BRB No. 06-0702 BLA

BILLY R. MORGAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAIN CLAY, INCORPORATED c/o ACORDIA EMPLOYERS SERVICE	)	DATE ISSUED: 02/27/2007
	)	
and	)	
	)	
JAMES RIVER COAL SERVICES c/o ACORDIA OF LEXINGTON	)	
	)	
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 Larry S. Merck, 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 (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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 (2004-BLA-6743) of Administrative Law Judge Larry S. Merck 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 that the parties stipulated to a coal mine employment history of nineteen years and that the stipulation was supported by the record. Decision and Order at 4. The administrative law judge further found that the evidence failed to establish the existence of coal worker's pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 6-16. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in not finding the existence of pneumoconiosis established based on x-ray and medical opinion evidence, and erred in not finding total respiratory disability established based on medical opinion evidence. In addition, claimant contends that because the administrative law judge found Dr. Simpao's opinion to be unreasoned, the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation pursuant to 30 U.S.C. §923(b). Employer responds, urging that the denial of benefits be affirmed. The Director responds, asserting that the Board should reject claimant's argument that the Director failed to provide him with a complete pulmonary evaluation.[1]

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising

[1] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination, the finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3) or total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), and the finding that claimant failed to establish total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). The administrative law judge did not address 20 C.F.R. §718.203.

out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any element of entitlement precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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 Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.[2] Contrary to claimant's assertion, the administrative law judge may rely upon the qualifications of the physicians in weighing the x-ray evidence and determining the weight to be assigned the interpretations, and may consider the numerical superiority, in this case, of the negative x-ray evidence. The administrative law judge found that the x-ray evidence consisted of four separate x-rays taken on July 25, 2003, September 16, 2003, March 10, 2004, and May 10, 2005. Considering all of the x-ray evidence, the administrative law judge properly accorded little weight to the positive x-ray reading of the July 25, 2003 x-ray rendered by Dr. Simpao, Director's Exhibit 10, and the positive reading of the March 10, 2004 film by Dr. Baker, Claimant's Exhibit 2, because these physicians did not possess the B reader and Board-certified radiologist qualifications of the physicians who reread these films and found them negative for pneumoconiosis. Decision and Order at 6-7. Thus, the administrative law judge rationally found that the x-ray evidence failed to affirmatively establish the existence of pneumoconiosis because the preponderance of x-ray readings by physicians with superior qualifications was negative. Decision and Order at 9-10; 20 C.F.R. §§718.102(c), 718.202(a)(1)[3]; *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); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)

---

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

[3] Section 718.202(a)(1) provides in pertinent part:

> where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration **shall** be given to the radiological qualifications of the physicians interpreting such X-rays. [emphasis added]

20 C.F.R. §718.202(a)(1).

(*en banc*); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Likewise, claimant's contention that the administrative law judge "may have selectively analyzed" the x-ray evidence is rejected, as claimant points to no evidence to support this contention nor does the administrative law judge's finding support this contention. *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). Accordingly, the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) is affirmed.

In addition, contrary to claimant's assertion, the administrative law judge did not err in finding that pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(4), based on the opinion of Dr. Baker. Claimant's Brief at 4-5. In reviewing the medical opinion evidence, the administrative law judge properly considered the quality of the evidence in determining whether the opinions were supported by their underlying documentation and were adequately explained.

The administrative law judge found the opinion of Dr. Rosenberg, who opined that claimant did not have coal workers' pneumoconiosis or chronic obstructive pulmonary disease, to be the most convincing opinion of record as Dr. Rosenberg was the best-reasoned and documented of record. This was proper. Decision and Order at 10-11; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Worhach*, 17 BLR at 1-108; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 n.4 (1993) (administrative law judge must consider each report to determine if underlying documentation supports it); *Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1986). *Collins v. J & L Steel*, 21 BLR 1-181 (1999). The administrative law judge acted within his discretion, as fact-finder, in concluding that Dr. Baker's opinion was insufficient to support a finding of pneumoconiosis because Dr. Baker's diagnosis of coal worker's pneumoconiosis and pulmonary impairment due, in part, to coal mine employment, was based solely upon a positive x-ray reading that was subsequently read as negative by a better qualified physician. Decision and Order at 10-11; Director's Exhibit 11; 20 C.F.R. §718.104(d)(1)-(5); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *see also Jericol Mining , Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Stephens* 298 F.3d 511, 22 BLR 2-495; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 1-62, 1-175 (4th Cir. 2000); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n. 4 (1984).

Further, contrary to claimant's contention, the Director did not fail to satisfy his statutory obligation to provide claimant with a complete pulmonary evaluation because the administrative law judge found that Dr. Simpao's opinion as to the existence of pneumoconiosis was not persuasively explained and was outweighed by Dr. Rosenberg's

better-reasoned and better-supported opinion. *See* 30 U.S.C. §923(b); 20 C.F.R. §725.405, 406; *Barnes v. ICO Corp.*, 31 F.3d 673, 18 BLR 2-319 (8th Cir. 1994); *Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25, 2-31 (8th Cir. 1984); *see also Clark*, 12 BLR 1-149; *Fields*, 10 BLR 1-19; *Winters*, 6 BLR 1-877.

We, therefore, affirm the administrative law judge's finding that the evidence fails to establish the existence of pneumoconiosis and because the evidence fails to establish the existence of pneumoconiosis, an essential element of entitlement, we need not consider claimant's argument concerning total respiratory disability. *Anderson*, 12 BLR 1-111; *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.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge