BRB No. 98-0596 BLA

DENNIS LEWIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
APOGEE COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-1207) of Administrative Law Judge Thomas F. Phalen, Jr., 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 sixteen 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 5. The administrative law judge considered the evidence of

[1] Claimant filed his claim for benefits on May 5, 1995, which was denied by the Director, Office of Workers' Compensation Programs (the Director), for failure to establish total disability due to pneumoconiosis arising out of coal mine employment. Director's Exhibit 1. On October 7, 1996, claimant filed an affidavit alleging that he never received a notice of denial and requested a hearing. Director's Exhibit 16. The Director again denied the claim on all elements on February 11, 1997.

record and found that it 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 contends that the evidence of record is sufficient to establish the existence of pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.204(c). Employer has not responded on appeal. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he would not participate 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 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 permissibly found that the evidence of record was

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Director's Exhibit 29. Claimant subsequently requested a hearing on February 14, 1997. Director's Exhibit 28.

[2] The administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2) and (3) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-616 (1983).

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 11, 13, 14, 25; Employer's Exhibits 1-4; Decision and Order at 10; *Staton v. Norfolk and 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); *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990). We therefore affirm the administrative law judge's weighing of the x-ray evidence as rational and in accordance with law.

Further, the administrative law judge considered the entirety of the medical opinion evidence of record and permissibly found that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4). The administrative law judge reviewed the relevant evidence of record and found that the opinions of Drs. Myers and Vaezy, diagnosing pneumoconiosis, and the opinions of Drs. Dahhan and Lockey, who opined that claimant did not suffer from pneumoconiosis, were all well documented and reasoned. Director's Exhibit 11, 25; Claimant's Exhibit 4; Decision and Order at 12; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge then rationally concluded that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis by a preponderance of the evidence as the medical opinions were in equipoise. Director's Exhibits 11, 25; Employer's Exhibit 4; Decision and Order at 12; *Director, OWCP, v. Greenwich Colleries [Ondecko]*, 114 S.Ct. 2251 (1994), *aff'g* 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Perry*, *supra*. In addition, contrary to claimant's contention, the administrative law judge is not required to defer to the opinion of a physician who examined the miner twice, especially where, as in the instant case, all the physicians examined the miner and Dr. Vaezy noted that on the second visit, claimant was being checked for the flu.[3] *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988); Director's Exhibit 25; Decision and Order at 11. 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 pursuant to Section 718.202(a) as it is supported by substantial evidence and is in accordance with law.

[3] The administrative law judge properly noted that Dr. Vaezy examined claimant on July 12, 1996 and July 19, 1996. Decision and Order at 11; Director's Exhibit 25.

Inasmuch as claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement pursuant to Part 718, entitlement thereunder is precluded.[4] *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

[4] As we affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a), we need not address claimant's contentions pursuant to 20 C.F.R. §718.204(c). *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).