BRB No. 06-0231 BLA

D. JOE HENSLEY)
)
Claimant-Petitioner)
)
v.)
)
CANDLE RIDGE MINING,) DATE ISSUED: 07/24/2006
INCORPORATED)
)
and)
)
KY EMPLOYERS MUTUAL INSURANCE)
)
Employer/Carrier-Respondent)
)
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.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (04-BLA-5281) of Administrative Law Judge Rudolf L. Jansen (the administrative law judge) rendered 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 that the record established a coal mine employment history of twenty-four years, but that the evidence failed to establish the existence of coal workers' pneumoconiosis pursuant

to 20 C.F.R. §718.202(a)(1)-(4) or a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's findings that the x-ray interpretation evidence and the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4). Claimant also contends that the administrative law judge erred in finding that the evidence failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, is not participating in 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 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove 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 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 first contends that the administrative law judge erred in failing to find that the x-ray interpretation evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Claimant asserts that the administrative law judge improperly relied upon the negative x-ray interpretations of physicians with superior credentials and the numerical superiority of the negative x-ray readings, noting that the Board has held that an administrative law judge is not required to defer to doctors with superior qualifications, nor is he required to accept as conclusive the numerical weight of x-ray interpretations. Claimant's Brief at 2-3.

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[1] The administrative law judge's length of coal mine employment determination as well as his findings that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (3) or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge found that the record contains eight x-ray interpretations of four x-rays. Of these eight, the administrative law judge found that three were positive for the existence of pneumoconiosis. Director's Exhibits 11, 12; Claimant's Exhibit 1, while the weight of the readings by the physicians with the superior qualifications of B-reader and/or board-certified radiologist[2] was negative for the existence of pneumoconiosis. Decision and Order at 6, 10; Director's Exhibits 13, 15, 16.

Contrary to claimant's argument, in finding that the x-ray evidence did not establish the existence of pneumoconiosis, the administrative law judge permissibly gave greater weight to the preponderance of the negative x-ray interpretation evidence by the physicians who possessed superior radiological qualifications. Decision and Order at 10. The administrative law judge's evaluation of the x-ray evidence constituted a proper qualitative and quantitative analysis of the x-ray interpretation evidence.[3] 20 C.F.R. §718.202(a)(1); *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). Accordingly, we reject claimant's argument regarding the administrative law judge's analysis of the x-ray evidence at Section 718.202(a)(1) and affirm his finding that the x-ray interpretation evidence failed to establish the existence of pneumoconiosis. In addition, we reject claimant's contention that the administrative law judge "may" have "selectively analyzed" the x-ray evidence. Claimant's Brief at 3. This argument is rejected as claimant provides no support for this general allegation. *White v. New White Coal Co.*, 23 BLR 1-1, 1-5 (2004); *see Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986).

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[2] 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 for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Company, Inc. of Virginia 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). A board-certified radiologist is a physician who has been certified by the American Board of Radiology as having a particular expertise in the field of radiology.

[3] Review of Dr. Broudy's x-ray interpretation of February 23, 2005, Employer's Exhibit 3, demonstrates a reading of 0/1 and not 0/0 as found by the administrative law judge. The administrative law judge's error is harmless, however, see *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1985) inasmuch as a 0/1 reading does not constitute a positive reading of pneumoconiosis. *Canton v. Rochester & Pittsburgh Coal Co.*, 8 BLR 1-475 (1986); *Stanford v. Director, OWCP*, 7 BLR 1-541 (1984).

Claimant next challenges the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Claimant asserts that the administrative law judge should have credited the documented and reasoned opinions of Dr Baker, Director's Exhibit 11, and Dr. Simpao, Director's Exhibit 12, both of whom found coal workers' pneumoconiosis and a respiratory impairment/disease due to coal mine employment based on physical examination, medical and work histories, pulmonary function study, arterial blood gas study and chest x-ray. Claimant's Brief at 4-5.

In considering the opinions of Drs. Baker and Simpao, as well as the opinions of Drs. Broudy and Lockey, who found that claimant did not suffer from pneumoconiosis or any condition arising out of coal mine employment, Director's Exhibit 11; Employer's Exhibit 3, the administrative law judge concluded that Drs. Baker, Lockey and Broudy all possessed the superior credentials of Board-certified pulmonolgists and all submitted well-reasoned and well documented opinions regarding the existence of pneumoconiosis, but that inasmuch as Dr. Baker was the only physician, among the three, to diagnose the existence of pneumoconiosis or a respiratory disease arising out of coal mine employment, the preponderance of the medical opinion evidence, by the better qualified physicians, failed to establish the existence of pneumoconiosis. Decision and Order at 16. This constitutes a permissible exercise of the administrative law judge's discretion. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 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); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). We reject, therefore, claimant's contention and we affirm the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Because claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement pursuant to 20 C.F.R. Part 718, entitlement is precluded and we need not address claimant's argument concerning total disability at 20 C.F.R. §718.204(b). *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge