BRB No. 99-0744 BLA

JIMMY LEWIS Claimant-Petitioner v. LEECO, INCORPORATED and TRANSCO ENERGY COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Paul E. Jones (Baird, Baird, Baird & Jones, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (98-BLA-0589) of Administrative Law Judge Rudolf L. Jansen 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 considered the instant claim, which was filed on April 16, 1997, pursuant to the applicable regulations at 20 C.F.R. Part 718. After crediting claimant with twenty-nine years and eleven months of coal mine employment based upon the stipulation of the parties, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the

administrative law judge denied benefits. On appeal, claimant challenges the administrative law judge's findings under Sections 718.202(a)(1) and 718.204(c)(4). Employer responds in support of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend to participate in this appeal.

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, 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 fifteen negative x-ray readings of record over the three positive x-ray readings 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 the instant case arises, has held that these factors must be considered by a fact-finder when weighing the x-ray evidence. *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). In weighing the x-ray evidence in the instant case, the administrative law judge correctly stated that, of the three positive x-ray interpretations, only two were submitted by B readers, while, in contrast, eleven of the negative readings were submitted by more highly qualified physicians, *i.e.*, B reader/Board-certified radiologists.[1] Decision and Order

[1]The administrative law judge correctly stated that Dr. Powell, a B reader, submitted two of the positive readings, having read the films dated March 28, 1996 and September 27, 1996 as positive for pneumoconiosis. Decision and Order at 4, 8; Director's Exhibits 14, 16. As the administrative law judge noted, these films were reread as negative for the disease by Drs. Wiot, Spitz and Wheeler, who are dually-qualified B reader/Board-certified radiologists. Decision and Order at 4, 8; Director's Exhibit 30; Employer's Exhibit 8. The administrative law judge correctly found in summarizing the x-ray evidence that the March 28, 1996 film was also read as negative by Dr. Branscomb, a B reader, and that the September 27, 1996 film was also read as negative by Dr. Fino, a B reader. Decision and Order at 4; Employer's Exhibits 2, 4. The administrative law judge also correctly found that the two other films of record, which are dated May 19, 1997 and October 20, 1997, were read only as negative, and that all of these negative readings of these two films were

at 4-5, 8; Director's Exhibits 10, 12, 14-16, 29, 30; Employer's Exhibits 2-8. The administrative law judge properly found that, because the negative readings constitute the majority of interpretations and are verified by more highly-qualified physicians, the x-ray evidence failed to support a finding of pneumoconiosis. *See Staton, supra; Woodward, supra*; *Roberts v. Bethlehem Mines Corp.,* 8 BLR 1-211 (1985); Decision and Order at 8; Director's Exhibits 10, 12, 14-16, 29, 30; Employer's Exhibits 2-8. Inasmuch as it is supported by substantial evidence and is in accordance with law, we affirm the administrative law judge's finding that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).[2] *Staton, supra; Woodward, supra; Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); Decision and Order at 8; Director's Exhibits 10, 12, 14-16, 29, 30; Employer's Exhibits 2-8. We further affirm the administrative law judge's findings that claimant did not establish the presence of pneumoconiosis pursuant to Section 718.202(a)(2)-(4), as claimant does not challenge these findings on appeal.[3] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Inasmuch as 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, supra; Gee, supra; Perry, supra.* We need not address,

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submitted by B readers and/or Board-certified radiologists. Decision and Order at 4; Director's Exhibits 10, 12, 29; Employer's Exhibits 3, 5-7.

[2]Claimant generally suggests that the administrative law judge may have selectively analyzed the x-ray evidence, thereby committing error. Claimant provides no support for his conclusion, however, and the administrative law judge's 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 4-5, 8. Thus, we reject this suggestion.

[3]Similarly, we affirm the administrative law judge's length of coal mine employment finding, and the administrative law judge's findings under 20 C.F.R. §718.204(c)(1)-(3) as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 3, 9-11.

therefore, claimant's contentions under Section 718.204(c)(4).

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge