

BRB No. 07-0200 BLA

L.G.)
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 Claimant-Petitioner)
)
 v.)
)
 MT. VICTORY COAL COMPANY,) DATE ISSUED: 10/31/2007
 INCORPORATED)
)
 and)
)
 TRAVELERS 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 Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

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

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

Barry H. Joyner (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; 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: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (04-BLA-6348) of Administrative Law Judge Jeffrey Tureck (the administrative law judge)¹ 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 July 9, 2002 filing date, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718. Addressing the elements of entitlement, the administrative law judge found that the medical evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). 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 the x-ray or medical opinion evidence pursuant to Section 718.202(a)(1), (4), and erred in not finding total respiratory disability established based on the 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), since the administrative law judge "discredited Dr. Simpao's report." Claimant's Brief at 5-6. Employer responds, urging affirmance of the denial of benefits. In a limited response, the Director asserts that the Board should reject claimant's argument that the Director failed to provide him with a complete pulmonary evaluation.²

¹ This case was originally assigned to Administrative Law Judge Richard Huddleston, who presided over the formal hearing on January 31, 2006. Hearing Transcript at 4. Subsequent to the hearing, but prior to issuing a decision, Judge Huddleston retired from the Office of Administrative Law Judges. This case was thereafter reassigned to Administrative Law Judge Jeffrey Tureck for decision. Decision and Order at 2.

² We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant 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).

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.³ 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*).

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 six interpretations of four x-rays.⁴ Director's Exhibits 9, 11, 11A; Employer's Exhibits 2, 3, 7, 9. Weighing these readings in light of the readers' radiological qualifications, the administrative law judge found that Dr. Simpao, who possesses no specific radiological qualifications, read the October 14, 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 2-3; Director's Exhibits 9, 11A; Employer's Exhibit 9. Similarly, the administrative law judge found that Dr. Baker, a B reader, read the July 13, 2002 x-ray as positive for the existence of pneumoconiosis; that reading was countered by the negative reading of Dr. Hayes, who is both a B reader and Board-certified radiologist. Decision and Order at 2-3; Director's Exhibit 11; Employer's Exhibit 7. The administrative law judge further found that Dr. Dahhan, a B reader, read the July 22, 2003 x-ray as negative, and Dr. Broudy, also a B reader, interpreted the August 24, 2004 x-ray as negative for pneumoconiosis. Decision and Order at 3; Employer's Exhibits 2, 3.

³ 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*).

⁴ An additional reading by Dr. Barrett was obtained solely to assess the quality of the October 14, 2002 x-ray. Director's Exhibit 10.

Based upon this review, the administrative law judge acted within his discretion as fact-finder in finding the negative readings of the July 13, 2002 and October 14, 2002 films outweighed the positive readings, as they were performed by physicians who are dually-qualified as B readers and Board-certified radiologists. Decision and Order at 3; 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 his 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 may have selectively analyzed the readings, lack merit.⁵ Claimant's Brief at 2-4; Decision and Order at 2-3. 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.

Pursuant to Section 718.202(a)(4), the administrative law judge considered four medical opinions. Drs. Simpao and Baker diagnosed claimant with pneumoconiosis, while Drs. Dahhan and Broudy concluded that he does not have pneumoconiosis. Director's Exhibits 9, 11; Employer's Exhibits 1-4. The administrative law judge accorded no weight to Dr. Simpao's diagnosis of pneumoconiosis because it was based on the physician's positive x-ray reading, which the administrative law judge found was erroneous. The administrative law judge further found that Dr. Simpao stated that his opinion was also based on the EKG and pulmonary function study administered as part of his evaluation, but the administrative law judge found that these tests did not support Dr. Simpao's diagnosis as the pulmonary function study was normal and an EKG diagnoses heart disease, not lung disease. Decision and Order at 3. Consequently, the administrative law judge found Dr. Simpao's opinion was "baseless, and therefore is not entitled to any weight." Decision and Order at 3; Director's Exhibit 9. Further, the administrative law judge found Dr. Baker's diagnosis of "Coal Workers' Pneumoconiosis, category 1/0" not entitled to any weight because the only basis cited by Dr. Baker in diagnosing pneumoconiosis, was his erroneous x-ray reading. Decision and Order at 3-4; Director's Exhibit 11. By contrast, the administrative law judge found that Drs. Dahhan and Broudy determined that claimant does not suffer from pneumoconiosis, and, therefore, the medical opinions of record were insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order at 4.

⁵ 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 4.

Claimant contends that the administrative law judge erred in discounting Dr. Baker's opinion as "merely an x-ray interpretation." Claimant's Brief at 4. In addition, claimant contends that Dr. Baker's opinion was documented and reasoned, and that the administrative law judge provided an invalid reason for discounting Dr. Baker's diagnosis of pneumoconiosis. Claimant's Brief at 4-5. We reject these arguments.

Contrary to claimant's contention, the administrative law judge permissibly found that Dr. Baker's diagnosis of pneumoconiosis did not constitute a documented and reasoned medical opinion because the physician relied primarily upon his own positive x-ray interpretation, which was re-read as negative by a physician with superior radiological qualifications. Decision and Order at 3-4; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *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). In addition, the administrative law judge properly discounted Dr. Baker's opinion because Dr. Baker failed to otherwise explain his conclusion that claimant suffers from pneumoconiosis. *See Director, OWCP v. Rowe*, 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*). Consequently, we affirm the administrative law judge's finding that Dr. Baker's opinion is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Because claimant does not otherwise challenge the administrative law judge's specific findings pursuant to Section 718.202(a)(4), we affirm his finding that claimant has failed to establish the existence of pneumoconiosis.

We must, however, address claimant's contention that the Director failed to fulfill his statutory obligation to provide a complete, credible pulmonary evaluation pursuant to Section 413(b) of the Act, since the administrative law judge discredited Dr. Simpao's report because it was merely based upon an erroneous x-ray interpretation, and thus entitled to "no weight." Claimant's Brief at 5-6. The Director responds that "Section 413(b) obligates the Director to provide each miner-claimant with [a] pulmonary evaluation so that he has the opportunity to substantiate his claim. The Director, however, is not required to [provide] a claimant with a dispositive evaluation." Director's Letter Brief at 1 (citations omitted). In addition, the Director argues that although the administrative law judge stated that he found Dr. Simpao's opinion entitled to no weight, he, in fact, found the opinion outweighed by the negative x-ray interpretation of Dr. Wiot, who possesses superior radiological qualifications. Director's Letter Brief at 2. Therefore, the Director asserts that even if the administrative law judge accorded "full weight" to Dr. Simpao's opinion, he would still have deferred to the opinion of Dr. Wiot. *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), 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, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

The record reflects that Dr. Simpao 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 9; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). The administrative law judge did not find, nor does claimant contend, that Dr. Simpao’s opinion was incomplete because it failed to address one of the essential elements of entitlement. Rather, claimant contends that the Director failed to provide a complete, credible pulmonary evaluation because the administrative law judge did not credit Dr. Simpao’s opinion regarding the existence of pneumoconiosis. Claimant’s Brief at 5. We reject claimant’s contentions. In *Gallaher v. Bellaire Corp.*, No. 03-3066, 71 Fed. Appx. 528, 531, 2003 WL 21801463 (6th Cir. Aug. 4, 2003)(unpublished), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that the Director had discharged his responsibility because the doctor’s report at issue addressed the essential elements of entitlement, even though the administrative law judge had discredited the doctor’s diagnosis of pneumoconiosis as unexplained and based on a questionable x-ray interpretation. In keeping with the reasoning of *Gallaher*, which involves facts essentially identical to those presented in the instant case, and Dr. Simpao’s opinion which addressed all of the essential elements of entitlement, Director’s Exhibit 9, we reject claimant’s argument that the Director failed to provide him with a full pulmonary evaluation. *Cf. Hodges v. BethEnergy Mines*, 18 BLR at 1-89-90.

Because claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), a requisite element of entitlement in a miner’s claim under Part 718, entitlement to benefits is precluded. *Hill*, 123 F.3d at 415-16, 21 BLR at 2-196-7; *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.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge