BRB No. 98-0789 BLA

MARSHALL PEACE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ANDALEX RESOURCES, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
AMERICAN RESOURCES SELF INSURANCE COMPANY	)	
	)	
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 - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Sherri P. Brown (Ferreri, Fogle, Pohl & Picklesimer), Lexington, Kentucky, for employer.

Before: , and , Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (97-BLA-0059) of Administrative Law Judge Daniel J. Roketenetz 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). Claimant filed a claim for benefits in September 1995. Director's Exhibit 1. The administrative law judge, considering the case pursuant to 20 C.F.R. Part 718, found that claimant established eighteen years of coal mine employment, that the evidence was insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4), and that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied. Claimant appeals, arguing that the administrative law judge erred in denying benefits. Employer has submitted a response brief supporting affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has submitted a letter stating that he will not respond to the appeal unless specifically requested to do so by the Board.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon the Board and may not be disturbed. 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 under Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's totally disabling respiratory impairment was due at least in part to his pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). Failure to prove 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*).

With respect to Section 718.202(a)(1), the administrative law judge correctly found that of the thirty x-ray readings, only four were positive for pneumoconiosis. Decision and Order at 4; Director's Exhibits 21-24. The administrative law judge found that "the numerous readings of no pneumoconiosis by several B-readers and board-certified physicians substantially outweighs [sic] the positive x-ray interpretations of record." Decision and Order at 4. The administrative law judge stated that "the majority of the B-readers and board-certified radiologists found the x-ray evidence to be negative." *Id.* at 5. The administrative law judge correctly found that only two B readers found the x-ray evidence to be positive, Director's Exhibits 21, 23, while eight B readers,[1] six of whom were also Board-certified radiologists, found the x-ray evidence to be negative. Decision and Order at 5; Director's Exhibits 19, 20, 37-41; Employer's Exhibits 1-10. The administrative law judge stated that it was proper for him to consider the numerical superiority of the x-ray interpretations in conjunction with the readers's qualifications. Decision and Order at 5. Accordingly, the administrative law judge found that the x-ray evidence failed to establish the existence of pneumoconiosis under Section 718.202(a)(1).

On appeal, claimant argues that the administrative law judge erred by basing his opinion on the qualifications and numerical superiority of the x-ray readers, and by selectively analyzing the evidence. Claimant's Brief at 4. These arguments are without

[1] The record only verifies B reader status for Dr. Scott, one of the negative readers, from August 1, 1992 through July 31, 1996. DX 39; EX 10. Three of the negative readings made by Dr. Scott occurred after this date. EX 10.

merit. Claimant contends that the administrative law judge *need* not defer to qualifications and numerical superiority, but does not argue that the administrative law judge *may* not base his decision on these bases. *Id*. The administrative law judge did not err in basing his finding on the qualifications of the x-ray readers in combination with the numerical superiority of the x-ray interpretations. *See Crace v. Kentland-Elkhorn Coal Corp.*, 109 F.3d 1163, 21 BLR 2-73 (6th Cir. 1997); *Staton v. Norfolk & Western Railway 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). We, therefore, affirm the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1).

We affirm the administrative law judge's findings that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(2) and (a)(3), inasmuch as these findings are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

With regard to Section 718.202(a)(4), the administrative law judge correctly found that Drs. Anderson, Myers, Baker and Vaezy[2] found claimant to be suffering from pneumoconiosis.[3] Decision and Order at 7; Director's Exhibits 13-16. The administrative

[2] Dr. Vaezy, in a September 18, 1995 opinion, diagnosed coal workers' pneumoconiosis. Director's Exhibit 16. However, in a an October 31, 1995 opinion, Dr. Vaezy opined that claimant did not have an occupational lung disease which was caused by his coal mine employment. When asked if claimant's impairment was related to pneumoconiosis or had another etiology, Dr. Vaezy responded that claimant's pulmonary impairment was mostly due to smoking. Director's Exhibit 17.

[3] The record contains an Agreement as to Compensation and Order Approving Settlement from the Kentucky Workers' Compensation Board. DX 3. This Order is for pneumoconiosis but does not contain a medical opinion. Director's Exhibit 3.

law judge discredited these opinions because they relied primarily on their own chest x-ray readings. Decision and Order at 7. The administrative law judge stated, "The vast majority of the x-ray readings by the more highly qualified physicians, however, were negative for the disease. A diagnosis or medical opinion which is merely a restatement of a positive x-ray is not a reasoned medical opinion within the meaning of §718.202(a)(4)." *Id*. In addition, the administrative law judge stated, "the opinions of these opinions are not supported by the objective laboratory data, a discrepancy they fail to address. I find their reports to be poorly documented, poorly reasoned, and entitled to little weight." *Id*. at 8. The administrative law judge correctly found that Dr. Broudy found that claimant is not suffering from pneumoconiosis. *Id.* at 7-8; Director's Exhibit 37. The administrative law judge found Dr. Broudy's report to be the better-reasoned and better-documented opinion, and based upon Dr. Broudy's opinion, found that pneumoconiosis was not established pursuant to Section 718.202(a)(4).

On appeal, claimant argues that the administrative law judge erred in not finding the existence of pneumoconiosis established under Section 718.202(a)(4). Specifically, claimant avers that an administrative law judge may not discredit the opinion of a physician whose report is based on a positive x-ray interpretation which is contrary to the administrative law judge's findings. Further, claimant maintains that an administrative law judge may not discredit a report based on a positive x-ray merely because the record contains subsequent negative x-rays. Claimant contends that the administrative law judge erred by interpreting medical tests and thereby substituting his own conclusion for those of a physician. Claimant also alleges that the administrative law judge erred in rejecting the opinions of Drs. Baker, Anderson and Myers as unreasoned. Claimant's Brief at 6-7.

Claimant's arguments are without merit. A medical opinion which is merely a restatement of an x-ray opinion may not establish the existence of pneumoconiosis under Section 718.202(a)(4). *See Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993). There are in the instant case three doctors who issued medical reports and who unequivocally opined that claimant suffered from pneumoconiosis – Drs. Anderson, Myers and Baker. Dr. Anderson's report includes a history and the results of a physical examination, x-ray, pulmonary function study, blood gas study, and electrocardiogram. Dr. Anderson stated that claimant had "Category 1/1 pneumoconiosis." Dr. Anderson also opined that claimant had an occupational lung disease caused by his coal mine employment based upon x-ray. Director's Exhibit 15. Dr. Myers' report includes a history and the results of a physical examination, x-ray, pulmonary function study, and electrocardiogram. Dr. Myers opined that claimant had an occupational lung disease caused by his coal mine employment based upon x-ray. Director's Exhibit 13. Dr. Baker's report includes a history and the results of a physical examination, x-ray, pulmonary function study, and blood gas study. Dr. Baker diagnosed "Coal workers' pneumoconiosis, category 1/0, on basis of the 1980 ILO Classification - based on abnormal x-ray *and significant duration of exposure*." Director's Exhibit 14, Report at 3 (emphasis added). Dr. Baker also checked off a box to the effect that the miner had an occupational lung disease caused by his coal mine employment based upon x-ray. *Id.* at 4. Dr. Vaezy diagnosed "Coal Worker's Pneumoconiosis (based on chest x-ray only)." Director's Exhibit 16, Report at 4. There is substantial evidence to support the administrative law judge's determination that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis on the basis that the doctors relied primarily on their own x-

ray readings. Although Dr. Baker based his diagnosis of pneumoconiosis on claimant's coal mine employment history as well as an x-ray, there is, on the whole, substantial evidence to support the administrative law judge's finding. *See generally Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988). Since we affirm this basis by the administrative law judge for his finding, we decline to address the other bases provided by the administrative law judge for this finding. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). We therefore affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Since we affirm the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), we decline to address the issue of total disability, inasmuch as any error by the administrative law judge regarding this issue would be harmless. *See Perry*, *supra*; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, we affirm the administrative law judge's Decision and Order - Denial of Benefits.

SO ORDERED.

Administrative Appeals Judge

Administrative Appeals Judge

Administrative Appeals Judge