

BRB No. 06-0385 BLA

CHARLIE COLLETT)
)
 Claimant-Petitioner)
)
 v.)
)
 NALLY & HAMILTON ENTERPRISES)
)
 and) DATE ISSUED: 09/29/2006
)
 NATIONAL UNION FIRE INSURANCE)
 COMPANY)
)
 Employer/Carrier-Respondent)
)
 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 Rudolf L. Jansen, 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/carrier.

Richard A. Seid (Howard M. Radzely, 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 Benefits (04-BLA-5426) of Administrative Law Judge Rudolf L. Jansen with respect to 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). The administrative law judge accepted the parties’ stipulation to twenty-three years of coal mine employment and considered the claim, filed on January 29, 2002, pursuant to the regulations set forth in 20 C.F.R. Part 718. The administrative law judge determined that the evidence of record was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability under 20 C.F.R. §718.204(b)(2). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge’s findings that the evidence of record is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1) and (a)(4) and total disability due to pneumoconiosis under Section 718.204(b)(2)(iv). Claimant also argues that remand is required because the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers’ Compensation Programs (the Director), has also responded and maintains that a remand for a complete pulmonary evaluation is not warranted in this case.¹

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*

¹ The parties do not challenge the administrative law judge’s decision to credit claimant with twenty-three years of coal mine employment, or his findings pursuant to 718.202(a)(2)-(a)(3), and 718.204(b)(2)(i)-(iii). These findings are, therefore, affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Sons, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant initially argues that the administrative law judge's finding that the x-ray evidence of record is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1) must be vacated, as the administrative law judge erred in relying upon the physicians' qualifications and the numerical superiority of the negative x-ray interpretations. Claimant also contends that the administrative law judge selectively analyzed the x-ray evidence. These allegations of error are without merit. The administrative law judge acted within his discretion as fact-finder in determining that the x-ray evidence did not establish the existence of pneumoconiosis based upon the preponderance of negative readings performed by physicians with superior qualifications. Decision and Order at 8; Director's Exhibit 9, 10, 15; *see Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Accordingly, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis under Section 718.202(a)(1).

Claimant also argues that the administrative law judge erred in determining that Dr. Simpao's opinion, that claimant has coal workers' pneumoconiosis, did not support a finding of pneumoconiosis pursuant to Section 718.202(a)(4). This contention has no merit. The administrative law judge acted within his discretion in finding that Dr. Simpao's opinion was outweighed by the contrary probative evidence of record, including two negative rereadings of the x-ray obtained by Dr. Simpao, which were performed by physicians with superior radiological qualifications, and the opinion of Dr. Broudy, which was better supported by the objective evidence of record.² Decision and Order at 9-10; Director's Exhibit 9; Employer's Exhibit 2; *Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We affirm, therefore, the

² Dr. Simpao examined claimant on March 29, 2002, at the request of the Department of Labor. He recorded claimant's work, medical, and smoking histories, and obtained a chest x-ray, a blood gas study, a pulmonary function study, and an EKG. Dr. Simpao diagnosed coal workers' pneumoconiosis and indicated that claimant was totally disabled due to a mild respiratory impairment. Director's Exhibit 9. Dr. Broudy reviewed Dr. Simpao's report and other medical evidence of record and determined that claimant does not have pneumoconiosis and is not suffering from a totally disabling respiratory or pulmonary impairment. Employer's Exhibit 2.

administrative law judge's determination that the medical opinion evidence does not support a finding of pneumoconiosis pursuant to Section 718.202(a)(4).

Because the administrative law judge's findings that the medical evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement, have been affirmed, we must also affirm the denial of benefits. *Trent*, 11 BLR at 1-27. In light of this disposition of claimant's appeal, we need not reach claimant's arguments concerning the administrative law judge's weighing of the evidence under Section 718.204(b)(2), as error, if any, in the administrative law judge's findings would be harmless. *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

We must, however, address claimant's contention that he did not receive a complete pulmonary evaluation as required under the Act. Claimant asserts that this case must be remanded to the district director because the administrative law judge found that Dr. Simpao's opinion, which was provided at the request of the Department of Labor, contained deficiencies with respect to the issue of the existence of pneumoconiosis. The Director argues in response that Dr. Simpao's opinion was sufficient to satisfy the Director's obligation, as the administrative law judge merely found it less compelling than Dr. Broudy's contrary opinion.

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).

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 allege that Dr. Simpao's report was incomplete. When weighing Dr. Simpao's opinion under Section 718.202(a)(4), the administrative law judge determined that it was "incomplete in that his conclusions are inadequately explained" and, therefore, entitled to less probative weight. Decision and Order at 9; Director's Exhibit 9. The administrative law judge also found, however, that Dr. Broudy's opinion, that claimant does not have pneumoconiosis, was entitled to greater weight than Dr. Simpao's, "because it is better supported by the objective medical data." Decision and Order at 10; Employer's Exhibit 2. In light of the

fact that the administrative law judge ultimately found Dr. Simpao's opinion merely outweighed 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 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).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge