

BRB No. 07-0242 BLA

W.C.)
)
 Claimant-Petitioner)
)
 v.)
)
 CONSOL OF KENTUCKY,) DATE ISSUED: 11/30/2007
 INCORPORATED)
)
 and)
)
 ACORDIA EMPLOYERS SERVICE)
)
 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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

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

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Barry H. Joyner (Jonathan L. Snare, Acting Solicitor of Labor; 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: , , and , Administrative

Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (05-BLA-5493) of Administrative Law Judge Adele Higgins Odegard 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). Based on claimant's June 14, 2001 filing date, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718. She then found that the record supports the parties' stipulation to twenty-nine years of coal mine employment. The administrative law judge further found that the medical 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). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in not finding the existence of pneumoconiosis established based on x-ray evidence pursuant to Section 718.202(a)(1), and erred in not finding total respiratory disability established based on medical opinion evidence pursuant to Section 718.204(b)(2)(iv). 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). 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 the fact that the administrative law judge found Dr. Hussain's diagnosis of pneumoconiosis to be outweighed by the contrary evidence does not result in a violation of 20 C.F.R. §725.406(a).¹ Director's Letter at 2. *Id.*

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).

In order to establish entitlement to benefits in a living miner's claim 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.² *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co.*

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

² As claimant's coal mine employment occurred in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

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 of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant contends that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). The x-ray evidence consists of four interpretations of three x-rays taken on August 7, 2002, September 25, 2003 and February 16, 2004.³ Director's Exhibits 10, 35. Weighing these readings in light of the readers' radiological qualifications, the administrative law judge found that Dr. Hussain, who possesses no specific radiological qualifications, read the August 7, 2002 x-ray as positive for pneumoconiosis; whereas Dr. Wiot, who is both a B reader and Board-certified radiologist, read this x-ray as negative for pneumoconiosis. Decision and Order at 6; Director's Exhibits 11, 35. The administrative law judge further found that Dr. Repsher and Dr. Rosenberg, both of whom are B readers, read the September 25, 2003 and February 16, 2004 x-rays, respectively, as negative for pneumoconiosis. Decision and Order at 6; Director's Exhibit 35.

Based upon this review, the administrative law judge acted within her discretion as fact-finder in according greater weight to the negative readings, as they were performed

³ An additional reading by Dr. Barrett was obtained solely to assess the quality of the August 7, 2002 x-ray. Director's Exhibit 12.

by physicians who are B readers or B readers and Board certified-radiologists. Decision and Order at 6-7; 20 C.F.R. §718.202(a)(1); *see Dixon v. North Camp Coal Co.*, 8 BLR 1-31, 1-37 (1991); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984). Therefore, contrary to claimant's assertions, the record indicates that the administrative law judge based her finding on a proper qualitative analysis of the x-ray evidence. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004); *Woodward v. Director, OWCP*, 991 F.2d 314, 320, 17 BLR 2-77, 2-87 (6th Cir. 1993); *Sheckler*, 7 BLR at 1-131. Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, merely counted the negative readings, and that she may have selectively analyzed the readings, lack merit.⁴ Claimant's Brief at 2-3; Decision and Order at 6-7. We therefore affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) as supported by substantial evidence.

In light of our affirmance of the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under Part 718. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Consequently, we need not address claimant's contentions regarding the administrative

⁴ Claimant has provided no support for his assertion that the administrative law judge "may have 'selectively analyzed' the x-ray evidence." Claimant's Brief at 3.

law judge's finding that the medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

We must, however, address claimant's contention that he did not receive a complete pulmonary evaluation as required under the Act. Claimant contends that since the administrative law judge concluded that "Dr. Hussain's report was based merely upon an erroneous x-ray interpretation and was not well-reasoned," 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). Claimant's Brief at 4. The Director responds that he is only required to provide claimant with a complete and credible examination, not a dispositive one, and the fact that the administrative law judge found Dr. Hussain's diagnosis of pneumoconiosis to be outweighed by the contrary evidence does not result in a violation of 20 C.F.R. §725.406(a). Director's Letter Brief at 1-2. In addition, the Director notes that remand for a complete, credible pulmonary evaluation is also unnecessary because the administrative law judge's finding that a totally disabling respiratory impairment was not established is sufficient to support her denial of benefits, and any defect in the administrative law judge's consideration of Dr. Hussain's opinion on the issue of pneumoconiosis would be moot. Director's Letter Brief at 1, n.2.

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), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director has met this duty may arise 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*, 18 BLR 1-84, 1-88 n.3 (1994); *accord 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).

The record reflects that Dr. Hussain 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. Director’s Exhibit 11; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). On the issue of the existence of pneumoconiosis, the administrative law judge found that Dr. Hussain’s diagnosis of pneumoconiosis was based largely on a positive x-ray reading that the administrative law judge found outweighed by the negative reading of a physician with superior radiological credentials. Decision and Order at 6, 10. This was the sole cardiopulmonary diagnosis listed in Dr. Hussain’s report, and the administrative law judge merely found the specific medical data for Dr. Hussain’s diagnosis to be outweighed. Director’s Exhibit 11. In addition, the administrative law judge ultimately accorded determinative weight to the medical opinions of Drs. Repsher and Rosenberg, which included the opinion that claimant does not suffer from pneumoconiosis pursuant to Section 718.202(a)(4), a finding not challenged by claimant.

Decision and Order at 10-11. Because Dr. Hussain's report as to the existence of pneumoconiosis was complete and the administrative law judge merely found it outweighed, *cf. Hodges*, 18 BLR at 1-93, we decline to order a remand of this case.

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

SO ORDERED.

Administrative Appeals Judge

Administrative Appeals Judge

Administrative Appeals Judge