BRB No. 05-0376 BLA

RICK BROUGHTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
C & H MINING, INCORPORATED	)	DATE ISSUED: 09/23/2005
	)	
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.

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer.

Michelle S. Gerdano (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, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (04-BLA-5028) of Administrative Law Judge Daniel J. Roketenetz on a claim[1] filed pursuant to the provisions

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[1] Claimant, Rick Broughton, filed an application for benefits on March 15, 2002.

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). The administrative law judge initially credited claimant with 8.62 years of qualifying coal mine employment. Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, and total respiratory disability due to pneumoconiosis pursuant to 718.204. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis established by x-ray evidence under Section 718.202(a)(1) and total respiratory disability under Section 718.204(b)(2)(iv). Claimant additionally contends that because the administrative law judge discredited the medical opinion of Dr. Simpao, a physician who examined him at the behest of the Department of Labor, the Director, Office of Workers' Compensation Programs (the Director), failed to provide claimant with a complete and credible pulmonary examination as required by Section 413(b) of the Act, 30 U.S.C. §923(b), to substantiate his claim. In response, employer urges affirmance of the denial of benefits. The Director has filed a response letter addressing arguments contained in claimant's brief, arguing that he satisfied his obligation to provide claimant with a complete, credible pulmonary evaluation as required by the Act.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In challenging the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1), claimant argues that the administrative law judge erred by placing substantial weight on the numerical superiority of the x-ray interpretations and by relying exclusively on the qualifications of the physicians providing the x-ray interpretations. Claimant contends that an administrative law judge is not

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Director's Exhibit 2.

[2] We affirm the administrative law judge's determinations regarding length of coal mine employment and pursuant to 20 C.F.R. §§718.202(a)(2)-(3), 718.203, 718.204(b)(2)(i)-(iii) because these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 7, 9, 11-13.

required to defer to a physician with superior qualifications and may not selectively analyze the x-ray evidence.

Section 718.202(a)(1) provides, in pertinent part, "where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration *shall* be given to the radiological qualifications of the physicians interpreting such X-rays." 20 C.F.R. §718.202(a)(1) [emphasis added]. The administrative law judge considered the radiological expertise of the physicians and properly accorded greater weight to the negative interpretation of Dr. Wiot, who was a Board-certified radiologist and B-reader, and permissibly accorded less weight to the sole positive interpretation rendered by Dr. Simpao, who possessed no demonstrated radiological expertise. 20 C.F.R. §718.202(a)(1); *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 9; Director's Exhibits 14, 15, 25. Because the administrative law judge's determination to accord dispositive weight to the negative interpretation rendered by Dr. Wiot, a physician with superior, demonstrated radiological qualifications, was rational and supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). In addition, we reject claimant's contention that the administrative law judge "may have selectively analyzed" the x-ray evidence inasmuch as claimant has not provided any support for that assertion, nor does a review of the evidence and the administrative law judge's Decision and Order reveal a selective analysis of the x-ray evidence. *See White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-4 (2004).

Claimant also contends that the administrative law judge discredited the opinion of Dr. Simpao, a physician who conducted claimant's pulmonary evaluation at the behest of the Department of Labor, on the basis that it was based on an erroneous length of coal mine employment, and that therefore, the Director failed to provide him with a complete, credible pulmonary examination sufficient to substantiate his claim. The Director responds, asserting that he is only required to provide claimant with a complete and credible examination as required by the Act. The Director avers further that the administrative law judge's discrediting of Dr. Simpao's opinion, which was based on Dr. Simpao's reliance on an inaccurate coal mine employment history, was not a flaw attributable to the physician since claimant provided the incorrect history to Dr. Simpao. Consequently, the Director asserts that he did not abdicate his statutory obligation to provide claimant with a complete pulmonary evaluation. The Director's position has merit.

In assessing the credibility of the medical opinion evidence pursuant to Section 718.202(a)(4), the administrative law judge found that, although Dr. Simpao's opinion diagnosing the presence of pneumoconiosis was based on a physical examination and objective tests, the reliability of this opinion was undermined by Dr. Simpao's reliance on an inaccurate duration of claimant's coal mine employment for eighteen years, a history that was more than twice the 8.62 year history relied upon by the administrative law judge. This was rational. *See Creech v. Benefits Review Board*, 841 F.2d 706, 709, 11 BLR 2-86, 2-91 (6th Cir. 1988); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-81 (1993); *Fitch v. Director, OWCP*, 9 BLR 1-45, 1-46 (1986); *Gouge v. Director, OWCP*, 8 BLR 1-307-308 (1985); *Hall v. Director, OWCP*, 8 BLR 1-193, 1-195 (1985); Decision and Order at 10. However, as the Director asserts, Dr. Simpao's reliance on an incorrect coal mine employment history was not a flaw attributable to Dr. Simpao, but instead was an inaccuracy provided by claimant who reported his employment history to the physician. *See* Decision and Order at 4-7; Director's Exhibit 2. The administrative law judge's concern regarding Dr. Simpao's opinion, therefore, was attributable to claimant's failure to prove his alleged eighteen years of coal mine employment to the administrative law judge and not due to any fundamental error rendered by Dr. Simpao. Accordingly, we reject claimant's argument that the Director failed to provide claimant with a credible examination because the administrative law judge permissibly discredited Dr. Simpao's opinion diagnosing pneumoconiosis. *See Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1992), *alj decision summarily aff'd*, 972 F.2d 234, 16 BLR 2-137 (8th Cir. 1992) (court retained jurisdiction.); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984). Furthermore, because claimant has not otherwise challenged the administrative law judge's discrediting of Dr. Simpao's opinion, the sole physician's opinion of record, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Based on the foregoing, we affirm the administrative law judge's determination that claimant failed to affirmatively establish the existence of pneumoconiosis pursuant to Section 718.202(a) as this finding is rational, contains no reversible error, and is supported by substantial evidence. Inasmuch as claimant has failed to satisfy his burden to establish the existence of pneumoconiosis, a requisite element of entitlement under Part 718, we affirm the administrative law judge's denial of benefits. 20 C.F.R. §718.202(a); *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).[3]

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[3] Claimant's failure to affirmatively establish the existence of pneumoconiosis, a requisite element of entitlement, obviates the need to address his argument regarding total respiratory disability at Section 718.204(b)(2)(iv). *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Accordingly, the Decision and Order – Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge