BRB No. 05-0845 BLA

STANFORD HOSKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PERRY COUNTY COAL CORPORATION	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 07/18/2006
	)	
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 – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order – Denial of Benefits (04-BLA-5589) of Administrative Law Judge Robert L. Hillyard in a miner's 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 the miner with twenty years of coal mine employment. Decision and Order at 3-4. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the evidence insufficient to establish both the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total respiratory disability pursuant to 20 C.F.R. §718.204(b). *Id.* at 8-12. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Claimant's Brief at 3-4. Additionally, claimant contends that the administrative law judge erred in failing to find total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 4-6. Claimant further asserts that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete and credible pulmonary evaluation as required by the Act. *Id.* at 4. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director responds, arguing only that remand for a credible pulmonary evaluation is not needed in this case.[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 rational, supported by substantial evidence, and in accordance with applicable 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).

To establish entitlement to benefits under Part 718 in a living miner's claim, a 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.

[1]Claimant is Stanford Hoskins, the miner, who filed his claim for benefits on April 18, 2002. Director's Exhibit 2.

[2]We affirm the administrative law judge's finding of twenty years of coal mine employment and his findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4), as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

§§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant initially contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge considered four readings of two x-rays, taken on June 13, 2002 and February 10, 2004.[3] Of these four x-ray interpretations, the administrative law judge noted that Dr. Simpao, who is neither a B reader[4] nor a Board-certified radiologist, read the June 13, 2002 x-ray as positive for the existence of pneumoconiosis and Dr. Kendall, who is a B reader and a Board-certified radiologist, found this x-ray to be negative. Decision and Order at 8. The administrative law judge accorded greater weight to Dr. Kendall's reading, based on his superior qualifications, and found that this x-ray does not support a finding of the existence of pneumoconiosis. *Id.* The administrative law judge also noted that Dr. Dahhan, a B reader, and Dr. Halbert, a B reader and a Board-certified radiologist, found the February 10, 2004 x-ray to be negative for the existence of pneumoconiosis. *Id.* Accordingly, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *Id.*

Claimant contends that the administrative law judge erred: in considering the qualifications of the physicians in weighing the x-ray evidence, in placing substantial weight on the numerical superiority of the x-ray readings, and in selectively analyzing the x-ray evidence. Claimant's Brief at 3-4. Contrary to claimant's assertion, the administrative law judge permissibly considered the radiological qualifications of the x-ray readers. *See Johnson v. Island Creek Coal Co.*, 846 F.2d 364, 11 BLR 2-161 (6th Cir. 1988); *Creech v. Benefits Review Board*, 841 F.2d 706, 11 BLR 2-86 (6th Cir. 1988); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Similarly, because the administrative law judge considered the x-ray readers' qualifications, he did not rely solely on the numerical superiority of the negative readings in rendering his finding. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55,

[3]In addition, Dr. Barrett interpreted claimant's June 13, 2002 x-ray for film quality only. Director's Exhibit 10.

[4]A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

19 BLR 2-271 (6th Cir. 1995). Additionally, claimant's assertion that the administrative law judge selectively analyzed the x-ray evidence is without merit, because the administrative law judge thoroughly considered both the positive and negative x-ray interpretations in the record. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984); *see generally Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Therefore, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[5]

Because claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), we affirm the administrative law judge's finding that the existence of pneumoconiosis is not established pursuant to 20 C.F.R. §718.202(a).

Claimant next argues that, given the administrative law judge's finding at Section 718.202(a)(4), that Dr. Simpao's opinion is not well-reasoned, the Director failed to provide him with a complete and credible pulmonary evaluation, as required under Section 413(b) of the Act, 30 U.S.C. §923(b).[6] In considering Dr. Simpao's opinion pursuant to Section 718.202(a)(4), the administrative law judge accorded this physician's opinion less weight because of his "lack of pulmonary credentials" and because of the "lack of support for his diagnosis." Decision and Order at 10. In response to claimant's assertion, the Director contends that the administrative law judge's according of less weight to Dr. Simpao's pneumoconiosis diagnosis "does not mean that the Director failed to provide [claimant] with an adequate pulmonary evaluation." Director's Brief at 2. The Director states that the administrative law judge "did not entirely reject Dr. Simpao's opinion. Rather, he accorded [Dr. Simpao's] pneumoconiosis diagnosis 'less weight.'" *Id.* The Director maintains that he "is only required to provide miners with a complete and credible examination, not a dispositive one" and the fact that the administrative law

[5]Although in discussing the administrative law judge's Section 718.202(a)(1) finding, claimant states in his brief that "[p]ursuant to §725.414, there are limitations to the amount of evidence that each party can submit," claimant does not identify any violation of the limitations at 20 C.F.R. §725.414, nor is one apparent in this case. *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

[6]Claimant selected Dr. Simpao to perform a pulmonary evaluation on him. Director's Exhibit 9. By report dated June 13, 2002, Dr. Simpao diagnosed coal workers' pneumoconiosis and found that claimant suffers from a moderate impairment, caused by pneumoconiosis, which would prevent him from performing his usual coal mine employment. Director's Exhibit 10.

judge "accord[ed] Dr. Simpao's diagnosis 'less' weight, rather than no weight, establishes that his opinion retained some credibility and therefore satisfies section 413(b) of the Act." *Id.* We agree with the position taken by the Director, whose duty it is to ensure the proper enforcement and lawful administration of the Act, *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-87 (1994); *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989)(*en banc order*), that a remand of the case for a full pulmonary evaluation is not warranted, based on the facts of this case. *See generally Cline v. Director, OWCP*, 972 F.2d 234, 16 BLR 2-137 (8th Cir. 1992). Therefore, we decline to remand this case on that basis.

Because claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), a requisite element of entitlement under Part 718, we affirm the administrative law judge's denial of benefits.[7] *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[7]In light of the foregoing, it is unnecessary for us to address claimant's assertions regarding total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), as a finding of entitlement is precluded in this case. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

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