

BRB No. 08-0202 BLA

R.A.)
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 Claimant-Petitioner)
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 v.)
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 DIXIE FUEL COMPANY, LLC) DATE ISSUED: 09/25/2008
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 and)
)
 EMPLOYERS INSURANCE OF WAUSAU)
)
 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 of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer/carrier.

Rita Roppolo (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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.

PER CURIAM:

Claimant appeals the Decision and Order (06-BLA-5024) of Administrative Law Judge Alice M. Craft (the administrative law judge) denying benefits 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 at least twenty-two years of coal mine employment,¹ and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. 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). The administrative law judge also found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges 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). Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director has filed a limited response, urging the Board to reject claimant's contention that the case should be remanded to the district director for the Director to provide claimant with a complete and credible pulmonary evaluation.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'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 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.

¹ The record indicates that claimant was last employed in the coal mining industry in Kentucky. Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

² Because the administrative law judge's length of coal mine employment finding and her finding that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2)-(4) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

§§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 20 C.F.R. §718.202(a)(1). Specifically, claimant asserts that the administrative law judge improperly relied on the qualifications of the physicians submitting negative x-ray readings, and the numerical superiority of the negative x-ray readings. The administrative law judge considered the four interpretations of three x-rays dated October 25, 2004,³ February 1, 2005, and June 15, 2005. All of the x-ray readings were negative for pneumoconiosis. Director's Exhibits 12, 14; Employer's Exhibits 1, 2. Consequently, we reject claimant's assertion that the administrative law judge improperly relied on the qualifications of the physicians submitting negative x-ray readings, and the numerical superiority of the negative x-ray readings.⁴ *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). Thus, 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), as supported by substantial evidence.

Because we have affirmed the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis, claimant is unable to establish an essential element of entitlement under 20 C.F.R. Part 718. See 20 C.F.R. §718.202(a)(1)-(4). Consequently, we affirm the administrative law judge's denial of benefits.⁵ *Anderson*, 12 BLR at 1-112.

Claimant next contends that the Director failed to provide him with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. Specifically, claimant argues that "the [administrative law

³ Dr. Barrett, who is dually qualified as a B reader and a Board-certified radiologist, read the October 25, 2004 x-ray for quality only. Director's Exhibit 13.

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 10. Thus, we reject claimant's suggestion.

⁵ In view of our disposition of the case at 20 C.F.R. §718.202(a), we decline to address claimant's contentions at 20 C.F.R. §718.204(b)(2)(iv). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

judge] concluded that Dr. Simpao's report was outweighed by the better qualified physicians of record because Dr. Simpao possessed no pulmonary credentials (Decision, page 11)." Claimant's Brief at 4. The Director responds that that the statutory obligation to provide claimant with a complete and credible pulmonary evaluation has been fulfilled. The Director argues that "there is no statutory or regulatory requirement that that the DOL-sponsored pulmonary examination be completed by a Board-certified physician or by the best-credentialed doctor." Director's Letter Brief at 2. The Director also argues that "[t]he medical examination must be credible, but not necessarily dispositive." *Id.*

The record reflects that Dr. Simpao conducted an examination and the full range of testing required by the regulations, and addressed the elements of pneumoconiosis and total disability on the Department of Labor examination form. Director's Exhibit 12; 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 718.104, 725.406. Dr. Simpao diagnosed coal workers' pneumoconiosis, and opined that claimant could not perform the physical labor required by his last coal mine job as a welder due to his mild pulmonary impairment. Director's Exhibit 12. At Section 718.202(a)(4), the administrative law judge permissibly gave greater weight to Dr. Broudy's opinion that claimant does not have pneumoconiosis than to Dr. Simpao's contrary opinion, because of Dr. Broudy's superior qualifications.⁶ *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). In addition, the administrative law judge permissibly gave greater weight to Dr. Broudy's opinion than to Dr. Simpao's contrary opinion, because Dr. Broudy's opinion was better supported by the objective evidence. *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youghioghny and Ohio Coal Co.*, 7 BLR 1-829 (1985). We agree with the Director that the administrative law judge found Dr. Simpao's diagnosis of pneumoconiosis outweighed by more persuasive evidence, and that this finding does not indicate a failure by the Director to fulfill his statutory obligation to claimant. *Cf. Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-93 (1994).

⁶ Dr. Broudy is a Board-certified internist and pulmonologist. Director's Exhibit 14. The record does not contain Dr. Simpao's credentials.

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