BRB No. 08-0805 BLA

R.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	DATE ISSUED: 07/10/2009
	)	
and	)	
	)	
JAMES RIVER COAL COMPANY	)	
	)	
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 - Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

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

Todd P. Kennedy (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (2006-BLA-05879) of Administrative Law Judge Donald W. Mosser 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). This case involves a subsequent claim filed

on July 14, 2005.[1] 20 C.F.R. §725.309. The administrative law judge credited claimant with 5.44 years of coal mine employment based on a stipulation of the parties, and adjudicated the claim pursuant to 20 C.F.R. Part 718. Because he determined that the newly submitted medical evidence is sufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant demonstrated a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309. However, addressing the merits of entitlement, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in weighing the x-ray and medical opinion evidence pursuant to Section 718.202(a)(1) and (a)(4). Claimant also argues that the administrative law judge erred in failing to find that he established a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv). In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief unless requested to do so by the Board.[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.[3] 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).

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[1] Claimant's prior claim for benefits, filed on April 24, 1978, was denied by the district director on January 6, 1981, because claimant failed to establish any of the requisite elements of entitlement. Director's Exhibit 1.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that the newly submitted evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2) and, thus, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). In addition, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (3). *Id*.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mining employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 4.

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, 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. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to Section 718.202(a)(1),[4] claimant contends that the administrative law judge erred in finding that claimant failed to establish the existence of pneumoconiosis by a preponderance of the x-ray evidence. In challenging the administrative law judge's weighing of the x-ray evidence, claimant merely states that the administrative law judge need not defer to the readings by physicians with superior qualifications, nor "accept as conclusive the numerical superiority of x-ray interpretations." Claimant's Brief at 3. In addition, claimant contends that the administrative law judge "may have 'selectively analyzed' the x-ray evidence." *Id*. Claimant's arguments are without merit.

Contrary to claimant's contention, an administrative law judge should consider the quantity of the x-ray evidence in light of the qualifications of the interpreting physicians. *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 58, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). In the present case, the administrative law judge considered the quality and quantity of the x-ray evidence, and permissibly relied on the weight of the interpretations by the better qualified readers.[5] *Staton*, 65 F.3d at 58, 19 BLR at 2-279; *see White v. New White Coal*

[4] The administrative law judge initially considered the newly submitted evidence and found that the x-ray and medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 9-10. Subsequent to determining that claimant had established a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309, the administrative law judge considered the evidence submitted with the miner's prior claim, which was denied in 1981. Decision and Order at 12. However, he found this evidence entitled to little weight because it was more than twenty-four years older than the evidence associated with the miner's current application. *Id*. Therefore, the administrative law judge found that nothing in the evidence from the previous claim changes his finding that the evidence is insufficient to establish the existence of pneumoconiosis and, thus, "a review of the entire record fails to establish that the miner has pneumoconiosis." *Id*.

[5] The administrative law judge considered six readings of three x-ray films dated August 30, 2005, December 9, 2005 and March 20, 2007. The administrative law judge found the readings of the August 30, 2005 x-ray to be in equipoise because Dr. Alexander, a B reader and Board-certified radiologist, read the film as positive for

Co., Inc., 23 BLR 1-1 (2004); Decision and Order at 9-10. We, therefore, reject claimant's assertion that the administrative law judge "may have" selectively analyzed the x-ray evidence, as claimant has provided no support for that assertion. *See White*, 23 BLR at 1-5. As claimant has not identified with specificity any substantive error of law or fact in the administrative law judge's weighing of the x-ray evidence at Section 718.202(a)(1), the Board has no basis upon which to review his findings thereunder. *See Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984*); Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Consequently, we affirm the administrative law judge's finding that the weight of the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1). *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 272-76, 18 BLR 2A-1, 2A-6-9 (1994).

Claimant also argues that the administrative law judge erred in finding that the medical opinions did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). In challenging the administrative law judge's finding, claimant merely sets forth the general standards by which an administrative law judge should weigh the relevant medical evidence, such as the principle that an administrative law judge may not discredit a medical opinion merely because it is based on a positive x-ray reading that is contrary to the administrative law judge's findings; or, that the administrative law judge may not substitute his own interpretation of the medical data for that of the physician. Claimant's Brief at 4. In addition, claimant contends that a "documented" opinion is one that sets forth the clinical findings, observations, facts and other data relied on by the physician. Claimant's Brief at 4. Claimant has not set forth a meritorious argument.

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pneumoconiosis, whereas, Dr. Wheeler, also a dually-qualified radiologist, read the film as negative for pneumoconiosis. Decision and Order at 9; Claimant's Exhibit 1; Employer's Exhibit 5. The administrative law judge also noted that the initial positive reading of the August 30, 2005 x-ray by Dr. Baker, a B reader, was entitled to little weight because Dr. Baker, in a later narrative report, changed his opinion and stated that he did not believe that the x-ray showed the presence of pneumoconiosis. Decision and Order at 9; Director's Exhibit 35; Employer's Exhibit 2. The administrative law judge then found the December 9, 2005 x-ray to be positive for pneumoconiosis, according greater weight to Dr. Alexander's positive reading, over the negative reading by Dr. Broudy, a B reader, because of his better qualifications. Decision and Order at 10; Director's Exhibit 20; Claimant's Exhibit 2. Lastly, the administrative law judge found the March 20, 2007 film to be negative for pneumoconiosis, based on the uncontradicted negative reading by Dr. Dahhan, a B reader. Decision and Order at 10; Employer's Exhibit 2.

The administrative law judge, within a proper exercise of his discretion, found that the opinion of Dr. Baker is insufficient to establish the existence of pneumoconiosis, based on Dr. Baker's supplemental opinions stating that, in light of claimant's 5.44 years of coal mine employment, the changes seen on x-ray and any pulmonary impairment are not due to claimant's coal dust exposure, but would be due to his long smoking history. 20 C.F.R. §718.201; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-123 (6th Cir. 2000); *Nance v. Benefits Review Board*, 861 F.2d 68, 71, 12 BLR 2-31, 2-36 (4th Cir. 1988); *Henley v. Cowan & Co., Inc.*, 21 BLR 1-147, 1-150 (1999); *Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48, 1-52 (1990); Decision and Order at 10; Director's Exhibits 15, 35; Employer's Exhibit 2. In addition, the administrative law judge correctly determined that the opinions of Drs. Broudy and Dahhan, that there was no evidence of pneumoconiosis, are insufficient to establish the existence of pneumoconiosis, because they found no evidence of clinical pneumoconiosis and opined that claimant did not suffer from a respiratory or pulmonary impairment due to claimant's coal dust exposure, *i.e.*, legal pneumoconiosis. 20 C.F.R. §718.201; *see Cornett*, 227 F.3d at 576, 22 BLR at 2-123; *Nance*, 861 F.2d at 71, 12 BLR at 2-36; *Henley*, 21 BLR at 1-150; *Gorzalka*, 16 BLR at 1-52; Decision and Order at 10; Director's Exhibits 20, 41; Employer's Exhibits 2, 4. Because the administrative law judge rationally found that the record contains no credible, affirmative evidence of pneumoconiosis, claimant's contention that the administrative law judge erred in substituting his interpretation of the medical evidence for that of a physician lacks merit. Consequently, since claimant does not otherwise allege any specific errors in the administrative law judge's weighing of the evidence in this case, we affirm his finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See Cox*, 791 F.2d at 446, 9 BLR at 2-49; *Sarf*, 10 BLR at 1-121; *Fish*, 6 BLR at 1-109.

Since claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement under Part 718, an award of benefits is precluded. *Hill*, 123 F.3d at 415-16; 21 BLR at 2-196-7; *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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BETTY JEAN HALL
Administrative Appeals Judge