

BRB No. 05-0415 BLA

BOBBY HOSKINS	)	
	)	
Claimant-Petitioner	)	
v.	)	
	)	
LEECO, INCORPORATED	)	DATE ISSUED: 08/22/2005
	)	
v.	)	
	)	
JAMES RIVER COAL 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 (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Jeffrey S. Goldberg (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (04-BLA-5187) of

Administrative Law Judge Daniel J. Roketenetz rendered 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).<sup>1</sup> The administrative law judge found that while the newly submitted evidence failed to establish the existence of pneumoconiosis, it did establish total respiratory disability. Considering all the evidence of record, therefore, the administrative law judge concluded that while it established total respiratory disability, it failed to establish the existence of pneumoconiosis and disability causation, essential elements of entitlement. Benefits were, accordingly, denied.

On appeal, claimant challenges the administrative law judge's finding that the x-ray and medical opinion evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (4).<sup>2</sup> Claimant also states that since "pneumoconiosis is proven to be a progressive and irreversible disease...[i]t can therefore be concluded that during the considerable amount of time that has passed since the initial diagnosis of pneumoconiosis the claimant's condition has worsened, thus adversely affecting his ability to perform his usual coal mine employment or comparable gainful work." Claimant's Brief at 5. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, is not participating in this appeal.

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).

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<sup>1</sup> Claimant filed his first claim with the Department of Labor (DOL) on December 8, 1994. Director's Exhibit 1. Following a hearing, Administrative Law Judge Robert L. Hillyard denied benefits in a Decision and Order dated September 30, 1996, finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4)(2000), an essential element of entitlement. *Id.* Claimant took no further action, and the denial became final. Claimant filed the instant, subsequent claim with DOL on February 27, 2002, Director's Exhibit 3, which is at issue in this appeal.

<sup>2</sup> The administrative law judge's finding that the evidence fails to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3) is affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant first contends that the administrative law judge erred in finding that the x-ray evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Claimant asserts that the administrative law judge improperly relied on the x-ray readings by physicians with superior credentials and the numerical superiority of the negative x-ray readings to find that the x-ray evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(1).

In considering the x-ray evidence, the administrative law judge found that the preponderance of negative readings by B-readers and Board-certified radiologists outweighed the positive reading by a lesser qualified physician. This was reasonable. We affirm, therefore, the administrative law judge's finding that the x-ray evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(1). In addition, we reject claimant's contention that the administrative law judge "may" have "selectively analyzed" the x-ray evidence. Claimant's Brief at 3. We note that claimant cites to nothing in the record to support his speculation, and a review of the evidence together with the administrative law judge's Decision and Order does not reveal a selective analysis of the x-ray evidence. *White v. New White Coal Co, Inc.*, 23 BLR 1-1, 1-5 (2004); see *Cox v. Benefits Review Board*, 791 F. 2d 445, 9 BLR 2-46 (6th Cir. 1986).

Claimant next contends that the administrative law judge erred in failing to find that Dr. Simpao's January 13, 2003 opinion established the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Claimant asserts that Dr. Simpao diagnosed coal workers' pneumoconiosis and a mild pulmonary impairment, both of which were due to coal dust exposure, based on a physical examination, medical and work histories, a pulmonary function study, an arterial blood gas study, and a chest x-ray, and that his opinion was, therefore, well-reasoned and well-documented. Claimant's Brief at 4-5.

In considering the medical opinion evidence, the administrative law judge found that both Dr. Simpao, who found pneumoconiosis, and Dr. Rosenberg,<sup>3</sup> who found that claimant did not have pneumoconiosis, provided well-reasoned and well-documented opinions. The administrative law judge concluded therefore that the most recent medical opinion evidence was in equipoise and that claimant failed, therefore, to carry his burden of establishing the existence of pneumoconiosis under the Act. This was proper. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*; 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Young*

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<sup>3</sup> Dr. Rosenberg examined claimant on February 17, 2004.

*v. Barnes and Tucker Co.*, 11 BLR 1-147, 1-150 (1988).<sup>4</sup> Accordingly, we affirm the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis. As claimant has failed to establish the existence of pneumoconiosis, an essential element of entitlement, based on the evidence of record, benefits must be denied and we do not address claimant's other argument. *See Ondeko*, 512 U.S. 267, 18 BLR 2A-1; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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<sup>4</sup> The administrative law judge accorded little probative weight to the opinions of Dr. Dahhan because they were inconsistent. Decision and Order at 11. Claimant has not challenged this finding. *See Coen*, 7 BLR 1-30; *Skrack*, 6 BLR 1-710.