumoconiosis was not established at 20 C.F.R. §718.202(a)(4) where the evidence was in equipoise). Consequently, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1).

The administrative law judge next found that the evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) and (a)(3) because there is no biopsy or autopsy evidence, and the presumptions at 20 C.F.R. §§718.304-718.306 are inapplicable.[3] Decision and Order at 9-10. As the administrative law judge properly found that claimant did not establish the existence of pneumoconiosis at Section 718.202(a)(2) and (a)(3), we affirm this finding.

The administrative law judge lastly found that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4). Drs. Haggenjos and Lenkey, whose qualifications are not in the record, opined that claimant has pneumoconiosis, while Drs. Rosenberg and Renn, both Board-certified in internal medicine and pulmonary disease, stated that claimant does not have pneumoconiosis. Director's Exhibits 10, 32, 33, 43; Claimant's Exhibit 1; Employer's Exhibit 1. The administrative law judge gave greater weight to the opinions of Drs. Rosenberg and Renn based on their qualifications as pulmonary specialists. He further credited these opinions because he found them well documented and better reasoned, in that they were supported by the pulmonary test results and because the negative chest CAT scans relied upon by these doctors supported their opinions. Decision and Order at 11.

Both Drs. Rosenberg and Renn explained why the pulmonary test results indicate that claimant does not have pneumoconiosis, while Dr. Haggenjos did not discuss the results of any pulmonary testing in finding that claimant has pneumoconiosis, and Dr. Lenkey did not

[3] Both Drs. Renn and Rosenberg testified at their respective depositions that claimant does not have complicated pneumoconiosis. Employer's Exhibits 10 at 51-52; 11 at 43. Therefore, the administrative law judge properly found that the presumption at 20 C.F.R. §718.304 does not apply. The instant claim was filed after 1982; consequently, the administrative law judge properly found that the presumptions at 20 C.F.R. §§718.305 and 718.306 are inapplicable.

explain why he diagnosed pneumoconiosis based on his studies. Dr. Rosenberg explained in his report that claimant has chronic obstructive pulmonary disease due to smoking and not coal mine employment because the bronchodilator response on the pulmonary function study was not characteristic of a fixed impairment associated with coal workers' pneumoconiosis. Director's Exhibit 33. Dr. Rosenberg additionally explained at his subsequent deposition that claimant's pulmonary disease is due to smoking and not coal mine employment because the pulmonary function study showed a significantly reduced FEV1/FVC ratio and low diffusing capacity, results which are not characteristic of coal workers' pneumoconiosis. Employer's Exhibit 10 at 48-50. In his report, Dr. Renn opined that claimant's pulmonary problems are due to smoking and not coal mine employment because the pulmonary function study results indicate an obstructive ventilatory defect which significantly improves following bronchodilator. Employer's Exhibit 1. Subsequently, Dr. Renn further explained at his deposition that claimant's pulmonary problems are due to smoking and not coal mine employment because the pulmonary function study results show a disproportionate reduction in lung volumes and reduction in diffusing capacity. Employer's Exhibit 11 at 45-47, 54. Dr. Haggenjos did not discuss the results of any pulmonary testing performed on claimant in any of his three reports, even though the physician had the opportunity to read and review the testing performed by Drs. Rosenberg and Renn explaining why they opined that claimant's pulmonary disease is due to his smoking and not his coal mine employment.[4] Director's Exhibits 32, 43; Claimant's Exhibit 1. Dr. Lenkey performed a pulmonary function study on claimant but did not discuss the results of his pulmonary function testing, except to say, after diagnosing pneumoconiosis, that claimant was 100 percent disabled based on his "current exam studies." Director's Exhibit 10 at 4.

Generally, pulmonary function studies, in and of themselves, are not diagnostic of the presence or absence of pneumoconiosis, *see Lambert v. Itmann Coal Co.*, 6 BLR 1-256 (1983), but they can indicate the presence or absence of a disease arising out of coal mine employment, a finding that constitutes pneumoconiosis. *See Morgan v. Bethlehem Steel Corp.*, 7 BLR 1-226 (1984); 20 C.F.R. §718.201(a)(2). An administrative law judge may reject a medical opinion where he finds that the doctor failed to adequately explain his diagnosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *see also Gilliam v. G&O Coal Co.*, 7 BLR 1-59 (1984). Conversely, an administrative law judge may credit a medical opinion where he finds the doctor better explained his diagnosis. As the administrative law judge rationally found that the opinions of Drs. Rosenberg and Renn explain why claimant does not have pneumoconiosis based on the

[4] In his April 15, 2004 report, Dr. Haggenjos stated that he had the opportunity to read Dr. Rosenberg's report and review the chest x-ray and chest CAT scan performed by Dr. Rosenberg. Director's Exhibit 43. In his October 4, 2004 report, Dr. Haggenjos stated that he had the opportunity to read Dr. Renn's letter. Claimant's Exhibit 1.

pulmonary test results, whereas the opinions of Drs. Haggenjos and Lenkey do not adequately explain why they diagnose pneumoconiosis in the face of conflicting evidence, the administrative law judge's decision to give greater weight to the opinions of Drs. Rosenberg and Renn on this basis is affirmed.[5]

The administrative law judge additionally credited the opinions of Drs. Rosenberg and Renn, that claimant does not have pneumoconiosis, over the contrary opinions of Drs. Haggenjos and Lenkey because the negative chest CAT scans relied upon by Drs. Rosenberg and Renn supported their conclusion. Decision and Order at 11. The administrative law judge accurately noted that all of the chest CAT scans of record are negative for pneumoconiosis. Decision and Order at 5, 6; Director's Exhibits 33, 42; Employer's Exhibits 1, 2. An administrative law judge may accord greater weight to a medical opinion which is better supported by its objective data. *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n. 1 (1986). Thus, we affirm the administrative law judge's crediting of the opinions of Drs. Rosenberg and Renn, that claimant does not have pneumoconiosis, over those of Drs. Haggenjos and Lenkey, because the former opinions were supported by the negative chest CAT scans underlying their opinions.

Next, the administrative law judge accorded less weight to Dr. Lenkey's opinion because the physician is not as highly qualified as Drs. Rosenberg and Renn. Decision and Order at 11. An administrative law judge may consider the qualifications of a physician in weighing his opinion. *See Carson v. Westmoreland Coal Co.*, 19 BLR 1-16, 1-22 (1994). Consequently, we affirm the administrative law judge's decision to accord less weight to the opinion of Dr. Lenkey because the record does not establish that he is as highly qualified as Drs. Rosenberg and Renn.[6]

Lastly, the administrative law judge found that he was not required to accept the

[5] Dr. Lenkey's report was written in 2003; thus, he did not review the 2004 reports of Drs. Rosenberg and Renn. Director's Exhibit 10. Dr. Lenkey performed a pulmonary function study but did not explain how the results of that testing supported his diagnoses of coal workers' pneumoconiosis, chronic bronchitis, and coronary artery disease related to coal dust and tobacco exposure. Director's Exhibit 10 at 3, 4. The record reflects that Dr. Haggenjos had the opportunity to read and review the reports of Drs. Rosenberg and Renn. Director's Exhibits 33, 43; Claimant's Exhibit 1; Employer's Exhibit 1.

[6] The record establishes that Drs. Rosenberg and Renn are Board-certified in internal medicine and pulmonary disease, whereas the qualifications of Drs. Haggenjos and Lenkey are not in the record. Director's Exhibit 33; Employer's Exhibits 4; 10 at 4; 11 at 2. The administrative law judge did not discuss the qualifications of Dr. Haggenjos.

opinion of claimant's treating physician, Dr. Haggenjos, that claimant has pneumoconiosis. Decision and Order at 11. In black lung litigation, the opinions of treating physicians get the deference they deserve based on their power to persuade. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *see also* 20 C.F.R. 718.104(d)(5). The administrative law judge rationally gave greater weight to the opinions of Drs. Rosenberg and Renn based on their qualifications as pulmonary specialists and because he found that their opinions were well documented and better reasoned. Thus, we affirm the administrative law judge's finding that he was not required to accept Dr. Haggenjos's opinion, despite his status as treating physician.

Consequently, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). As claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement, the administrative law judge's denial of benefits is affirmed. *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Accordingly, the administrative law judge's Decision and Order-Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH

Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge