BRB No. 04-0538 BLA

PHILLIP GOFF	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 03/17/2005
	)	
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 – Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Phillip Goff, Hartford, Kentucky, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Helen H. Cox (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel, the Decision and Order –

[1] By Order dated September 8, 2004, the Board noted that Joseph Kelley (Monhollon & Kelley, P.S.C.), withdrew as claimant's counsel of record. The Board

Denial of Benefits (03-BLA-5446) of Administrative Law Judge Thomas F. Phalen, Jr. 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 credited claimant with fourteen years of coal mine employment pursuant to employer's stipulation. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] Decision and Order at 4. The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a) and 718.204(b), respectively. Accordingly, benefits were denied.

Claimant contends that the administrative law judge should have remanded the case to afford him a complete pulmonary evaluation, in light of the administrative law judge's discrediting of the opinions rendered by Dr. Simpao on behalf of the Director, Office of Workers' Compensation Programs (the Director), and by Dr. O'Bryan on behalf of employer. Claimant further asserts that the record refutes the administrative law judge's findings that Dr. Simpao's deposition testimony was "conclusory, confusing, contradictory, and sometimes incomprehensible," Decision and Order at 12, and that Dr. O'Bryan's opinion was unreasoned. Claimant further asserts that the administrative law judge inconsistently analyzed Dr. Fino's opinion on the issues of the existence of pneumoconiosis and total disability, and failed to resolve conflicts in the evidence. In response to claimant's appeal, employer contends that where the administrative law judge finds a medical opinion, based on a purportedly complete pulmonary evaluation, to be outweighed or unpersuasive, remand of the case for a new pulmonary evaluation of a claimant is not required. Employer thus argues that the Director met his statutory obligation to provide claimant with a complete credible pulmonary evaluation by virtue of Dr. Simpao's reports, notwithstanding the administrative law judge's finding that Dr. Simpao's reports were entitled "to a lesser degree of probative weight." Decision and Order at 12. The Director responds, contending that since the administrative law judge found Dr. Simpao's opinion entitled to less probative weight, rather than no weight, the Director satisfied his statutory obligation to provide claimant with a complete credible pulmonary evaluation by virtue of Dr. Simpao's evaluation. Employer has filed a

---

indicated that it would review the appeal under the general standard of review. *See* 20 C.F.R. §§802.211(e), 802.220. Before withdrawing as counsel, Mr. Kelley had filed a Petition for Review and Brief in Support of Petition for Review.

[2] Claimant filed his claim for benefits on March 19, 2001. Director's Exhibit 1. The district director issued a Proposed Decision and Order denying benefits on October 15, 2002. Pursuant to claimant's request, the case was transferred to the Office of Administrative Law Judges for a hearing, which was held on September 3, 2003.

response to the Director's response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we hold that the administrative law judge's findings are in accordance with law and supported by substantial evidence, and thus, that the administrative law judge's Decision and Order contains no reversible error. The administrative law judge found the x-ray evidence insufficient to establish the existence of pneumoconiosis based on a negative reading by a dually qualified physician. There are four readings of one x-ray. The x-ray, dated April 26, 2001, was read as positive by Drs. Simpao and O'Bryan, physicians who are neither B readers nor Board-certified radiologists. Director's Exhibit 10; Claimant's Exhibit 1. The April 26, 2001 x-ray was read as negative by Dr. Wiot, a physician dually qualified as a B reader and Board-certified radiologist. Employer's Exhibit 1. The film quality was found to be acceptable for determining the presence or absence of pneumoconiosis by Dr. Sargent, a physician also dually qualified as a B-reader and Board-certified radiologist. Director's Exhibit 11. We affirm, as rational, the administrative law judge's finding at 20 C.F.R. §718.202(a)(1) that the x-ray evidence failed to establish the existence of pneumoconiosis. *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); Decision and Order at 10.

The administrative law judge correctly found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3) as there was no biopsy evidence, this claim was filed after January 1, 1982, and there was no evidence relevant to invocation of the irrebuttable presumption of total disability due to pneumoconiosis provided at 20 C.F.R. §718.304. 20 C.F.R. §§718.304, 718.305, 718.306; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986); Decision and Order at 11.

Considering the medical opinion evidence of record at 20 C.F.R. §718.202(a)(4), the administrative law judge found it insufficient to establish the existence of pneumoconiosis. Specifically, the administrative law judge properly accorded less weight to the opinions of Drs. O'Bryan and Simpao, the only medical opinions supportive of claimant's burden at 20 C.F.R. §718.202(a)(4). Dr. O'Bryan diagnosed category 1/1 pneumoconiosis, and mild combined obstructive and restrictive ventilatory impairment. He stated that the impairment had a mixed etiology of cigarette smoking, pneumoconiosis, and weight. Claimant's Exhibit 1. The administrative law judge rationally found Dr. O'Bryan's opinion unreasoned as it was based on an x-ray interpretation and history of coal dust exposure. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985). The administrative law judge also considered Dr. O'Bryan's diagnosis of respiratory impairment as a diagnosis of legal pneumoconiosis. He permissibly found that Dr. O'Bryan did not provide a reasoned explanation for his conclusions and accorded them lesser weight. *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-13 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1989).

In an April 26, 2001 opinion submitted by the Director, Dr. Simpao diagnosed "cwp 1/1 due to multiple years of coal dust exposure," which he found to be "medically significant in [claimant's] pulmonary impairment," which he classified as "moderate" and attributed solely to pneumoconiosis. Director's Exhibit 10. Dr. Simpao concluded that claimant had occupational lung disease caused by coal mine employment and was unable to perform his usual coal mine employment. *Id.* In July of 2003, Dr. Simpao issued a consulting report based on objective testing done by Dr. O'Bryan, and concluded (1) that claimant had an occupational lung disease caused by coal mine employment based upon "multiple years of dust exposure;" (2) that claimant had a moderate impairment due solely to pneumoconiosis, and (3) that claimant could not perform his usual coal mine employment. Claimant's Exhibit 2. At his deposition, Dr. Simpao agreed that the pulmonary function studies showed a mild impairment when advised that Dr. O'Bryan, and other physicians who reviewed Dr. O'Bryan's objective testing, found a mild impairment. Employer's Exhibit 5 at 8. Further, Dr. Simpao testified that his April 26, 2001 pulmonary function study was valid, but later agreed that this pulmonary function study could be thrown out as not a valid indicator of claimant's pulmonary abilities. *Id*. at 22, 24.

The administrative law judge found Dr. Simpao's testimony to be "conclusory, confusing, contradictory, and sometimes incomprehensible." Decision and Order at 12. The administrative law judge further found that "[t]he innate confusion propagated by Dr. Simpao's testimony is epitomized by his response to [the] simple question" of whether, at the time of his April 2001 evaluation, he physically examined claimant. Decision and Order at 12. Dr. Simpao had replied, "Normally they're referred by the coal – I don't

have a record here, but usually we do. Yes, sir. Effort, yeah. I saw Mister – yeah. I've got examination." Employer's Exhibit at 16. Given Dr. Simpao's testimony, we hold that substantial evidence in the record supports the administrative law judge's findings that Dr. Simpao's testimony was "conclusory, confusing, contradictory, and sometimes incomprehensible," Decision and Order at 12, and that "[s]ince Dr. Simpao's testimony was focused on the findings contained in his April 2001 report and his supplemental July 2003 report, the reliability of those two reports are [sic] diminished." *Id.* *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). The administrative law judge thus rationally found that, based on the record as a whole, Dr. Simpao's opinions regarding the presence or absence of clinical and legal pneumoconiosis, were unreasoned and thus "entitled to a lesser degree of probative weight" at Section 718.202(a)(4). *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 12. Based on the foregoing, we affirm the administrative law judge's finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Because we herein affirm the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), an essential element of entitlement, we need not address the administrative law judge's findings on the issue of total disability at 20 C.F.R. §718.204(b), as a finding of entitlement is precluded in this case. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-5.

Further, in order to provide claimant with a complete pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim, as required by the Act and regulations, *see* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990) (*en banc*), the Director must provide claimant with a medical opinion that addresses all of the elements of entitlement. *Hodges*, 18 BLR at 1-91-93. Because Dr. Simpao's opinion addressed all of the elements of entitlement, and the administrative law judge rationally found Dr. Simpao's opinion entitled to less probative weight, as opposed to no weight, we agree with the Director that Dr. Simpao's opinion constitutes a complete and credible pulmonary evaluation such as to meet the Director's obligation. 30 U.S.C. §923(b); 20 C.F.R. §§718.202(a); 718.203; 718.204(c); *see Newman*, 745 F.2d at 1166, 7 BLR at 2-31.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge