

BRB No. 06-0947 BLA

G.M.)
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 Claimant-Petitioner)
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 v.)
)
 LEE WEST COAL COMPANY) DATE ISSUED: 09/25/2007
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 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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and 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-6390) of Administrative Law Judge Daniel F. Solomon denying benefits on a subsequent 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 The administrative law judge credited

¹ Claimant filed his first claim on October 26, 1994. Director's Exhibit 1. It was denied on March 21, 1995 because the evidence did not establish any of the elements of entitlement. *Id.* On June 6, 1995, the district director ordered claimant to show cause within thirty days why his claim should not be dismissed by reason of abandonment for

claimant with twenty-seven years of coal mine employment based on the parties' stipulation and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the medical evidence developed since the prior denial of benefits established total disability pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, however, 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 challenges the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1),(4). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined 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 supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish 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 one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Claimant initially contends that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(1). The administrative law judge considered eleven interpretations of five x-

failure to appear at an informal conference on June 2, 1995. *Id.* In a letter dated June 10, 1995, claimant advised the Department of Labor that he was enclosing a transcript of his April 17, 1995 deposition for filing as a part of the record. *Id.* No additional documentation regarding claimant's first claim is contained in the record. Claimant filed this claim on May 27, 2003. Director's Exhibit 3.

² Because 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, we affirm those findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

rays dated September 11, 2003, February 2, 2004, March 10, 2004, August 9, 2004, and September 7, 2004. Drs. Alexander and Patel, who are B readers and Board-certified radiologists, read the September 11, 2003 x-ray as positive for pneumoconiosis, Director's Exhibits 13, 28, while Dr. Wiot, who is a B reader and a Board-certified radiologist, read this x-ray as negative for pneumoconiosis. Employer's Exhibit 6. Similarly, Dr. Patel read the February 2, 2004 x-ray as positive for pneumoconiosis, Claimant's Exhibit 1, while Dr. Wiot read this x-ray as negative for pneumoconiosis. Employer's Exhibits 7, 9. Dr. DePonte, who is a B reader and a Board-certified radiologist, read the March 10, 2004 x-ray as positive for pneumoconiosis. Claimant's Exhibit 2. Whereas Dr. DePonte read the August 9, 2004 x-ray as positive for pneumoconiosis, Claimant's Exhibit 4, Dr. Rosenberg, a B reader, and Dr. Poulos, a B reader and a Board-certified radiologist, read the August 9, 2004 x-ray as negative for pneumoconiosis. Employer's Exhibits 1, 5. Lastly, Dr. Patel read the September 7, 2004 x-ray as positive for pneumoconiosis, Claimant's Exhibit 3, while Dr. Halbert, who is a B reader and a Board-certified radiologist, read this x-ray as negative for pneumoconiosis. Employer's Exhibit 10.

The administrative law judge gave greater weight to Dr. Wiot's negative x-ray readings, based on Dr. Wiot's superior qualifications. Decision and Order at 9. The administrative law judge also gave less weight to Dr. Patel's positive x-ray readings because they were inconsistent. *Id.* Although the administrative law judge acknowledged the numerical superiority of the positive x-ray readings, he determined that this evidence was equivocal, at best. *Id.* The administrative law judge therefore found that the x-ray evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(1).

Claimant asserts that "treating and examining physicians were improperly afforded less weight contrary to applicable precedent." Claimant's Brief at 9. We disagree. A doctor's status as a treating or examining physician is not relevant to the administrative law judge's weighing of the x-ray evidence at Section 718.202(a)(1). *Alley v. Riley Hall Coal Co.*, 6 BLR 1-376 (1983). Thus, we reject this assertion.

Claimant also asserts that the administrative law judge erred in finding Dr. Wiot the most qualified reader. We disagree. The administrative law judge noted that Drs. Patel, DePonte, Alexander, Wiot, and Halbert were all dually qualified as B readers and Board-certified radiologists. The administrative law judge, however, gave greater weight to Dr. Wiot's negative x-ray readings because "Dr. Wiot is the best qualified reader in this record based on his achievements." Decision and Order at 9. In addition to considering the B reader and Board-certified status of a reader as required by Section 718.201(a)(1), an administrative law judge may rely on a reader's academic qualifications in radiology and his involvement in the B reader program as bases for according greater weight to the readings rendered by that reader. *Harris v. Old Ben Coal*

Co., 23 BLR 1-98, 1-114 (2006)(*en banc*)(McGranery and Hall, JJ., concurring and dissenting); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). The record reveals that Dr. Wiot is an emeritus professor in radiology and was involved in the development of the B reader program. Employer's Exhibit 9 at 4-11. Thus, contrary to claimant's assertion, substantial evidence supports the administrative law judge's decision to accord greater weight to Dr. Wiot's negative x-ray readings, based on Dr. Wiot's superior qualifications. *Harris*, 23 BLR at 1-114; *Worhach*, 17 BLR at 1-108.

Claimant additionally asserts that the administrative law judge erred in finding that Dr. Patel's x-ray readings were inconsistent, when they were all consistently read as positive for pneumoconiosis. In considering Dr. Patel's readings of the September 11, 2003, February 2, 2004, and September 7, 2004 x-rays, the administrative law judge determined that "[Dr. Patel's September 7, 2004] reading represents a reduction in the profusion of the opacities that he read on the two earlier films."³ Decision and Order at 9. The administrative law judge therefore found Dr. Patel's readings "inconsistent" and he attributed "less weight to [Dr. Patel's] opinion than to that of the other [B]oard certified dually qualified [B] readers." *Id.*

The record reflects that, while Dr. Patel did not give all three x-rays the same classification, he read each one as positive for pneumoconiosis. *See* 20 C.F.R. §718.102. Moreover, each x-ray of record should be evaluated independently. However, because the administrative law judge properly accorded greater weight to Dr. Wiot's negative x-ray readings, based on Dr. Wiot's superior qualifications, *Harris*, 23 BLR at 1-114; *Worhach*, 17 BLR at 1-108, we hold that any error by the administrative law judge in according less weight to Dr. Patel's positive x-ray readings because they were inconsistent was harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).

Finally, claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the reports of Drs. Rasmussen, Rosenberg, and Repsher. Dr. Rasmussen diagnosed coal workers' pneumoconiosis and chronic obstructive pulmonary disease (COPD) related to coal dust exposure and cigarette smoking. Director's Exhibit 13; Claimant's Exhibit 3. By

³ Dr. Patel classified the September 11, 2003 and February 2, 2004 x-rays as 1/1, Director's Exhibit 13; Claimant's Exhibit 1, and he classified the September 7, 2004 x-ray as 1/0. Claimant's Exhibit 3.

contrast, Dr. Rosenberg diagnosed COPD related to smoking, and not coal dust exposure. Employer's Exhibit 1. Dr. Rosenberg also opined that claimant does not have coal workers' pneumoconiosis. *Id.* Similarly, Dr. Repsher diagnosed COPD related to cigarette smoking, and not coal dust exposure. Employer's Exhibit 3. Dr. Repsher also opined that claimant does not have coal workers' pneumoconiosis or any other pulmonary or respiratory disease caused by coal dust exposure. *Id.*

The administrative law judge discounted Dr. Rasmussen's opinion because it was not well-reasoned. Decision and Order at 10. Consequently, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4). *Id.*

Claimant asserts that the administrative law judge erred in discounting Dr. Rasmussen's opinion on the ground that it was not well-reasoned. Specifically, claimant maintains that the administrative law judge erred in finding that "Dr. Rasmussen improperly 'relied' on the x-ray interpretations of Dr. Patel in his report." Claimant's Brief at 10, 11. We disagree. The administrative law judge found that "a review of Dr. Rasmussen's reports does not disclose a valid basis to diagnose pneumoconiosis." Decision and Order at 9. Specifically, the administrative law judge determined that Dr. Rasmussen's reliance on Dr. Patel's positive x-ray readings was misplaced because "Dr. Rasmussen relied on Dr. Patel's readings, as if these are conclusive, but I find that the x-ray evidence was not dispositive of pneumoconiosis." *Id.* at 10.⁴ *Id.* In addition, the administrative law judge stated that "there is no explanation why the CT evidence, albeit 'other,' less dispositive evidence was not even discussed, especially as some are in the prior record." *Id.* Thus, we hold that substantial evidence supports the administrative law judge's finding that Dr. Rasmussen's opinion was not well-reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement, we affirm the administrative law judge's denial of

⁴ As an additional example of a lack of explanation, the administrative law judge noted that Dr. Rasmussen did not comment on the abnormal EKG results or how their abnormalities may affect claimant's blood gases or spirometry. Decision and Order at 10.

benefits under 20 C.F.R. Part 718. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge