BRB No. 06-0769 BLA

PRICE HOSKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 04/30/2007
and	)	
	)	
JAMES RIVER COAL COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Alan L. Bergstrom, 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.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-6349) of Administrative Law Judge Alan L. Bergstrom denying benefits 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). This case involves a miner's claim filed on February 25, 2003.

After crediting claimant with thirty-two years of coal mine employment, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a). The administrative law judge also found that the evidence did not establish total disability. 20 C.F.R. §718.204(b). Accordingly the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also argues that the administrative law judge erred in finding that the medical opinion evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *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*).

Claimant contends that the administrative law judge erred in finding that the x-ray evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The x-ray evidence consists of interpretations of three x-rays taken on May 21, 2003, June 24, 2003, and September 15, 2004. Dr. Simpao, a reader with no special radiological qualifications, interpreted claimant's June 24, 2003 x-ray as positive for pneumoconiosis, Director's Exhibit 8, and Dr. Poulos, a Board-certified radiologist and B reader, interpreted this x-ray as negative for the disease. Employer's Exhibit 7. The administrative law judge acted within his discretion in crediting Dr. Poulos's negative interpretation of claimant's June 24, 2003 x-ray over Dr. Simpao's positive interpretation of this x-ray, based upon Dr. Poulos's superior qualifications. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 11. The remaining x-ray interpretations of record are negative for pneumoconiosis.[1] Because it is based

[1] Dr. Dahhan, a B reader, interpreted claimant's May 21, 2003 x-ray as negative

upon substantial evidence,[2] we affirm the administrative law judge's finding that the x-ray evidence does not establish the existence of pneumoconiosis.[3] 20 C.F.R. §718.202(a)(1).

Claimant also contends that the administrative law judge erred in finding that the medical opinion evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In this case, the administrative law judge did not make a specific finding regarding whether the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). However, the record contains only one medical opinion supportive of a finding of pneumoconiosis. In a report dated June 24, 2003, Dr. Simpao diagnosed "CWP 1/1." Director's Exhibit 8. Dr. Simpao provided no basis for his diagnosis of coal workers' pneumoconiosis other than his

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for pneumoconiosis, Employer's Exhibit 3, and Dr. Repsher, a B reader, interpreted claimant's September 15, 2004 x-ray as negative for the disease. Employer's Exhibit 1.

[2] In challenging the administrative law judge's finding that the x-ray evidence does not establish the existence of pneumoconiosis, claimant asserts that an administrative law judge "need not defer to a doctor with superior qualifications" and that an administrative law judge "need not accept as conclusive the numerical superiority of the x-ray interpretations." Claimant's Brief at 3. Claimant also asserts that the administrative law judge "may have 'selectively analyzed' the x-ray evidence." *Id.* In this case, the administrative law judge permissibly considered both the quality and the quantity of the x-ray evidence in finding that it does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Staton v. Norfolk & Western Ry. 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). Moreover, claimant has provided no support for his assertion that the administrative law judge "may have 'selectively analyzed' the x-ray evidence."

[3] In this case, the administrative law judge did not render any findings pursuant to 20 C.F.R. §718.202(a)(2) and (3). However, because there is no biopsy evidence of record, claimant cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Moreover, claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3). Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, because this claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

positive interpretation of claimant's June 24, 2003 x-ray. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that merely restating an x-ray interpretation does not qualify "as a reasoned medical judgment." *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *see also Cornett v. Benham Coal Co.*, 277 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Moreover, as previously noted, the administrative law judge acted within his discretion in crediting Dr. Poulos's negative interpretation of claimant's June 24, 2003 x-ray over Dr. Simpao's positive interpretation of this x-ray based upon Dr. Poulos's superior qualifications. An administrative law judge may not rely on a doctor's opinion that a miner has clinical pneumoconiosis when the physician bases his opinion entirely on x-ray evidence that the administrative law judge has already discredited. *Williams*, 338 F.3d at 514, 22 BLR at 269. Consequently, on this record as weighed by the administrative law judge, Dr. Simpao's opinion is insufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The remaining medical opinions of record state that claimant does not have pneumoconiosis.[4] We, therefore, hold that, on this record as weighed by the administrative law judge, the medical opinion evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Consequently, in this case, the administrative law judge's failure to render a specific finding pursuant to 20 C.F.R §718.202(a)(4) constitutes harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

In light of our affirmance of the administrative law judge's findings that the evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent*, 11 BLR at 1-27; *Gee*, 9 BLR at 1-5; *Perry v. Director, OWCP*, 9 BLR at 1-2. Consequently, we need not address claimant's contentions regarding the administrative law judge's finding that the medical opinion evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Larioni*, 6 BLR at 1-1278.

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[4] In a report dated May 29, 2003, Dr. Dahhan opined that there is no evidence of occupational pneumoconiosis. Employer's Exhibit 3. During a December 19, 2003 deposition, Dr. Dahhan opined that claimant has no evidence of coal dust induced lung disease. Employer's Exhibit 4 at 9.

In a report dated October 12, 2004, Dr. Repsher opined that there is no evidence of coal workers' pneumoconiosis or any other pulmonary or respiratory disease caused or aggravated by claimant's coal mine employment. Employer's Exhibit 1. During a February 10, 2005 deposition, Dr. Repsher opined that claimant does not suffer from either medical or legal pneumoconiosis. Employer's Exhibit 2 at 31.

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