BRB No. 08-0539 BLA

W.H.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 04/16/2009
CUMBERLAND RIVER COAL COMPANY	)	
	)	
and	)	
	)	
ARCH COAL, INCORPORATED, c/o UNDERWRITERS SAFETY & CLAIMS, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order – Denying Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

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

Denise M. Davidson (Davidson & Associates), Hazard, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (04-BLA-5796) of Administrative Law Judge Alan L. Bergstrom 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 noted that the parties stipulated to "at least" sixteen years of coal mine employment.[1] Decision and Order at 2. The administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in finding that the evidence did not establish the existence of pneumoconiosis or total disability. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this appeal.[2]

To establish entitlement to benefits in a living miner's claim under 20 C.F.R. Part 718, 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to 20 C.F.R. §718.202(a)(1), 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 finding that the x-ray evidence did not establish the existence of pneumoconiosis. Claimant's Brief at 2-3. Claimant's assertion lacks merit.

The administrative law judge considered six interpretations of three x-rays, and considered the readers' radiological qualifications. As the administrative law judge found, Dr. Simpao, who lacks radiological qualifications, interpreted the December 2, 2002 x-ray as positive for pneumoconiosis, and Dr. Wiot, a Board-certified radiologist and B reader, interpreted the same x-ray as negative.[3] Director's Exhibits 10, 11.

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[1] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[2] The administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2),(3) are not challenged on appeal. Therefore, we affirm those findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] Dr. Barrett, a Board-certified radiologist and B reader, reviewed the December 2, 2002 x-ray for quality purposes only. Director's Exhibit 11.

Additionally, Dr. Baker, a B reader, interpreted the June 7, 2003 x-ray as positive for pneumoconiosis, while Dr. Wiot read the same x-ray as negative. Director's Exhibit 12; Employer's Exhibit 1. Contrary to claimant's contention, the administrative law judge permissibly determined that Dr. Wiot was "the better qualified reader," Decision and Order at 8, and he rationally credited Dr. Wiot's readings to find that the December 2, 2002 and June 7, 2003 x-rays were negative for pneumoconiosis. *See 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). Noting that the remaining x-ray, dated July 14, 2003, was interpreted as negative for pneumoconiosis by Dr. Jarboe, a B reader, Director's Exhibit 14, the administrative law judge found that claimant did not meet his burden to establish the existence of pneumoconiosis.

The administrative law judge properly considered both the quantity and the quality of the x-ray readings of record, and permissibly found that the preponderance of the negative readings by the most highly qualified reader outweighed the positive interpretations by the less qualified physicians. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-4 (2004). 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*, 23 BLR at 1-5. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1), as it is supported by substantial evidence.

Pursuant to 20 C.F.R. §718.202(a)(4), claimant contends that the administrative law judge erred in according diminished weight to the opinions of Drs. Baker and Simpao that claimant has pneumoconiosis. Claimant's Brief at 4-5. We disagree.

The administrative law judge considered the opinions of Drs. Simpao, Baker and Jarboe. In a December 2, 2002 report, Dr. Simpao diagnosed "CWP 2/2" based on a chest x-ray, and he opined that claimant's coal dust exposure was "medically significant" in his moderate pulmonary impairment. Director's Exhibit 10. In a June 7, 2003 report, Dr. Baker diagnosed coal workers' pneumoconiosis by chest x-ray, and chronic bronchitis and hypoxemia due to both coal mine dust exposure and cigarette smoking. Director's Exhibit 12. By contrast, in a July 15, 2003 report and subsequent deposition, Dr. Jarboe opined that claimant does not have coal workers' pneumoconiosis, or any impairment related to coal mine dust exposure. Director's Exhibits 14, 24. Dr. Jarboe

diagnosed claimant with chronic bronchitis "most likely" caused by "ongoing cigarette smoking."[4] Director's Exhibit 14 at 3.

In considering whether the existence of clinical pneumoconiosis[5] was established, the administrative law judge reasonably accorded less weight to the diagnoses of coal workers' pneumoconiosis rendered by Drs. Baker and Simpao, because they relied on their own positive readings of the December 2, 2002 and June 7, 2003 x-rays that Dr. Wiot, a physician with superior radiological qualifications, reread as negative for pneumoconiosis. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); *Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985). Thus, we reject claimant's argument that the administrative law judge improperly discredited the opinions of Drs. Simpao and Baker as based on a positive x-ray interpretation that was contrary to the administrative law judge's findings.

With respect to whether the medical opinions established the existence of legal pneumoconiosis,[6] the administrative law judge permissibly found that although Dr. Simpao opined that coal mine dust exposure was "medically significant" in claimant's impairment, Dr. Simpao "did not explain his rationale," and thus it was unclear "whether he factored Claimant's smoking history into his conclusion. . . ." Decision and Order at 9-10; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Similarly, the administrative law judge reasonably found that Dr. Baker did not explain his rationale for attributing claimant's chronic bronchitis and hypoxemia in part to coal mine dust exposure. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

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[4] Dr. Jarboe reported that claimant had elevated carboxyhemoglobin levels compatible with smoking two packs of cigarettes per day. Dr. Jarboe noted further that claimant's pulmonary function study reflected that claimant has no restriction and minimal airway obstruction, and he explained that the variability in claimant's test results is inconsistent with a condition caused by coal mine dust inhalation. Director's Exhibit 24 at 16-19.

[5] Clinical pneumoconiosis is a disease "characterized by [the] permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[6] Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2)(b).

Claimant asserts that "the opinions of Drs. Baker and Simpao are well reasoned, [and] therefore Judge Bergstrom should not have rejected them for the reasons he provided." Claimant's Brief at 5. However, the Board is not authorized to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Substantial evidence supports the administrative law judge's permissible determination that Drs. Baker and Simpao did not adequately explain their opinions. Further, substantial evidence supports the administrative law judge's discretionary finding that Dr. Jarboe persuasively explained how the objective evidence supported his opinion that claimant's respiratory condition is related to smoking, not coal mine dust exposure. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Therefore, we reject claimant's allegation of error, and affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(4).

Because we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established, a necessary element of entitlement in a miner's claim under 20 C.F.R. Part 718, a finding of entitlement is precluded.[7] *See Trent*, 11 BLR at 1-27. We therefore affirm the denial of benefits.

[7] Claimant alleges that the administrative law judge erred in finding that total disability was not established. Claimant's Brief at 6-8. However, the administrative law judge did not address whether claimant established total disability, because he found that claimant did not establish the existence of pneumoconiosis. Decision and Order at 10.

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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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge