BRB No. 98-0486 BLA

JAMES D. SHEPHERD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAIN CLAY, INCORPORATED) c/o TRANSCO COAL CO.	)	DATE ISSUED:
	)	
and	)	
	)	
ACCORDIA OF LEXINGTON, INCORPORATED	)	
	)	
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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Beecham A. Lakes (Lay Representative), Berea, Kentucky, for claimant.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of an attorney, appeals the Decision and Order (97-BLA-530) of Administrative Law Judge Daniel J. Roketenetz 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 found seventeen years of coal mine employment and based on the date of filing, adjudicated the

claim pursuant to 20 C.F.R. Part 718.[1] Decision and Order at 3. The administrative law judge concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(c). Accordingly, benefits were denied. On appeal, claimant generally contends that he is entitled to benefits in light of positive x-ray readings and the opinion of the treating physician and that the case should be remanded to develop additional evidence. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he would not 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 supported by substantial evidence, is rational, and is in accordance with 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. The administrative law judge, in the instant case, permissibly determined that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) based on the preponderance of negative x-ray readings by physicians with superior qualifications. Director's Exhibits 13-17; Employer's Exhibits 2, 6, 9-13, 16; Claimant's Exhibit 1; Decision and Order at 4-5; *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990). Further, the administrative law judge found that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(2) and (3) as there is no biopsy of record, this is a living miner's claim filed after January 1, 1982, and there is no evidence of complicated pneumoconiosis in the record. Decision and Order at 5; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). In addition, the

[1] Claimant filed his claim for benefits on May 17, 1996. Director's Exhibit 1.

administrative law judge considered the entirety of the medical opinion evidence of record and permissibly accorded greatest weight to Dr. Broudy, an examining physician, who opined that claimant did not suffer from pneumoconiosis, than to the opinions of Drs. Clarke and Wheeler, diagnosing pneumoconiosis, as Dr. Broudy's opinion is better supported by the objective evidence of record and the opinions of other highly qualified physicians. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985); Director's Exhibits 9-11; Employer's Exhibits 2-4, 7, 8, 14, 17; Decision and Order at 5-7.

The administrative law judge, in the instant case, also permissibly determined that the evidence of record was insufficient to establish total disability pursuant to Section 718.204(c). *Piccin, supra*. The administrative law judge permissibly found that total disability was not established pursuant to Section 718.204(c)(1)-(3) as all of the pulmonary function studies and blood gas studies of record produced non-qualifying values[2] and there is no evidence of cor pulmonale with right-sided congestive heart failure in the record. *See* 20 C.F.R. §718.204(c)(1)-(3); Director's Exhibits 7, 8, 12; Employer's Exhibits 2, 7, 8, 14; Decision and Order at 8-9; *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Further, the administrative law judge properly considered the medical opinion evidence of record and permissibly found the finding of total disability by Drs. Wheeler and Clarke outweighed by the opinions of Drs. Broudy, Fino, Chandler and Branscomb as these opinions are better supported by the objective evidence of record. *Dillon*, *supra*; *King*, *supra*; Director's Exhibit 9-11; Employer's Exhibits 2-4, 7, 8, 14, 17; Decision and Order at 9. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark*, *supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis and total disability pursuant to Section 718.202(a) and Section 718.204(c) as it is supported by substantial evidence and is in accordance with law.[3]

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[2] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix B, C respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

[3] Claimant's assertion that the case should be remanded for the development of additional evidence is without merit. The record indicates that the Department of Labor has satisfied its statutory duty to provide claimant with a complete pulmonary examination sufficient to constitute an opportunity to substantiate the claim. 30

Inasmuch as claimant has failed to establish the existence of pneumoconiosis or total disability, requisite elements of entitlement pursuant to Part 718, entitlement thereunder is precluded. *Trent, supra*; *Perry, supra*.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); Director's Exhibit 11. If claimant believes that he has new evidence necessary to the adjudication of the claim, then he may seek modification with the district director. 33 U.S.C. §922; 20 C.F.R. §725.310; *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).