BRB No. 04-0449 BLA

TRUMAN SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAIN CLAY, INCORPORATED	)	DATE ISSUED: 01/31/2005
	)	
and	)	
	)	
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 – Denying Benefits of Rudolf L. Jansen, 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.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (03-BLA-5513) of Administrative Law Judge Rudolf L. Jansen (the administrative law judge) 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 twenty-one years of coal mine employment. Considering all the evidence of record on the merits of the claim, the administrative law judge found that the evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4) or total respiratory or pulmonary disability at 20 C.F.R. §718.204(b). Accordingly, benefits were denied. On appeal, claimant alleges error in the administrative law judge's findings 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 (a)(4), and that the medical opinion evidence failed to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b). Employer responds in support of the decision below. The Director, Office of Workers' Compensation Programs, has not filed a brief in the 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 rational, supported by substantial evidence, and in accordance with 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that he is totally disabled due to a respiratory or pulmonary impairment arising out of coal mine employment. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to establish any element of entitlement will preclude a finding of entitlement to benefits.

Claimant asserts that the administrative law judge relied "almost solely" on the relative qualifications of the physicians interpreting the x-rays of record, placed "substantial weight" on the numerical superiority of the negative x-ray readings, and may have selectively analyzed the x-ray evidence.[1] Claimant's Brief at 3. Claimant further asserts that employer never provided him with Dr. Broudy's August 3, 2001 x-ray film and thus, Dr. Broudy's

[1] In finding the x-ray evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), the administrative law judge noted that the record contains six interpretations of four x-rays; three of the four negative interpretations were rendered by physicians qualified as B readers or Board-certified radiologists/B readers and the two positive interpretations were rendered by physicians with no special radiological qualifications. *See* Director's Exhibits 11, 13, 14; Employer's Exhibit 6; Decision and Order at 5.

interpretation of it should have been "stricken from the record." Claimant's Brief at 4. Claimant argues that because the administrative law judge failed to take note of this fact, the case must be remanded for reexamination of the record.

Claimant's contentions lack merit. The administrative law judge analyzed the quantitative and qualitative nature of the relevant x-ray evidence and rationally found that "[b]ecause the negative readings constitute the majority of interpretations and are verified by more, highly-qualified physicians," the weight of the x-ray evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).[2] *Staton v. Norfolk & Western Ry. 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); Decision and Order at 9. Further, the record shows that claimant's counsel expressly stated that he had "[n]o objection" to the admission of, *inter alia*, Dr. Broudy's interpretation of the August 3, 2001 x-ray, when the administrative law judge offered him the opportunity to object to it at the hearing. Hearing Transcript at 9-10. Claimant explicitly waived his objection to the admission of Dr. Broudy's interpretation of the August 3, 2001 x-ray, contained in Employer's Exhibit 6. *Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-6 (1995). Furthermore, since claimant waived his right to object to the admission of Employer's Exhibit 6 before the administrative law judge, he cannot now raise this argument before the Board for the first time on appeal. *Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991)(Stage, J., dissenting). We therefore affirm the administrative law judge's finding that the x-ray evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) because it is supported by substantial evidence and is in accordance with law.

Claimant next asserts that the administrative law judge "appears to have" substituted his opinion for that of the medical experts, namely Drs. Baker and Simpao, in determining that the medical opinion evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).[3] The administrative law judge found that the opinions of Drs. Broudy and Rosenberg, that claimant does not have pneumoconiosis, Employer's Exhibits 1, 7, 9, 10,

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[2] Claimant generally suggests that the administrative law judge "may have" selectively analyzed the x-ray evidence. Claimant provides no support for his contention, however, and the Decision and Order reflects that the administrative law judge considered all of the x-ray evidence, as discussed *supra*, without engaging in a selective analysis. Decision and Order at 5, 8-9. Thus, we reject claimant's suggestion.

[3] Claimant does not challenge the administrative law judge's findings that the evidence fails to establish the existence of pneumoconiosis at 20 C. F.R. §718.202(a)(2) and (a)(3). We thus affirm these findings. *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

outweighed the contrary opinions of Drs. Baker and Simpao, that claimant has pneumoconiosis. Claimant asserts that the opinions of Drs. Baker and Simpao are reasoned and documented.

Claimant's contentions lack merit. At 20 C.F.R. §718.202(a)(4), the administrative law judge noted that Dr. Broudy's opinion, that claimant does not have pneumoconiosis, was based on a review of the medical evidence, radiological evidence, examination findings, and the results of pulmonary testing, including a CT-scan of the chest that showed no evidence of pneumoconiosis. Employer's Exhibits 1, 3, 4, 6, 9; Decision and Order at 6-7, 10. Dr. Rosenberg based his opinion, that claimant does not have pneumoconiosis, on a review of the medical evidence, including the reports of Drs. Broudy, Baker, and Simpao, and all the objective tests underlying these reports. Employer's Exhibits 7, 10. In his three-page consultative opinion dated June 25, 2003, Dr. Rosenberg specifically stated that, "despite various B readers stating that coal workers' pneumoconiosis (CWP) was present, the CAT scan findings indicate that such is not the case… Clearly, when all the above information is looked at in total, Mr. Smith does not have the interstitial form of CWP." Employer's Exhibit 7. The administrative law judge determined, within his discretion, that Dr. Rosenberg's opinion "in particular, is detailed and thorough," Decision and Order at 10, and that "[b]oth [Drs. Rosenberg and Broudy] had the opportunity to review the medical evidence of record for a more complete picture of Mr. Smith's health," *Id. Hall v. Director, OWCP*, 8 BLR 1-193 (1985). With regard to the contrary opinions of Drs. Simpao and Baker that claimant has pneumoconiosis, the administrative law judge noted that while Dr. Simpao based his opinion on a positive x-ray, examination findings, and symptomatology, *see* Director's Exhibit 11, Dr. Baker based his opinion on a positive x-ray and history of exposure to coal mine dust alone, *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); Director's Exhibit 13; Decision and Order at 9. Based on the foregoing, we hold that the administrative law judge permissibly found that the opinions of Drs. Broudy and Rosenberg were the "better-reasoned opinions of record," *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 10, and rationally determined that these opinions outweighed other competing evidence, namely the contrary opinions of Drs. Baker and Simpao, upon which claimant relies. *Riley v. National Mines Corp.*, 852 F.2d 197, 11 BLR 2-182 (6th Cir. 1988).

Claimant further cites to the provisions of 20 C.F.R. §718.104(d) regarding an administrative law judge's consideration of the report of a claimant's treating physician, and asserts that the administrative law judge should have granted Dr. Baker's opinion controlling weight, based on his status as claimant's treating physician. While the administrative law judge did not consider Dr. Baker's opinion pursuant to 20 C.F.R. §718.104(d), he recognized Dr. Baker as having examined and treated claimant during 2001 and 2002. Decision and Order at 7. Moreover, the administrative law judge provided a valid reason for finding that Dr. Baker's treatment records are "not probative on the issue of pneumoconiosis" since

"[t]hese record [sic] merely record that Claimant saw Dr. Baker for a check-up and that there was no change in his condition. There is no information regarding the basis for the diagnosis."[4] *Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); Decision and Order at 9-10; *see* Director's Exhibit 13. We thus affirm the administrative law judge's finding that the evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Because claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202, an essential element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits, as a finding of entitlement is precluded in this case. *Trent*, 11 BLR at 1-27. Given our affirmance of the administrative law judge's denial of benefits, based on claimant's failure to establish the existence of pneumoconiosis at 20 C.F.R. §718.202, we need not reach claimant's arguments challenging the administrative law judge's findings at 20 C.F.R. §718.204(b).

[4] Dr. Baker's treatment forms document claimant's visits on August 16, 2001, November 20, 2001, February 19, 2002, April 16, 2002, and July 22, 2002. Director's Exhibit 13. Dr. Baker checked boxes to indicate that claimant has coal workers' pneumoconiosis and chronic bronchitis, and noted that there was no change in his condition. *Id.*

Accordingly, we affirm the administrative law judge's Decision and Order – Denying Benefits.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge