

BRB No. 07-0225 BLA

H.W.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BILLY RAY MORGAN CONSTRUCTION)	
AND EXCAVATION)	
)	
and)	DATE ISSUED: 10/24/2007
)	
FIDELITY & CASUALTY COMPANY OF)	
NEW YORK)	
)	
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 Living Miner's Benefits of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

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

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Sarah M. Hurley (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Living Miner's Benefits (04-BLA-6326) of Administrative Law Judge Daniel A. Sarno, Jr., 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). Claimant filed his claim on February 14, 2002. Director's Exhibit 2. After crediting claimant with two years of coal mine employment, the administrative law judge found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and that total disability was not established at 20 C.F.R. §718.204(b)(2)(iv).¹ Moreover, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete and credible pulmonary evaluation sufficient to substantiate his claim. Employer responds in support of the administrative law judge's denial of benefits. The Director responds that he met his obligation to provide claimant with a complete and credible pulmonary evaluation.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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*

¹ The administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4) are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Additionally, we note that, contrary to claimant's contention, the administrative law judge did not reach the issue of whether the medical evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 8.

v. Valley Camp of Utah, Inc., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.202(a)(1), the administrative law judge considered four readings of three x-rays dated June 4, 2002, November 12, 2003, and January 9, 2006. Dr. Simpao, with no known radiological qualifications, interpreted the June 4, 2002 x-ray as positive for pneumoconiosis, while Dr. Scott, a Board-certified radiologist and B reader, interpreted this x-ray as negative for pneumoconiosis.² Director's Exhibits 9, 11B. Dr. Halbert, a Board-certified radiologist and B reader, interpreted the November 12, 2003 x-ray as negative for pneumoconiosis. Director's Exhibit 11C. Dr. Dahhan, a B reader, interpreted the January 9, 2006 x-ray as negative for pneumoconiosis. Employer's Exhibit 15.

In finding that the x-ray evidence did not establish the existence of pneumoconiosis, the administrative law judge accorded "great weight" to the negative readings by Drs. Dahhan, Halbert, and Scott, based on the physicians' superior radiological qualifications. Decision and Order at 5-6. 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); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). Consequently, claimant's arguments that the administrative law judge improperly deferred to the numerical superiority of the x-ray readings by physicians with superior qualifications, and that he "may have 'selectively analyzed'" the readings, lack merit. Claimant's Brief at 3. Therefore, we affirm the administrative law judge's findings pursuant to Section 718.202(a)(1).

Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a miner's claim under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. *See Anderson*, 12 BLR at 1-112.

Claimant argues further that, because the administrative law judge found that Dr. Simpao's diagnosis of pneumoconiosis was based upon an erroneous x-ray interpretation, found that Dr. Simpao did not adequately consider claimant's smoking history, and found that Dr. Simpao did not explain his findings, "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 4. The Director responds that the Act "does not guarantee that the [Department of Labor]-sponsored exam[ination] must

² Dr. Barrett, a Board-certified radiologist and B reader, interpreted the June 4, 2002 x-ray for film quality only. Director's Exhibit 10.

trump all evidence; the medical examination must be credible, not necessarily dispositive.” Director’s Brief at 3. The Director asserts that, because the administrative law judge merely found that Dr. Simpao’s diagnosis of pneumoconiosis was outweighed, a remand for a complete pulmonary evaluation is not required.

We agree with the Director, whose duty it is to ensure the proper administration of the Act, *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-89-90 (1994), that a remand of this case to the district director for another pulmonary evaluation is not warranted. 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 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. 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director’s Exhibit 9. As the Director notes, the administrative law judge found that Dr. Simpao’s diagnosis of “CWP 1/0” was based on Dr. Simpao’s own positive x-ray reading, which was outweighed by the negative readings of doctors with superior qualifications. Decision and Order at 6-7. Additionally, the administrative law judge permissibly found that Dr. Simpao did not adequately explain his reasoning for attributing claimant’s mild restrictive and obstructive airway disease partly to coal dust exposure.³ See *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 7. The fact that the administrative law judge chose to accord “less weight” to Dr. Simpao’s opinion because it was not as fully explained as it might have been does not establish a violation of the Director’s duty to provide claimant with a complete pulmonary evaluation. See *Hodges*, 18 BLR at 1-88.

³ The administrative law judge found that, by contrast, Drs. Dahhan and Repsher submitted well-reasoned opinions that claimant does not have pneumoconiosis, and he accorded those opinions greater weight. Decision and Order at 7.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge