

BRB No. 05-0286 BLA

COBURN TURNER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
KANAWHA RIVER MINING COMPANY)	
)	DATE ISSUED: 08/23/2005
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 Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Barry H. Joyner (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (03-BLA-5535) of Administrative Law Judge Joseph E. Kane with respect to 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 accepted employer's stipulation to twenty-two years of coal mine employment and considered the claim, filed on July 10, 2001, pursuant to the regulations set forth in 20 C.F.R. Part 718. The administrative law judge determined that claimant did not establish either the

existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total respiratory disability pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

Claimant argues on appeal that the administrative law judge did not properly weigh the evidence relevant to Sections 718.202(a)(1) and (a)(4). Employer has not filed a brief in this appeal.¹ The Director, Office of Workers' Compensation Programs, has responded and maintains that the administrative law judge's findings are rational and supported by substantial evidence.²

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 this 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'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 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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant argues initially that the administrative law judge erred in finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to

¹ The designated responsible operator in this case is Kanawha River Mining Company, a subsidiary of Horizon Natural Resources Company (Horizon), which has been liquidated as a consequence of a bankruptcy proceeding. The Director, Office of Workers' Compensation Programs (the Director), and Foundation Coal Corporation, which is the administrator of the trust created to pay any benefit awards, filed a joint motion to hold this case in abeyance for sixty days. The Board granted this motion in an Order dated March 23, 2005. *Turner v. Kanawha River Mining Co.*, BRB No. 05-0286 BLA (Mar. 23, 2005)(unpub. Order). Subsequently, the Director filed a letter in which he indicated that the parties had agreed that Kanawha River Mining Company should remain as the designated responsible operator in this case. In response, the Board lifted the abeyance in an Order issued on May 26, 2005. *Turner v. Kanawha River Mining Co.*, BRB No. 05-0286 BLA (May 26, 2005)(unpub. Order).

² We affirm the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3), as they are unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Section 718.202(a)(1), as the administrative law judge relied exclusively on the qualifications of the x-ray readers, counted heads, and selectively analyzed the evidence. These contentions are without merit. The administrative law judge rationally determined that the existence of pneumoconiosis was not demonstrated at Section 718.202(a)(1) based upon the fact that a preponderance of the x-ray interpretations by the better qualified physicians was negative for the disease. Decision and Order at 9; 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995).³ We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

With respect to the medical opinion evidence, claimant argues that the administrative law judge erred in finding that the opinion of Dr. Baker was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Claimant's Exhibit 1. Claimant's contention is without merit. The administrative law judge acted within his discretion in finding that Dr. Baker's diagnosis of pneumoconiosis was not adequately reasoned, as Dr. Baker did not set forth the rationale for his opinion and did not discuss how the underlying documentation supported his diagnosis. Decision and Order at 11; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002). We affirm, therefore, the administrative law judge's determination that claimant did not meet his burden of establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Because we have affirmed the administrative law judge's determination that the evidence of record does not support a finding of pneumoconiosis under Section 718.202(a), an essential element of entitlement, we must affirm the denial of benefits.⁴ *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's last full year of coal mine employment occurred in the Commonwealth of Kentucky. Director's Exhibit 3; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

⁴ In light of our affirmance of the administrative law judge's determination that the record did not contain a reasoned and documented diagnosis of pneumoconiosis sufficient to meet claimant's burden under Section 718.202(a), we need not address claimant's arguments concerning the administrative law judge's weighing of the opinion in which Dr. Hussain stated that claimant does not have a cardiopulmonary disease, or the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c). *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge