BRB No. 11-0246 BLA

WOOLERY BOWLING	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PHIL YOUNG MINING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 11/15/2011
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan, Bledsoe, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order (2006-BLA-5184) of Administrative Law Judge Larry S. Merck denying benefits on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). The claim in this

case was filed on October 25, 2004.[1] After crediting claimant with thirty-five years of coal mine employment,[2] the administrative law judge found that the evidence did not establish the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(1)-(4), or the existence of a totally disabling respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the x-ray, computerized tomography (CT) scan, and medical opinion evidence establishes the existence of both simple and complicated pneumoconiosis, pursuant to 20 C.F.R. §§718.202(a), 718.304. Claimant further contends that, because he has established the existence of complicated pneumoconiosis, he has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis, pursuant to 20 C.F.R. §718.304. Employer/carrier responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[3]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is

[1] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this case, as the claim was filed before January 1, 2005. The record reflects that, at the parties' request, the administrative law judge bifurcated the case, initially proceeding only on the issue of whether employer is the responsible operator. The administrative law judge ultimately resolved that issue in an October 27, 2008 Order finding employer to be the responsible operator. The administrative law judge held a hearing addressing the merits of claimant's entitlement to benefits, on November 18, 2009. Decision and Order at 2.

[2] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 7. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] We affirm, as unchallenged, the administrative law judge's finding that, as there is no biopsy evidence of record, claimant cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 8.

totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*).

Claimant argues that the x-ray evidence establishes the existence of both simple and complicated pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1), (3); 718.304(a). The administrative law judge considered seven readings of six x-rays and considered the readers' radiological qualifications. After evaluating the interpretations of each x-ray, the administrative law judge found that:

> [N]one of the aforementioned x-rays are [sic] positive for complicated pneumoconiosis. Accordingly, I find that Claimant has not established complicated pneumoconiosis by a preponderance of the x-ray evidence pursuant to [20 C.F.R.] §718.202(a)(1). As to simple pneumoconiosis, only one of the x-rays was positive for pneumoconiosis; I give the most weight to the [negative] interpretations by Dr. Scott because of his superior qualifications and find that Claimant has not established simple pneumoconiosis under the provisions of [20 C.F.R.] §718.202(a)(1).

Decision and Order at 8.

Claimant contends that the positive x-ray readings by Drs. Baker and Alam establish the existence of pneumoconiosis. While Dr. Baker, a B reader, interpreted the December 16, 2004 x-ray as positive for both simple and complicated pneumoconiosis, Director's Exhibit 10, Dr. Scott, a B reader and Board-certified radiologist, interpreted this x-ray as negative for both simple and complicated pneumoconiosis. Employer's Exhibits 5, 10. Contrary to claimant's contention, the administrative law judge permissibly credited Dr. Scott's negative interpretation of the December 16, 2004 x-ray over Dr. Baker's positive interpretation, based upon Dr. Scott's superior qualifications. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); Decision and Order at 6.

We further reject claimant's contention that a positive x-ray interpretation by Dr. Alam, claimant's treating physician, should have been found to establish the existence of pneumoconiosis.[4] The administrative law judge permissibly concluded that, while this x-ray was positive, based on Dr. Alam's uncontradicted reading, it was outweighed by the

[4] In a treatment note dated February 20, 2008, Dr. Alam stated that claimant's "chest-x-ray and CT scan is positive with bilateral nodular densities diffusely spread out in both lungs which is probably 2/3 in an ILO classification . . . ." Claimant's Exhibit 3. The date of the x-ray is not given.

preponderance of negative x-ray readings by more highly-qualified readers. *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; Decision and Order at 8. Thus, the administrative law judge reasonably found that Dr. Alam's sole positive x-ray reading was insufficient to establish the existence of pneumoconiosis. Decision and Order at 8.

Because claimant does not allege any additional error in regard to the administrative law judge's consideration of the x-ray evidence, we affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of simple or complicated pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1), (3); 718.304(a).

Claimant next contends that the CT scan and medical opinion evidence establishes the existence of simple and complicated pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(3), (4); 718.304(c). Claimant argues that Dr. Alam indicated that a CT scan, read by Dr. Patel on February 6, 2008, was positive for pneumoconiosis. Claimant's Brief at 3. Dr. Patel, a radiologist, interpreted claimant's February 6, 2008 CT scan, stating: "fibronodular changes most probably coal workers [sic] pneumoconiosis with silicotic nodules . . . ." Claimant's Exhibit 3. Dr. Scott, a B reader and Board-certified radiologist, also interpreted this CT scan, finding "no background of small opacities to suggest silicosis/[coal workers' pneumoconiosis]." Employer's Exhibit 7. The administrative law judge acted within his discretion in crediting Dr. Scott's negative interpretation over Dr. Patel's positive interpretation, based upon his superior qualifications. *See Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; Decision and Order at 15-16. The administrative law judge, therefore, permissibly concluded that, as none of the CT scans is positive for complicated pneumoconiosis, and as the CT scan readings by the most highly qualified readers are also negative for simple pneumoconiosis, claimant failed to establish the existence of pneumoconiosis through the CT scan evidence.[5] *Id.*

Because claimant does not allege any additional error in regard to the administrative law judge's consideration of the CT scan evidence, we affirm the administrative law judge's finding that the CT scan evidence did not establish the existence of simple or complicated pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(3), (4); 718.304(c).

Regarding the medical opinions, claimant asserts that both Drs. Baker and Alam,

[5] In making the above finding, the administrative law judge considered six readings of five CT scans and considered the readers' radiological qualifications. Claimant raises no arguments regarding the remaining CT scans of record.

claimant's treating physicians, diagnosed pneumoconiosis and, therefore, the administrative law judge erred in failing to find that claimant established the existence of the disease. Claimant's Brief at 2-4. We disagree. The administrative law judge noted that, in a medical report dated December 16, 2004, and in medical treatment notes, Dr. Baker diagnosed simple clinical pneumoconiosis and complicated pneumoconiosis, as well as legal pneumoconiosis, in the form of chronic bronchitis causally related to coal mine dust exposure.[6] Decision and Order at 10-12, 17; Claimant's Exhibit 2; Director's Exhibit 10. The administrative law judge noted that Dr. Alam also diagnosed simple clinical pneumoconiosis and complicated pneumoconiosis, as well as chronic bronchitis and a lung infection, causally related to coal mine dust exposure. Decision and Order at 17; Claimant's Exhibit 3.

The administrative law judge permissibly found Dr. Baker's diagnoses of simple and complicated pneumoconiosis, as contained in his medical report, to be "neither well-documented nor well-reasoned," because these diagnoses were based on an x-ray that the administrative law judge properly found did not support the existence of pneumoconiosis. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003); *Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985); Decision and Order at 11.

The administrative law judge further acted within his discretion in finding the diagnoses of simple clinical pneumoconiosis contained in the medical treatment notes prepared by Drs. Baker and Alam to be neither well-documented nor well-reasoned, and thus, entitled to little probative weight. *See Williams*, 338 F.3d at 514, 22 BLR at 2-648-49; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 575-6, 22 BLR 2-107, 1-120 (6th Cir. 2000); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Decision and Order at 17. The administrative law judge also permissibly discounted Dr. Alam's additional diagnosis of complicated pneumoconiosis, as inadequately explained. *See Rowe v. Director, OWCP*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order at 17-18. Thus, we affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of clinical pneumoconiosis, either simple or complicated, pursuant to 20 C.F.R. §§718.202(a)(3), (4); 718.304(c).

In addressing the issue of legal pneumoconiosis, the administrative law judge permissibly found that the opinions of Drs. Baker and Alam, that claimant suffers from chronic bronchitis arising out of his coal mine employment, were of little probative value, because they were not sufficiently reasoned, as neither physician explained how the

[6] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

objective data, physical findings, and symptomology supported his conclusions. *See Rowe*, 710 F.2d 251 at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; Decision and Order at 11, 18; Director's Exhibit 10; Claimant's Exhibit 3. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Based on the foregoing discussion, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant did not establish the existence of complicated pneumoconiosis, and thus, is not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. *See* 20 C.F.R. §§718.202(a)(3), 718.304. We also affirm, as supported by substantial evidence, the administrative law judge's finding that claimant did not establish either simple clinical pneumoconiosis, or legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(1),(4). Therefore, we affirm the denial of benefits. In light of these holdings, we need not address the administrative law judge's additional finding that claimant failed to establish the existence of a totally disabling respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2), as entitlement to benefits is precluded. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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