

BRB No. 97-0642 BLA

BRUCE T. VANHOOSE )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 SHAMROCK PROCESSING )  
 COMPANY )  
 )  
 and )  
 )  
 ISLAND CREEK COAL COMPANY )  
 )  
 and )  
 )  
 EMPLOYER'S INSURANCE OF )  
 WAUSAU )  
 )  
 Employers/Carrier- )  
 Respondents )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, )  
 UNITED STATES DEPARTMENT OF )  
 LABOR )  
 Party-in-Interest )

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

John C. Collins (Collins & Allen), Salyersville, Kentucky, for claimant.

Bonnie Hoskins (Stoll, Keenon & Park, LLP), Lexington, Kentucky, for employer, Shamrock Processing Company.

John W. Walters (Jackson & Kelly), Lexington, Kentucky, for employer, Island Creek Coal Company.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (96-BLA-0658) of Administrative Law Judge Daniel J. Roketenetz 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 initially found that Shamrock Processing Company (Shamrock) is the responsible operator and dismissed Island Creek Coal Company (Island Creek) from the claim. The administrative law judge also credited claimant with twenty-eight years of coal mine employment. Considering the merits of the claim under 20 C.F.R. Part 718, he found that claimant failed to meet his burden to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

On appeal, claimant contends that the medical evidence is sufficient to establish the existence of pneumoconiosis and thus the administrative law judge's contrary finding is erroneous. Shamrock responds, and urges affirmance of the administrative law judge's denial of benefits based on his finding that claimant failed to establish the existence of pneumoconiosis. Island Creek also responds, and urges affirmance of the administrative law judge's denial of benefits, as well as his finding that Shamrock is the responsible operator and Island Creek is properly dismissed from the claim. 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 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 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 that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that he is totally disabled by the disease. 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*).

The administrative law judge found that the evidence is insufficient to establish the existence of pneumoconiosis under Section 718.202(a). Claimant relies on the two positive x-ray readings rendered by Drs. Powell and Vuskovich, Employer's Exhibit 7 and Claimant's Exhibit 2B. Claimant also argues that the opinion of his pulmonary treating physician, Dr. Amerson, should be accorded more weight at Section 718.202(a)(4).

In the instant case, at Section 718.202(a)(1), the administrative law judge properly found that the numerous negative x-ray readings rendered by the better qualified physicians outweigh the positive x-ray readings of record. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995), citing *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).<sup>1</sup> Claimant's recitation of favorable x-ray evidence,

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<sup>1</sup>The administrative law judge also properly noted that there is no biopsy evidence,

duly considered by the administrative law judge, does not amount to an assertion of specific error in the administrative law judge's weighing of the x-ray evidence. See generally *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Thus, we affirm the administrative law judge's findings at Section 718.202(a)(1).

Considering the medical opinion evidence pursuant to Section 718.202(a)(4), the administrative law judge found that the majority of physicians who either examined claimant or reviewed his medical records found no evidence of pneumoconiosis, radiographic or otherwise. In this regard, the administrative law judge noted that only Drs. Amerson and Fritzhand affirmatively diagnosed employment related pneumoconiosis, while Dr. Powell diagnosed "Nonspecific increase in irregular and rounded nodularity by chest x-ray consistent with a Category 1/1 T/Q occupational pneumoconiosis," which "may be related to [claimant's] work environment in that the nodularity may be due to the inhalation of coal mine dust." Employer's Exhibit 7. Weighing the medical opinions of record, the administrative law judge found, within his discretion, that the diagnoses of pneumoconiosis rendered by Drs. Amerson and Fritzhand "are outweighed by the contrasting opinions rendered by Drs. Broudy, Dahhan, Fino and Jarboe, most of whom are pulmonary specialists," Decision and Order at 11. *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); see also *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985).<sup>2</sup> Further, the administrative law judge specifically noted Dr. Amerson's report of his October 5, 1994, November 11, 1994, and May 6, 1995 examinations, Director's Exhibit 16, as well as Dr. Amerson's testimony that he had treated

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20 C.F.R. §718.202(a)(2), and properly determined that the presumptions contained at Section 718.202(a)(3) are inapplicable to this claim. See 20 C.F.R. §§718.202(a)(3), 718.304, 718.305 and 718.306.

<sup>2</sup>Inasmuch as the administrative law judge provided a valid basis for his weighing of the medical opinion evidence, we deem to be harmless error his decision to accord less value to the opinions of Drs. Amerson and Powell because their findings of pneumoconiosis are based in part on positive x-ray readings which the administrative law judge determined to be against the weight of the x-ray evidence of record. See *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161, 1-164 n.5 (1988).

claimant seven times between 1994 and 1996, Decision and Order at 8-9. The administrative law judge did not discredit Dr. Amerson's opinion, but rather, found his diagnosis of pneumoconiosis to be outweighed by the contrary evidence, see discussion *supra*. Accordingly, the administrative law judge's weighing of Dr. Amerson's opinion is not inconsistent with the decision of the United States Court of Appeals for the Sixth Circuit in *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993)(opinions of treating physicians are entitled to greater weight than those of non-treating physicians.) Inasmuch as substantial evidence supports the administrative law judge's findings that the medical opinion evidence fails to establish the existence of pneumoconiosis under Section 718.202(a)(4), they are affirmed.

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis under Part 718, an essential element of entitlement, we further affirm the administrative law judge's denial of benefits in the instant case, as a finding of entitlement is precluded. *Trent, supra; Perry, supra; see also Director, OWCP v. Greenwich Collieries, [Ondecko]*, 114 S.Ct. 2251, 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).

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

SO ORDERED.

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JAMES F. BROWN  
Administrative Appeals Judge

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NANCY S. DOLDER  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge