

BRB No. 05-0166 BLA

RALPH ASHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CALVARY COAL COMPANY, INCORPORATED	)	
	)	
Employer-Respondent	)	DATE ISSUED: 08/30/2005
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Rejection of Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

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

Timothy J. Walker (Ferreri & Fogle), Lexington, Kentucky, for employer.

Jeffrey S. Goldberg (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 – Rejection of Claim (03-BLA-5848) of Administrative Law Judge Edward Terhune Miller 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). The administrative law judge credited

claimant with 11.49 years of coal mine employment.<sup>1</sup> The administrative law judge found that the medical evidence did not establish either the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence when he found that claimant did not establish the existence of pneumoconiosis. Claimant argues further that the administrative law judge considered x-ray evidence submitted by employer in excess of the limits set forth in 20 C.F.R. §725.414(a)(3)(i). Claimant also contends that the administrative law judge erred in his consideration of the medical opinion evidence when he found that claimant did not establish that he is totally disabled. Additionally, claimant argues that 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 administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds that he met his obligation to provide claimant with a complete and credible pulmonary evaluation.<sup>2</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 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).

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

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<sup>1</sup> The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

<sup>2</sup> We affirm as unchallenged on appeal the administrative law judge's findings that claimant has 11.49 years of coal mine employment, and did not establish the existence of pneumoconiosis or that he is totally disabled pursuant to 20 C.F.R. §§718.202(a)(2)-(a)(3), 718.204(b)(2)(i)-(b)(2)(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered six readings of three x-rays in light of the readers' radiological credentials.<sup>3</sup> Two readings were positive for pneumoconiosis, Dr. Baker's "1/0" reading of a March 31, 2001 x-ray and Dr. Hussain's "2/3" reading of an August 22, 2001 x-ray. Decision and Order at 4, 8; Director's Exhibits 7, 8. The administrative law judge noted that Dr. Baker's positive reading of the March 31, 2001 x-ray was countered by the negative reading of Dr. Wiot, a Board-certified radiologist and B-reader. He also considered that Dr. Hussain's positive reading of the August 22, 2001 x-ray was countered by the negative readings of Drs. Wiot and Spitz, both Board-certified radiologists and B-readers. Finally, the administrative law judge noted that Dr. Westerfield, a B-reader, read a September 9, 2003 x-ray as negative for pneumoconiosis. Employer's Exhibit 1. Based upon this review, the administrative law judge found that "a preponderance of the x-ray evidence is negative for pneumoconiosis, as Dr. Westerfield's, Dr. Spitz's, and Dr. Wiot's credentials are superior to those of Drs. Hussein [sic] and Dr. Baker, neither of whom are either B-readers or board-certified radiologists." Decision and Order at 8. This was a proper qualitative analysis of the x-ray evidence which is supported by substantial evidence. *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). Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, merely counted the negative readings, and selectively analyzed the x-ray readings, lack merit.

Claimant also contends that a remand is required because employer "submitted two rebuttal interpretations of Dr. Hussain's [August 22, 2001] film," and the administrative law judge "failed to strike one of these interpretations of record." Claimant's Brief at 3-4. Employer responds that it complied with Section 725.414 because it submitted only one rebuttal reading of Dr. Hussain's August 22, 2001 x-ray, a reading by Dr. Wiot. Employer states that it submitted the other reading, by Dr. Spitz, as one of its two affirmative case readings permitted under Section 725.414(a)(3). The administrative law judge considered Dr. Spitz's reading as one of employer's two affirmative case readings, and Dr. Wiot's reading as a rebuttal reading. Decision and Order at 8.

On this record as weighed by the administrative law judge, we need not resolve this issue. The administrative law judge based his finding at Section 718.202(a)(1) on Dr. Hussain's lack of radiological credentials. Thus, had he excluded either Dr. Wiot's or Dr. Spitz's negative reading of Dr. Hussain's August 22, 2001 x-ray, he would still have had before him Dr. Hussain's positive reading, countered by a negative reading from a

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<sup>3</sup> The record contains a seventh interpretation, by Dr. Sargent, which was a re-reading for quality only. Decision and Order at 4; Director's Exhibit 8.

physician with “superior” credentials. Decision and Order at 8. Thus, it is clear that error, if any, in the administrative law judge’s admission of two negative readings of the August 22, 2001 x-ray could not have affected the disposition of this case. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Accordingly, we need not decide whether the administrative law judge properly admitted two negative readings from employer of the August 22, 2001 x-ray.

Claimant next contends that the administrative law judge provided an invalid reason for discounting Dr. Baker’s diagnosis of pneumoconiosis pursuant to Section 718.202(a)(4). We reject claimant’s argument that the administrative law judge provided an invalid reason for discounting the opinion of Dr. Baker diagnosing pneumoconiosis. 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 8; Director’s Exhibit 8; *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). We therefore affirm the administrative law judge’s otherwise unchallenged finding that the medical opinions did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Claimant argues that because the administrative law judge did not credit Dr. Hussain’s opinion on the issue of the existence of pneumoconiosis, “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 5. The Director responds that although the administrative law judge “declined to credit Dr. Hussain’s pneumoconiosis diagnosis” because the physician relied on his own positive x-ray reading which was later re-read as negative by credentialed readers, “this does not mean that the Director failed to provide [claimant] with an adequate pulmonary evaluation.” Director’s Brief at 2.

The record reflects that Dr. Hussain conducted a physical 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 7. The administrative law judge did not find, nor does claimant allege, that Dr. Hussain’s report was incomplete on the issue of pneumoconiosis. As the Director points out, Dr. Hussain’s diagnosis of pneumoconiosis at Section 718.202(a)(4) reiterated his positive x-ray reading, but the administrative law judge found that Dr. Hussain’s diagnosis of pneumoconiosis based on the x-ray was outweighed by the negative interpretation of that x-ray by physicians with superior qualifications. As such, the administrative law judge permissibly found that to the extent Dr. Hussain diagnosed pneumoconiosis based upon the April 22, 2001, x-ray that was

reread as negative by dually qualified physicians, Dr. Hussain's diagnosis was against the weight of the evidence. *See Williams*, 338 F.3d at 514, 22 BLR at 2-648-49. Because Dr. Hussain's report was merely found 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. *Cf. Hodges v. BethEnergy Mines*, 18 BLR 1-84 (1994).

Claimant's failure to establish the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement, precludes an award of benefits under 20 C.F.R. Part 718, and we need not address claimant's other arguments regarding total disability at Section 718.204(b)(2). *Trent*, 11 BLR at 1-27. Consequently, we affirm the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order – Rejection of Claim is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge