BRB No. 89-0346 BLA

ANDY CANTRELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JEWELL RIDGE COAL CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
CANTRELL BROTHERS COAL COMPANY	)	
	)	
Employers-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of E. Earl Thomas, Administrative Law Judge, United States Department of Labor.

Gerald F. Sharp (Browning, Morefield, Lamie and Sharp, P.C.), Lebanon, Virginia, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for Cantrell Brothers Coal Company, employer.

Before: SMITH and DOLDER, Administrative Appeals Judges, and NEUSNER, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (86-BLA-4461) of Administrative Law Judge E. Earl Thomas 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. §90l et seq. (the Act). The administrative law judge granted the motion by Jewell Ridge Coal Corporation to be dismissed as the responsible operator, and found that Cantrell Brothers Coal Company was the sole responsible operator herein pursuant to 20 C.F.R. §725.491. The administrative law judge then reviewed this claim pursuant to the provisions of 20 C.F.R. Part 718, and credited claimant with thirty-six years of qualifying coal mine employment. The administrative law judge found, however, that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202, and accordingly denied benefits. Claimant appeals, challenging the administrative law judge's findings under Section 718.202(a)(1), (a)(2), and (a)(4), and contending that the evidence establishes entitlement to benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not participated in

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

this appeal.[1]

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989); Trent v. Director, OWCP, 11 BLR 1-26 (1987).

Claimant first argues that the administrative law judge's analysis pursuant to Section 718.202(a)(1) was inadequate in light of the twenty-one positive x-ray interpretations of record by qualified readers. We disagree. The administrative law judge properly considered the qualifications of the readers and acted within his

[1] The administrative law judge's findings under Sections 725.491 and 718.202(a)(3), and with regard to length of coal mine employment are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

discretion in finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), based on the numerical preponderance of negative interpretations by B-readers, see generally Prater v. Clinchfield Coal Co., 12 BLR 1-121 (1989); Trent, supra; and as all of the most recent films were interpreted as negative for pneumoconiosis. See generally Handy v. Director, OWCP, BLR , BRB No. 88-4233 BLA (Nov. 14, 1990). The administrative law judge's findings pursuant to Section 718.202(a)(1) are supported by substantial evidence, and we hereby affirm them.

Claimant next maintains that the biopsy evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(2). Specifically, claimant argues that the opinions which diagnosed pneumoconiosis, i.e., those provided by Dr. Ferguson, the pathologist; Dr. Byers, claimant's treating physician; Dr. Buddington, an examining physician; and Dr. Stefanini, a reviewing pathologist, outweighed the contrary opinions of Drs. Hansbarger and O'Connor, who were reviewing pathologists. The administrative law judge, however, permissibly determined that the two pathology reports of Dr. Ferguson were insufficient to establish the existence of pneumoconiosis as defined in the Act and regulations, as they merely diagnosed adenocarcinoma of the lung and fibrosis with focal anthracotic pigmentation, but did not explicitly diagnose pneumoconiosis. Decision and Order at 5, 6; Director's Exhibit 13; Employer's Exhibit 5. See 20 C.F.R. §718.201; see generally Dobrosky

v. Director, OWCP, 4 BLR 1-680 (1982). Contrary to claimant's argument, Dr. Byers did not examine the biopsy slides and thus did not personally render an opinion pursuant to Section 718.202(a)(2). Decision and Order at 6, 7; Director's Exhibit 26; Claimant's Exhibit 1. The administrative law judge further permissibly found that the opinion of Dr. Buddington was too qualified to support a finding of pneumoconiosis, as the physician admitted that "[i]t is difficult to totally evaluate the case for the presence or absence of coalworkers' pneumoconiosis since much of the lung is overrun by scar." Decision and Order at 6; Claimant's Exhibit 2. See generally Justice v. Island Creek Coal Co., 11 BLR 1-91 (1988); Snorton v. Zeigler Coal Co., 9 BLR 1-106 (1986). The administrative law judge consequently determined that a numerical preponderance of the remaining reviewing pathologists found no evidence of pneumoconiosis, and therefore acted within his discretion in finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2). Decision and Order at 5, 6; Claimant's Exhibit 1; Employer's Exhibits A, C. See generally Prater, supra. We hereby affirm the administrative law judge's findings pursuant to Section 718.202(a)(2), as they are supported by substantial evidence.

Finally, claimant contends that the administrative law judge did not provide an adequate rationale for his finding that the medical opinions of record failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). We disagree. The administrative law judge provided valid reasons for according little

weight to the opinions of Drs. Byers and Buddington,[2] and found that the remaining reports of Drs. Baxter, Endres-Bercher, Dahhan and Castle were well-reasoned and documented. See Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987); Lucostic v. United States Steel Corp., 8 BLR 1-46 (1985). Although Dr. Baxter diagnosed pneumoconiosis, Drs. Endres-Bercher,[3] Dahhan and Castle found no evidence of pneumoconiosis. Consequently, the administrative law judge rationally determined that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) by a preponderance of the evidence. Decision and Order at 7; Director's Exhibit 14; Employer's Exhibits C, D, E, G; see Trent, supra. The administrative law judge's findings pursuant to Section 718.202(a)(4) are based on substantial evidence, and we may not substitute our judgment. See Anderson, supra. Inasmuch as claimant has failed to establish a requisite element of entitlement under Part 718, i.e., the existence of pneumoconiosis, we affirm the administrative law judge's finding that claimant is not entitled to benefits. See Trent, supra.

[2] Contrary to claimant's arguments, the administrative law judge permissibly found that Dr. Byers' opinion was unreasoned, as the physician failed to provide any documentation to support his diagnosis of pneumoconiosis. Decision and Order at 6, 7; Director's Exhibit 26; Claimant's Exhibit 1. See generally Moore v. Dixie Pine Coal Co., 8 BLR 1-334 (1985); Peskie v. United States Steel Corp., 8 BLR 1-126 (1985). Although Dr. Buddington's opinion was documented, the administrative law judge rationally found that it was equivocal. See Justice, supra.

[3] Contrary to claimant's argument, Dr. Endres-Bercher's diagnosis of "scar cell carcinoma secondary to anthracotic deposition" is not sufficient to come within the regulatory definition of "pneumoconiosis" pursuant to 20 C.F.R. §718.201.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

FREDERICK D. NEUSNER
Administrative Law Judge