BRB No. 07-0298 BLA

J. M.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	
	)	DATE ISSUED: 11/30/2007
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 Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

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

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Michelle S. Gerdano (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 Benefits (05-BLA-5623) of Administrative Law Judge Adele Higgins Odegard 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). In a Decision and Order dated November 21,

2006, the administrative law judge credited the miner with twenty years of coal mine employment,[1] as stipulated by the parties and supported by the record, found the existence of pneumoconiosis arising out of coal mine employment established at 20 C.F.R. §§718.202(a)(4), 718.203(b), but further found the evidence of record insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §§718.204(b)(2)(i)-(iv), 718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in her analysis of the x-ray evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and erred in her evaluation of the medical opinion evidence relevant to the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv). Claimant further asserts that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary evaluation as required by 20 C.F.R. §725.406(a). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director has filed a limited response brief contending that claimant received a complete pulmonary evaluation as contemplated by 20 C.F.R. §725.406(a).[2]

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 a finding of

[1] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 3. 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*).

[2] The administrative law judge's finding of twenty years of coal mine employment and her findings that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), but did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) or (3), and further failed to establish the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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).

Claimant asserts that the administrative law judge erred in relying almost solely on the qualifications of the interpreting physicians and the numerical superiority of the x-ray interpretations in evaluating the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). Claimant's Brief at 3. Claimant's assertion lacks merit. In finding that the x-ray evidence did not establish the existence of pneumoconiosis, the administrative law judge properly noted that the relevant x-ray evidence consists of four readings of three x-rays.[3] Decision and Order at 5. The administrative law judge permissibly found that the sole positive reading of record, that of an October 1, 2004 x-ray by Dr. Simpao, a physician with no radiological qualifications, was outweighed by the negative reading of the same x-ray by Dr. Halbert, who is a B reader and Board-certified radiologist. *See Staton v. Norfolk & Western Railway Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc on recon*.); Decision and Order at 5-6; Director's Exhibit 9; Employer's Exhibits 8, 11. Contrary to claimant's arguments, the administrative law judge properly considered both the quantity and the quality of the x-ray readings, and permissibly found that the preponderance of negative readings by B readers and dually qualified readers outweighed the sole positive reading by a lesser qualified physician. *See Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Cranor*, 22 BLR at 1-7; Decision and Order at 6.

In addition, we reject claimant's assertion that the administrative law judge "may have 'selectively analyzed'" the x-ray evidence. Claimant's Brief at 3. 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.*, 23 BLR 1-1, 1-5 (2004). Consequently, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1), as it is supported by substantial evidence.

Claimant next contends that in finding that the medical opinion evidence did not establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge failed to consider the exertional requirements of claimant's usual coal mine work. Claimant's Brief at 5. We disagree.

In weighing the medical opinion evidence of record, the administrative law judge found that Dr. Simpao opined that claimant has a mild respiratory impairment, but did not

[3] The record contains an additional reading for quality only (Quality 1), by Dr. Barrett, of the October 1, 2004 x-ray. Director's Exhibit 10.

specifically address whether claimant retained the respiratory capacity to perform his usual coal mine work. Decision and Order at 14; Director's Exhibit 9. By contrast, Drs. Broudy and Rosenberg concluded that claimant retains the respiratory capacity to perform his usual coal mine work or similar arduous work in a dust-free environment. Decision and Order at 14-15; Employer's Exhibits 1, 3-5. Contrary to claimant's arguments, the administrative law judge did not fail to consider the nature of claimant's usual coal mine employment. Decision and Order at 3, 14; *see Hvizdzak v. North American Coal Co.*, 7 BLR 1-469 (1984). Rather, the administrative law judge specifically found, based on information provided by claimant, that claimant's jobs as a bridge carrier operator and roof bolter were both located at or near the face of the coal, and that both "required heavy lifting, 50 pounds or more at a time, and other heavy labor." Decision and Order at 3; Hearing Transcript at 13-17. Moreover, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Rosenberg and Broudy, that claimant retained the respiratory capacity to perform his usual coal mine work, than to the opinion of Dr. Simpao, that claimant had a mild impairment, because she found that, in addition to being supported by the objective test results, all of which were non-qualifying,[4] the opinions of Drs. Broudy and Rosenberg were based on a better understanding of the exertional requirements of claimant's coal mine work than was Dr. Simpao's opinion.[5] *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order at 14-15; Director's Exhibit 9; Employer's Exhibits 1, 3-5. We therefore affirm the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iv). Because claimant did not establish total disability, an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Anderson*, 12 BLR at 1-113; *Trent*, 11 BLR at 1-27.

[4] A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[5] The administrative law judge also permissibly accorded little weight to the opinion of Dr. Vuskovich, that claimant's pulmonary function studies reflected that he retained the pulmonary capacity to continue working in the coal industry, because there was no indication in the record that the physician was aware of the exertional requirements of claimant's specific job. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order at 15; Employer's Exhibit 7.

Finally, we reject claimant's assertion that the administrative law judge found that Dr. Simpao's opinion was not credible, and that, therefore, claimant is entitled to have the denial of benefits vacated, and the case remanded to the district director for the Director to provide claimant with a new pulmonary evaluation pursuant to 20 C.F.R. §725.406.[6] As the Director correctly contends, in evaluating the evidence relevant to the issue of total disability, the administrative law judge did not discredit Dr. Simpao's opinion, but instead found his opinion to be outweighed by the more probative medical opinions of Drs. Broudy and Rosenberg.[7] *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *Clark*, 12 BLR at 1-155; Decision and Order at 13; Director's Brief at 2. Thus, there is no merit to claimant's argument that he is entitled to a new pulmonary evaluation pursuant to 20 C.F.R. §725.406.

[6] The Department of Labor has a statutory duty to provide a miner with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate the claim. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994).

[7] In addition, while the administrative law judge found Dr. Simpao's diagnosis of pneumoconiosis to be both based upon an erroneous positive x-ray reading and unexplained, we agree with the Director that any flaw in Dr. Simpao's diagnosis of pneumoconiosis is harmless because the administrative law judge ultimately concluded that the medical opinion evidence established the existence of the disease at 20 C.F.R. §718.202(a)(4). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Director's Brief at 2.

Accordingly, the administrative law judge's Decision and Order Denying Benefits 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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BETTY JEAN HALL
Administrative Appeals Judge