

BRB No. 97-0828 BLA

CLIFFORD PENCE)
)
 Claimant-Petitioner)
)
 v.)
)
 WICKER BROS. COAL COMPANY #2)
)
 and)
)
 AMERICAN BUSINESS & MERCANTILE)
 INSURANCE MUTUAL)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED) DATE ISSUED:
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION AND ORDER

Appeal of the Decision and Order - Denying Benefits of Richard K. Malamphy,
Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden Kentucky, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (95-BLA-1890) of Administrative Law Judge Richard K. Malamphy 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 credited claimant with eleven years of coal mine employment and adjudicated the case pursuant to 20 C.F.R. Part 718, based on claimant's April 1992 filing date. The administrative law judge found the medical evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence of record was insufficient to establish entitlement to benefits pursuant to Part 718. In particular, claimant contends that the x-ray and medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4). In addition, claimant contends that the medical evidence of record is sufficient to establish that claimant is totally disabled due to pneumoconiosis. In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence.¹ The Director, Office of Workers' Compensation Programs, filed a letter stating that he will not file a response brief in this appeal.²

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 applicable law. 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 under 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; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v.*

¹ Employer, in a footnote in its response brief, argues that the administrative law judge erred in finding that it was the properly designated responsible operator. Employer's Brief at 2, n.1. Inasmuch as this argument does not entail an alternate method of affirming the administrative law judge's denial of benefits, employer is required to raise this issue in a cross-appeal. See *King v. Tennessee Consolidation Coal Co.*, 6 BLR 1-87 (1983). Thus, we decline to consider this argument.

² The parties do not challenge the administrative law judge's decision to credit claimant with eleven years of coal mine employment and his findings pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3). These findings, therefore, are affirmed as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Director, OWCP, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Id.*

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the relevant evidence of record, we conclude that substantial evidence supports the administrative law judge's findings that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4). Contrary to claimant's contention, the administrative law judge reasonably exercised his discretion in finding that a preponderance of the x-ray interpretations by the more qualified physicians was negative for the existence of pneumoconiosis.³ 20 C.F.R. §718.202(a)(1); Director's Exhibits 13-15, 46-49, 51-57; Claimant's Exhibit 1; Employer's Exhibits 1, 3, 5-8, 10, 12, 15, 17-19, 23, 24; Decision and Order at 8; see *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); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Inasmuch as the administrative law judge weighed all of the relevant x-ray evidence, including the qualifications of the physicians providing these readings, we affirm his finding that claimant has failed to carry his burden of proving the existence of pneumoconiosis pursuant to Section 718.202(a)(1). 20 C.F.R. §718.202(a)(1); *Woodward, supra*; *Edmiston, supra*; *Roberts, supra*.

Moreover, we 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). The administrative law judge reasonably accorded greater weight to the opinions of Drs. Broudy, Dahhan and Fino, each of whom stated that claimant does not suffer from pneumoconiosis, based on their superior professional qualifications as Board-certified physicians in Internal Medicine and Pulmonary Diseases over the contrary opinions of Drs. Sundaram and Guberman, whose qualifications are not in the record. Compare Director's Exhibits 47, 53; Employer's Exhibits 11, 13, 16, 21, 22, 24 with Director's Exhibits 10, 11, 27; Claimant's Exhibit 1; Decision and Order at 11; *Edmiston, supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Moreover, contrary to claimant's general contention, the administrative law judge has not selectively analyzed the evidence of record in crediting the opinions of Drs. Broudy, Dahhan and Fino, but rather has rationally considered all of the relevant evidence and determined that the opinions of Drs. Broudy, Dahhan and Fino were the most credible in light of their reasoning. Decision and Order at 11; see *Clark, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Inasmuch as the administrative law judge has reasonably considered all of the relevant evidence, we affirm his finding that claimant failed to

³ The record contains eighty-one interpretations of eleven x-ray films, of which three interpretations were positive for pneumoconiosis, one of which was read by Dr. Alexander, a B reader. Director's Exhibits 16, 19, 27. The remainder of the x-ray interpretations were negative for pneumoconiosis; of these, seventy interpretations were by physicians qualified as B readers. Director's Exhibits 13-15, 46-49, 51-57; Claimant's Exhibit 1; Employer's Exhibits 1, 3, 5-8, 10, 12, 15, 17-19, 23, 24.

establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). See *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Since claimant has failed to establish the existence of pneumoconiosis, a necessary element of entitlement pursuant to Part 718, an award of benefits is precluded.⁴ *Trent, supra*; *Perry, supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER

⁴ Claimant argues that the administrative law judge erred in finding that claimant is not totally disabled due to pneumoconiosis. Contrary to claimant's suggestion, the administrative law judge did not address whether the evidence was sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204, inasmuch as his finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) precluded entitlement to benefits. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Administrative Appeals Judge