BRB No. 03-0809 BLA

DENNIS HAROLD EVERSOLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 07/07/2004
	)	
SHAMROCK COAL COMPANY, c/o ACORDIA EMPLOYERS SERVICE	)	
	)	
and	)	
	)	
SUN 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 – Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (03-BLA-5126) of Administrative Law Judge Daniel J. Roketenetz 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).[1] Claimant filed his claim for benefits on February 2, 2001. After crediting claimant with seventeen years of coal mine employment, the administrative law judge considered entitlement pursuant to the applicable regulations at 20 C.F.R. Part 718. The administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that claimant established total disability pursuant to 20 C.F.R. §718.204(b), but he failed to establish disability causation pursuant to 20 C.F.R. §718.204(c). Accordingly, he denied benefits. On appeal, claimant contends that the administrative law judge improperly denied benefits, challenging the administrative law judge's findings under Sections 718.202(a)(1), (a)(4) and 718.204(c). Employer has filed a response brief in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend to participate in this appeal.[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).

In order to establish entitlement to benefits under 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*,

---

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]We affirm, as unchallenged on appeal, the administrative law judge's finding of seventeen years of coal mine employment, and findings that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (a)(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 4, 7.

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*).

In challenging the administrative law judge=s weighing of the x-ray evidence of record under Section 718.202(a)(1), claimant argues that the administrative law judge erred in crediting the numerous negative x-ray readings of record over the sole positive x-ray reading of record, by relying on the qualifications of the physicians reading the films and the numerical superiority of the negative readings. Claimant=s contention is without merit. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge properly considers the quantity of the evidence in light of the difference in qualifications of the readers. *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). As accurately summarized by the administrative law judge, the x-ray evidence of record consists of x-ray films taken on September 28, 2000, February 22, 2001, June 22, 2001, November 12, 2001, and February 21, 2003. Decision and Order at 5-6; Director's Exhibits 10-12; Employer's Exhibit 4. The administrative law judge correctly found that the only positive x-ray reading of record is a 2/3 reading of the June 22, 2001 film by Dr. Hussain, a physician with no special qualifications as a radiologist. Decision and Order at 5-6; Director's Exhibit 10. The June 22, 2001 film was found to be overexposed by Dr. Sargent and negative by Dr. Scott.[3] Director's Exhibits 10, 12. Both physicians are B readers and Board-certified radiologists. *Id*. The remaining four films were interpreted as negative, and two of these negative interpretations were submitted by B readers, Drs. Broudy and Dahhan. Director's Exhibits 11, 12; Employer's Exhibit 4. The administrative law judge thus properly found that, because the negative readings constituted the majority of interpretations and were verified by more highly-qualified physicians, the x-ray evidence was insufficient to establish, by a preponderance of the evidence, the existence of pneumoconiosis. *See Staton*, 65 F.3d at 59, 19 BLR at 2-280; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; Decision and Order at 7-8. Because it is supported by substantial evidence and is in accordance with law, we affirm the administrative law judge=s finding that the

---

[3]The administrative law judge misstated that Dr. Scott read the film dated November 12, 2001. Decision and Order at 6. In fact, the film which Dr. Scott interpreted was the June 22, 2001 film which Dr. Hussain read as positive for pneumoconiosis. Director's Exhibit 12. Since this fact lends even greater support for the administrative law judge's finding that Dr. Hussain's positive reading was outweighed in light of the qualifications of the physicians reading the film, the administrative law judge's misstatement is harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order at 6.

x-ray evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).[4] *See Staton*, 65 F.3d at 59, 19 BLR at 2-280; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87*; Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); Decision and Order at 5-6; Director=s Exhibits 10-12; Employer's Exhibit 4.

In challenging the administrative law judge's findings with regard to the medical opinion evidence under Section 718.202(a)(4), claimant argues that the administrative law judge erred in rejecting Dr. Hussain's report, dated June 22, 2001. Specifically, claimant asserts that the administrative law judge erred in discounting Dr. Hussain's report on the ground that it was based upon a positive x-ray reading which conflicted with the administrative law judge's determination that the weight of the x-ray evidence was negative. Claimant suggests that the administrative law judge thereby improperly substituted his opinion for Dr. Hussain's opinion, and asserts that it was error for the administrative law judge not to find Dr. Hussain's report to be reasoned and documented in view of the fact that the doctor based his diagnosis of pneumoconiosis not only upon a positive x-ray reading, but also upon a physical examination, pulmonary function study, and medical and work histories. Claimant also contends that Dr. Hussain is Board-certified in internal medicine and pulmonary medicine. Claimant's contentions lack merit.

Dr. Hussain examined claimant on June 22, 2001, and diagnosed "pneumoconiosis" and "COPD." Director's Exhibit 10. Dr. Hussain opined that claimant has a "moderate impairment," seventy percent of which is attributable to pneumoconiosis, and thirty percent of which is attributable to COPD. *Id.* The administrative law judge properly discounted Dr. Hussain's opinion as "neither well-reasoned nor well-documented" upon determining that Dr. Hussain provided no reasons for his diagnosis of pneumoconiosis other than his positive x-ray reading of the June 22, 2001 film and claimant's twenty years of coal dust exposure.[5] *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir.

---

[4]Claimant generally suggests that the administrative law judge may have selectively analyzed the x-ray evidence. Claimant provides no support for his contention, however, and the Decision and Order reflects that the administrative law judge properly considered all of the x-ray evidence, as discussed *supra*, without engaging in a selective analysis. Decision and Order at 5-6. Thus, we reject claimant=s suggestion.

[5]The administrative law judge also discounted Dr. Hussain's opinion because the doctor failed to take into account claimant's nineteen year cigarette smoking history in rendering his opinion. Decision and Order at 9. To the extent

2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); Decision and Order at 9; Director's Exhibit 10. Furthermore, the administrative law judge properly credited the contrary opinions of Drs. Dahhan and Broudy, indicating that claimant does not have pneumoconiosis, as he found these opinions to be well-reasoned and documented in light of the objective evidence of record, and because both physicians examined claimant and had an opportunity to review all of the evidence of record. *Clark*, 12 BLR at 1-155; *Tackett,* 12 BLR at 1-14; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 10; Director's Exhibit 12; Employer's Exhibits 1, 6; Unmarked Exhibit. In addition, the administrative law judge properly credited the opinions of Drs. Dahhan and Broudy in light of their credentials as Board-certified physicians in internal medicine and pulmonary diseases. *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 10; Employer's Exhibit 1; Unmarked Exhibit. Contrary to claimant's contention, the record does not reflect that Dr. Hussain is Board-certified in either internal medicine or pulmonary disease. Accordingly, we affirm the administrative law judge's finding that the opinions of Drs. Dahhan and Broudy are entitled to greater weight than Dr. Hussain's opinion with regard to the issue of the existence of pneumoconiosis under Section 718.202(a)(4).

Claimant further argues that the administrative law judge should have credited Dr. Munis's opinion as sufficient to establish the existence of pneumoconiosis because Dr. Munis is claimant's treating physician. In this regard, claimant contends that the administrative law judge erred in failing to accord substantial weight to Dr. Munis's opinion when considering the factors relevant to treating physicians' opinions under 20 C.F.R. §718.104(d). Claimant's contention lacks merit. The administrative law judge properly found that Dr. Munis never diagnosed pneumoconiosis or any lung condition attributable, even in part, to coal dust exposure, in any of his reports or office visit notes. Decision and Order at 10; Director's Exhibit 11. As the administrative law judge noted, while Dr. Munis mentioned chronic obstructive pulmonary disease as among claimant's physical problems, Dr. Munis did not, in any of his reports, discuss the etiology of claimant's chronic obstructive pulmonary disease, and did not reference claimant's occupational history. *Id.* The administrative law judge thus properly found that Dr. Munis's opinion does not support a finding of pneumoconiosis. *See* 20 C.F.R. §§718.201, 718.202(a)(4). We affirm, therefore, the administrative law judge's

---

the administrative law judge erred in discounting Dr. Hussain's diagnosis of pneumoconiosis on this ground, such error is harmless in light of the administrative law judge's other proper bases for according less weight to the doctor's opinion. *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); Decision and Order at 9.

finding that the medical opinion evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Because we affirm the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4), a requisite element of entitlement under Part 718, we affirm the administrative law judge's denial of benefits. *See Trent*, 11 BLR at 1-27; *Gee*, 9 BLR at 1-5; *Perry*, 9 BLR at 1-2. We need not address, therefore, claimant=s contentions with regard to disability causation under Section 718.204(c).

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge