BRB No. 04-0515 BLA

DAUGH HENSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CHANEY CREEK COAL CORPORATION	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND	)	DATE ISSUED: 03/10/2005
	)	
Employer/Carrier-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 Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

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

David H. Neeley (Neeley & Reynolds PSC), Prestonsburg, Kentucky, for employer.

Barry H. Joyner (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 HALL, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order Denying Benefits (03-BLA-5423) of Administrative Law Judge Jeffrey Tureck 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 found that for purposes of the instant Decision and Order, he was "assuming" that claimant established total disability in this subsequent claim, an element previously adjudicated against him. Accordingly, the administrative law judge turned to consider whether the evidence as a whole established all the elements of entitlement. Decision and Order at 3.[1] Considering all the evidence relevant to the existence of pneumoconiosis, the administrative law judge found that claimant did not establish that he suffered from legal or clinical pneumoconiosis, *see* 20 C.F.R. §718.202(a). Decision and Order at 3-6. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in concluding that the evidence of record did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4). Employer, in response, urges that the administrative law judge's denial of benefits be affirmed. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a Motion to Remand. In his motion, the Director contends that remand is necessary in order for the administrative law judge to consider the issue of total disability on the merits. The Director asserts that if, on remand, the administrative law judge determines that the evidence of record fails to establish total disability, then further remand of the case would be unnecessary as claimant could not establish entitlement to benefits under the Act. If, however, the administrative law judge finds total disability established on the merits, the Director contends that the case must be remanded for the claimant to be provided a complete pulmonary evaluation as provided by the Act. The Director concedes that claimant was not provided a complete pulmonary evaluation because Dr. Hussain's

[1] Claimant initially filed a claim in February, 1971, which was finally denied by the Social Security Administration in May, 1979. Director's Exhibit 1. Claimant filed a second claim in August, 1983 which was finally denied by the district director in June, 1984, Director's Exhibit 2. Claimant's third claim was filed in March, 1988 and was finally denied in August, 1988. Director's Exhibit 3. Claimant's fourth claim was filed in January, 1995. In a Decision and Order, Administrative Law Judge Daniel Roketenetz found that claimant established a coal mine employment of at least twelve years, but that claimant was unable to establish the existence of pneumoconiosis or a totally disabling respiratory impairment. Accordingly, benefits were denied. Director's Exhibit 4. Subsequent to an appeal by claimant, the Board affirmed this denial of benefits. *Henson v. Chaney Creek Coal Co.*, BRB No. 98-1120 BLA (Jun. 11, 1999) (unpub.). The instant claim was filed on February 16, 2001. Director's Exhibit 6. On February 18, 2004, the administrative law judge issued the Decision and Order denying benefits from which claimant now appeals.

finding of clinical pneumoconiosis was discredited and Dr. Hussain failed to address the existence of legal pneumoconiosis, which could, if shown, establish the existence of pneumoconiosis under the Act. 30 U.S.C. §923(b); *see also* 20 C.F.R. §725.406.

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 of these elements precludes a finding of 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 argues that the administrative law judge committed several errors in his analysis of the x-ray evidence at Section 718.202(a)(1). Claimant first argues that the administrative law judge erred in relying upon the qualifications of the physicians rendering negative interpretations and also erred in relying upon the numerical superiority of the negative interpretations in determining that the x-ray evidence did not support a finding of the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Second, claimant generally asserts that the administrative law judge "may" have impermissibly selectively analyzed the x-ray evidence of record. Claimant's Brief at 3-4. Third, claimant argues that the administrative law judge erred in allowing employer to submit two rebuttal interpretations of the June 13, 2001, x-ray. Claimant contends that inasmuch as the regulatory limitations set forth at 20 C.F.R. §725.414 limit employer to one rereading of an x-ray, one of the two rereadings submitted by employer should have been struck from the record.

In considering the x-ray evidence pursuant to Section 718.202(a)(1), the administrative law judge considered all the x-ray evidence of record, both the newly submitted evidence and evidence submitted with the prior claims, and concluded that the weight of such evidence failed to affirmatively support a finding of the existence of pneumoconiosis. In finding that the newly submitted x-ray evidence, *i.e.*, that evidence submitted since the prior denial, failed to support a finding of the existence of pneumoconiosis, the administrative law judge concluded that all of the readings rendered by physicians with B-reader qualifications[2], those interpretations rendered by Dr.

[2] A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination

Westerfield, Director's Exhibit 16, Dr. Fino, Director's Exhibit 16, and Dr. Halbert, Employer's Exhibit 1, were negative for the existence of the disease, while the recent positive interpretation was made by Dr. Hussain, Director's Exhibit 14, a physician who did not demonstrate any particular proficiency in the interpretation of x-rays. The administrative law judge's accordance of greater weight to the negative readings by better qualified readers was, therefore, proper. 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk v. Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-71 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-68 (1985); *Aimone v. Morrison Knudson Co.*, 8 BLR 1-32 (1985).

In reaching this determination, we recognize, as claimant asserts, that the administrative law judge impermissibly allowed employer to submit more than one interpretation of the June 13, 2001, x-ray, *i.e.*, both the negative interpretations of Drs. Fino and Halbert, Director's Exhibit 16; Employer's Exhibit 1.[3] 20 C.F.R. §725.414(a)(3)(ii). Such error is harmless, however, inasmuch as the administrative law judge's ultimate finding regarding the newly submitted x-ray evidence, *i.e.*, that the readings of the newly submitted x-ray evidence by B-readers was all negative, remains true regardless of whether Dr. Fino or Dr. Halbert's x-ray interpretation is considered. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1985).[4]

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established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16 , 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

[3] In pertinent part, Section 725.414 states:

> [t]he responsible operator shall be entitled to submit, in rebuttal of the case presented by the claimant, no more than one physician's interpretation of each chest X-ray,…

20 C.F.R §725.414(a)(3)(ii).

[4] In concluding that the administrative law judge's error in this regard is harmless, we have no occasion to consider employer's assertion, raised in its response brief, that claimant waived the regulatory limitations found at Section 725.414. Recently, the Board has held that 20 C.F.R. §725.456(b)(1) does not provide for parties to waive the regulatory limitations on medical evidence submitted in fulfillment of Section 725.414. *See Smith v. Martin County Coal Corp.*, BRB No. 04-0126 (Oct. 27, 2004).

Moreover, the administrative law judge's consideration of all the x-ray evidence[5] of record and his conclusion that the overwhelming weight of such evidence was negative based on the superior qualifications of those physicians interpreting the x-rays as negative for the existence of pneumoconiosis. *Staton*, 65 F.3d 55, 19 BLR 2-271; *Woodward*, 991 F.2d 314, 17 BLR 2-77; *Vance*, 8 BLR 1-68 (1985); *Aimone*, 8 BLR 1-32 (1985); Decision and Order at 4-5. Accordingly, the administrative law judge's determination that the x-ray evidence of record is insufficient to support a finding of pneumoconiosis pursuant to Section 718.202(a) (1) is affirmed. 20 C.F.R. §718.202(a)(1); *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Claimant further contends that the administrative law judge erred in concluding that the medical opinion of Dr. Hussain, Director's Exhibit 14, did not support a finding of pneumoconiosis pursuant to Section 718.202(a)(4). Claimant argues that Dr. Hussain based his finding of pneumoconiosis on a thorough physical examination of claimant, a work history, a chest x-ray, a pulmonary function study and a blood gas study. Claimant asserts, therefore, that Dr. Hussain provided a documented and reasoned opinion and the administrative law judge impermissibly substituted his judgment for that of the medical expert in finding that Dr. Hussain's opinion did not establish the existence of pneumoconiosis.

In finding that the medical opinion evidence did not support a finding of the existence of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge considered the newly submitted opinion of Dr. Hussain as well as the newly submitted report of Dr. Westerfield, who opined that claimant suffered from chronic obstructive pulmonary disease due to smoking, and made no diagnosis of any disease related to coal dust exposure. Director's Exhibit 16. The administrative law judge further considered the previously submitted opinions of Dr. Dahhan, who concluded that claimant did not suffer from pneumoconiosis, Director's Exhibit 4, Dr. Bushey, who based his conclusion of pneumoconiosis on x-ray evidence, Director's Exhibit 4, Dr. Broudy, who acknowledged positive x-ray interpretations in the record, but did not diagnose the presence of the disease, Director's Exhibit 4, and Dr. Baker, who diagnosed pneumoconiosis based on an x-ray reading, Director's Exhibit 4. In a permissible exercise of his discretion, the administrative law judge found the opinions of Drs. Westerfield and Dahhan entitled to greatest weight as the opinions were the best-reasoned and supported of record. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-

[5] The administrative law judge also indicated that the record contained mostly negative readings produced prior to 1990, but noted that given the progressive nature of pneumoconiosis, such evidence was not probative. Decision and Order at 4 n.6.

623 (6th Cir. 2003); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002) (credibility of medical opinion is for administrative law judge to determine); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Further, contrary to claimant's assertion, the administrative law judge permissibly found Dr. Hussain's opinion to be entitled to no weight because the opinion, which found pneumoconiosis based on x-ray, coal mine employment history and hypoxemia, also relied in large part on an erroneous x-ray reading of complicated pneumoconiosis. Decision and Order at 5. *See Napier*, 301 F.3d 703, 22 BLR 2-537; *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).[6] We therefore affirm the administrative law judge's decision to accord superior weight to the opinions of Drs. Westerfield and Dahhan and affirm the administrative law judge's determination that the weight of the medical opinion evidence did not support a finding of the existence of pneumoconiosis at Section 718.202(a)(4). *See Ondecko*, 114 S.Ct. 2251, 18 BLR 2A-1. Accordingly, we affirm the administrative law judge's finding that claimant has not established the existence of pneumoconiosis based on his consideration of the evidence of record.

The Director, in his Motion to Remand, argues that since the administrative law judge accorded no weight to the opinion of Dr. Hussain regarding the existence of pneumoconiosis as unreasoned because it was based on discredited positive x-ray evidence and Dr. Hussain failed to address whether claimant had legal pneumoconiosis, the Director failed to provide claimant with a complete pulmonary evaluation addressing all elements of entitlement as required under the Act and the case must, accordingly, be remanded to provide claimant with such an evaluation. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.405(b); *Cline v. Director, OWCP*, 972 F.2d 234, 16 BLR 2-137 (8th Cir. 1992); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990). This assertion is rejected.

Resolution of conflicting medical opinions and a determination as to which opinions are entitled to greater weight is within the purview of the administrative law judge as trier-of-fact. In this case, the administrative law judge accorded greater weight

[6] Claimant does not challenge the administrative law judge's rejection of the opinions of Drs. Bushey and Baker on a similar basis, *i.e.*, that the physician's conclusions were based on x-ray interpretations. We therefore affirm that finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

to the opinions Drs. Dahhan and Westerfield than to the opinion of Dr. Hussain as he found them better reasoned. This was permissible. *See Knuckles v. Director, OWCP*, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). The administrative law judge accorded no weight to Dr. Hussain's diagnosis of pneumoconiosis because he found it based, in large part, on his erroneous x-ray finding of complicated pneumoconiosis, when better qualified readers had found that the x-ray evidence was negative for both simple and complicated pneumoconiosis. Decision and Order at 4.

The Director contends, however, that inasmuch as Dr. Hussain also diagnosed hypoxemia and a severe pulmonary impairment without discussing the etiology of these conditions, the case must be remanded because the doctor failed to address whether claimant had legal pneumoconiosis, an element which could, if shown, establish entitlement. 20 C.F.R. §718.201. Dr. Hussain, however, examined claimant, conducted objective testing, and reviewed claimant's history and symptoms. He provided a diagnosis of pneumoconiosis. He also diagnosed hypoxemia and a severe pulmonary impairment. The Director implicitly argues that the doctor's failure to discuss the etiology of these diseases requires remand. We disagree. The doctor conducted an examination of claimant, took a history, and conducted objective testing. The doctor reached his conclusion and gave the basis for that conclusion. He cannot be required to do more. Director's Exhibit 14. The administrative law judge found that Dr. Hussain's diagnosis was unreasoned compared to the diagnoses of other physicians whose findings he found to be better supported by the evidence. This was proper. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162, 2-174 n.9 (4th Cir. 2000). *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.405(b). Here, the administrative law judge determined, after considering the relevant evidence, that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), and remand for a complete pulmonary evaluation is unnecessary. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.405(b); *see generally Island Creek Coal Co. v. Compton*, 211 F.3d.203, 210, 22 BLR 2-162, 2-172 (4th Cir. 2000)(the Director's position not entitled to deference as it is not a reasonable interpretation of the Act). Because claimant did not establish the existence of pneumoconiosis based on the evidence of record, a requisite element of entitlement, *see Trent*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*), we affirm the denial of benefits.[7]

[7] Since the administrative law judge considered all of the evidence of record in finding that claimant failed to establish the existence of pneumoconiosis, we need not address the assertions by the Director, Office of Workers' Compensation Programs, concerning the administrative law judge's total disability finding and his finding at 20 C.F.R. §725.309(d). *See Trent*, 11 BLR 1-26 (1987); *Perry*, 9 BLR 1-1.

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

I concur.

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ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the denial of benefits. I agree with my colleagues that the administrative law judge may permissibly discredit a medical opinion diagnosing the existence of pneumoconiosis which is based on a positive x-ray when the weight of the x-ray evidence has been found not to support the existence pneumoconiosis, *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). It is my view, however, as the Director contends, that because Dr. Hussain's opinion of clinical pneumoconiosis was discredited and the doctor failed to address the existence of "legal" pneumoconiosis, a showing which could, if credited, establish entitlement, 20 C.F.R. §718.201, the Director has not provided claimant with a complete pulmonary examination to which he is entitled under the Act.

Section 413(b) of the Act states that each miner who files a claim has the right to "substantiate his or her claim by means of a complete pulmonary evaluation." Such an evaluation which must be provided by the Director. 30 U.S.C. §923(b); *see* 20 C.F.R. §725.406; *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-225 (8th Cir. 1984). If a physician provided by the Director fails to address an essential element of entitlement, as Dr. Hussain failed to do in this case, the Director has failed to satisfy his obligation. *See Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994). The regulation specifically states that if the examination provided by the Director fails to address a relevant issue of

entitlement, *i.e.*, Dr. Hussain's failure to address the existence of legal pneumoconiosis, remand of the case is required for further development of the evidence. 20 C.F.R. §725.456(e).

I agree with the Director that, ultimately, the issue of whether claimant was provided a complete pulmonary evaluation on the issue of pneumoconiosis will be moot if the evidence of record establishes that claimant is not totally disabled, another essential element of entitlement. I would, therefore, vacate the administrative law judge's denial of benefits and remand the case to the administrative law judge to consider whether the evidence of record establishes total disability. If the administrative law judge finds that the record fails to establish total disability, then claimant has failed to establish a requisite element of entitlement and benefits may be denied without further consideration. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). If, however, it is determined that the evidence of record establishes total disability, or if it is determined that Dr. Hussain's opinion of total disability is not credible, this case must be remanded to the district director for claimant to be provided with a complete pulmonary evaluation addressing all elements of entitlement.[8]

Accordingly, I would vacate the administrative law judge's Decision and Order Denying Benefits and I would remand the case to the administrative law judge for further consideration.

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BETTY JEAN HALL
Administrative Appeals Judge

[8] I do not address the problematic nature of the administrative law judge's implicit finding that claimant established an element previously adjudicated against him in this subsequent claim based on his assumption that claimant was now totally disabled, Decision and Order at 3, since a finding of whether or not claimant is totally disabled based on consideration of all the evidence would render this finding moot. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).