

BRB No. 05-0163 BLA

CHARLES A. SLUSHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLEDSON COAL CORPORATION c/o	)	
JAMES RIVER COAL COMPANY	)	DATE ISSUED: 09/15/2005
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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, McGRANERY and BOGGS, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order – Denial of Benefits (03-BLA-0046) of Administrative Law Judge Daniel J. Roketenetz 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 this initial claim for black lung benefits on February 21, 2001. Director's Exhibit 2. After accepting the parties' stipulation that claimant engaged in eighteen years of coal mine employment, the administrative law judge found that the evidence failed to establish the existence of pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1), (a)(4) and total disability under Section 718.204(b)(2)(iv). Claimant also argues that remand is required, as the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. In response, employer argues that the administrative law judge's denial of benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), responds that the denial of benefits is supported by substantial evidence and contends that remand for a complete pulmonary evaluation is not warranted in this case.<sup>1</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 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. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *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); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to Section 718.202(a)(1), the administrative law judge reasonably found that the preponderance of the x-ray interpretations by the better qualified physicians was negative for the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1); Decision and

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<sup>1</sup> The parties do not challenge the administrative law judge's decision to credit claimant with eighteen years of coal mine employment or his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3). We therefore affirm these findings as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Order – Denial of Benefits at 8; *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995). The administrative law judge considered that of the nine interpretations of five x-rays, two positive interpretations were by physicians holding no special qualifications, and the other two were by B readers, one of whom is also a Board-certified radiologist. Decision and Order – Denial of Benefits at 7; Claimant’s Exhibits 3, 7; Director’s Exhibits at 9, 20. In contrast, the administrative law judge found that all five negative readings were by B readers; two of those negative readings came from a physician also qualified as a Board-certified radiologist. *Id.*; Employer’s Exhibits 8, 9, 11; Director’s Exhibit 21. Because the administrative law judge permissibly considered both the quality and the quantity of the x-ray evidence in finding that it did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), claimant’s arguments to the contrary lack merit. *See Staton*, 65 F.3d at 59-60, 19 BLR at 2-280. We therefore affirm the administrative law judge’s finding pursuant to Section 718.202(a)(1).

Under Section 718.202(a)(4), the administrative law judge found that the better-reasoned and documented medical opinions did not establish the existence of pneumoconiosis. Drs. Baker and Hussain diagnosed pneumoconiosis, while Drs. Broudy and Rosenberg did not. The administrative law judge acknowledged that Dr. Baker had treated claimant between June 2001 and June 2002, and noted that he conducted a physical examination, recorded claimant’s work and smoking histories, and administered diagnostic tests, including an x-ray and normal pulmonary function and blood gas studies. Decision and Order – Denial of Benefits at 9-10. Contrary to claimant’s contention, the administrative law judge was not required to accord enhanced weight to the opinion of Dr. Baker based on his status as treating physician. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 509, 22 BLR 2-625, 2-640 (6th Cir. 2003). The administrative law judge reasonably found that Dr. Baker’s report was not well-reasoned or documented because the basis for his diagnosis was a discredited x-ray and claimant’s coal dust exposure history, and because he accounted for about only half of claimant’s smoking history.<sup>2</sup> Decision and Order – Denial of Benefits at 13; *Williams*, 338 F.3d at 514, 22 BLR at 2-648-49; *Cornett v. Benham Coal, Inc.*, 327 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000); Director’s Exhibit 14. Claimant does not otherwise challenge the administrative law judge’s finding pursuant to 718.202(a)(4). It is therefore affirmed.

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<sup>2</sup> Dr. Baker stated that claimant smoked one pack per day for five years, whereas the administrative law judge found that claimant testified that he smoked “about ten years.” Decision and Order – Denial of Benefits at 3, 13; Director’s Exhibit 12 at 8. The administrative law judge further accurately found that Dr. Baker diagnosed chronic obstructive airway disease, but did not link the disease to claimant’s coal dust exposure. Decision and Order – Denial of Benefits at 14; Director’s Exhibit 14; Claimant’s Exhibits 1, 2.

Claimant contends that because the administrative law judge did not credit a diagnosis of pneumoconiosis contained in Dr. Hussain's May 30, 2001 opinion provided by the Department of Labor, "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 7. The Director responds that he "is only required to provide each claimant with a complete and credible examination, not a dispositive one," and states that he met his statutory obligation in this case because the administrative law judge did not find Dr. Hussain's diagnosis of pneumoconiosis entitled to no weight. Director's Brief at 3, 4.

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).

Contrary to claimant's contention, with respect to the issue of pneumoconiosis, although the administrative law judge stated that Dr. Hussain's opinion was not well-reasoned or well-documented, he did not find it entitled to no weight; he reasonably found that his opinion failed to show the existence of pneumoconiosis because the negative opinions of Drs. Broudy and Rosenberg were based on a more complete picture of claimant's condition. Because the administrative law judge did not find that Dr. Hussain's opinion was incomplete or incredible on the issue of pneumoconiosis, there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. 20 C.F.R. §725.406(a); *Hodges*, 18 BLR at 1-93.<sup>3</sup>

Because we have affirmed the administrative law judge's findings that the medical evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), we affirm the denial of benefits without reaching the arguments concerning

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<sup>3</sup> Moreover, we note that contrary to the administrative law judge's statements, Dr. Hussain did report a coal mine employment history (by checking a box which indicated that a CM-911(a) form was attached to his report; that form listed eighteen years of coal mine employment) and a smoking history for claimant (he stated claimant never smoked). Director's Exhibit 9 at 1, 2, 6-7.

the administrative law judge's weighing of the evidence under Section 718.204(b)(2). *Trent*, 11 BLR at 1-27.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

I concur.

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JUDITH S. BOGGS  
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I concur in the majority's decision to affirm the denial of benefits. I would also reject claimant's argument that because the administrative law judge discredited Dr. Hussain's opinion on the existence of pneumoconiosis, the Director failed to provide a complete pulmonary examination.

The following is the administrative law judge's discussion of Dr. Hussain's opinion on the existence of pneumoconiosis:

I discount Dr. Hussain's opinion as being neither well-reasoned nor well-documented because he did not record either a coal mine employment history or a smoking history. *Id.*; *Crosson v. Director, OWCP*, 6 BLR 1-809 (1984); *Minton v. Director, OWCP*, 6 BLR 1-670 (1983). Furthermore, the x-ray on which he relied was not only reread by a dually certified reader as completely negative, but his interpretation of category 2/3 pneumoconiosis is extremely more advanced than any of the other readings of record, thus casting doubt on the credibility of the reading.

Decision and Order at 13.

The Director acknowledges that the administrative law judge found Dr. Hussain's opinion not well-reasoned nor well-documented but asserts he "did not find it was entitled to no weight." Director's Letter at 3. The Director cites nothing in the administrative law judge's opinion to suggest he gave Dr. Hussain's report any weight whatsoever. Because the only reasonable interpretation of the administrative law judge's words is that he accorded the doctor's opinion no weight, it would appear that the Director has not satisfied even his minimalist view of his statutory obligation: "Only where the examination provided by the Director is either not complete or not credible (*i.e.*, is not entitled to any weight at all) has the Director failed to meet his obligation. *See Cline v. Director, OWCP* 917 F.2d 9, 11 (8th Cir. 1990)." Thus, the Director would have failed to discharge his duty if the administrative law judge had properly rejected the doctor's opinion. Review of the record shows that the administrative law judge was wrong in stating that Dr. Hussain did not record a coal mine employment history or a smoking history, hence, his conclusion was invalid that the report was neither well-reasoned nor well-documented. Director's Exhibit 9 at 1-2. The administrative law judge's erroneous discrediting of Dr. Hussain's opinion cannot support claimant's contention that he was denied a complete, credible pulmonary examination. Because claimant's argument that he was denied a complete pulmonary examination rests solely on the administrative law judge's discrediting of Dr. Hussain's opinion on the existence of pneumoconiosis, it has no merit.<sup>4</sup> Since claimant does not argue that the administrative law judge erred in discrediting Dr. Hussain's opinion and the only arguments claimant raises with respect to the administrative law judge's finding on the existence of pneumoconiosis are without merit, I join with my colleagues in affirming the administrative law judge's decision denying benefits.

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REGINA C. McGRANERY  
Administrative Appeals Judge

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<sup>4</sup> Claimant does not discuss the administrative law judge's rejection of Dr. Hussain's opinion on total disability. The Director states that if the Board were to affirm the denial solely on the basis that claimant failed to establish total disability, the case would have to be remanded for the Director to fulfill his obligation under Section 413(b), because the administrative law judge had discredited the doctor's opinion on that issue.