

BRB Nos. 04-0521 BLA
and 04-0521 BLA-A

OMAS WAYNE SMITH)
)
 Claimant-Petitioner)
 Cross-Respondent)
)
 v.)
)
 SHAMROCK COAL COMPANY)
)
 and)
) DATE ISSUED: 03/25/2005
 SUN COAL COMPANY, INCORPORATED)
)
 Employer/Carrier-Respondent)
 Cross-Petitioner)
)
 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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer/carrier.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (03-BLA-5200) of Administrative Law Judge Daniel J. Roketenetz 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). Claimant filed a claim for benefits on April 19, 2001. Director’s Exhibit 2. The administrative law judge initially noted that the record contained a medical report from Dr. Repsher, which had not been designated as evidence submitted by any party. The administrative law judge found that while employer had proffered Dr. Repsher’s report at the hearing, the report also exceeded the evidentiary limitations at 20 C.F.R. §725.414. He thus decided to exclude Dr. Repsher’s opinion from consideration. The administrative law judge then found, based on the record evidence, that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R §718.202(a) and that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

Claimant appeals, arguing that the administrative law judge erred in finding that he failed to establish the existence of pneumoconiosis based on the medical opinion evidence at 20 C.F.R. §718.202(a)(4). Claimant also challenges the administrative law judge’s determination that he is not totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv).¹ Employer responds, urging affirmance of the denial of benefits. Employer has also filed a cross-appeal, arguing that 20 C.F.R. §725.414 is in an invalid regulation, and that the administrative law judge erred in excluding the medical opinion of Dr. Repsher from consideration on the basis that it was submitted in excess of the evidentiary limitations. The Director, Office of Workers’ Compensation Programs (“the Director”), filed a brief addressing employer’s arguments on cross-appeal. The Director maintains that the administrative law judge properly excluded Dr. Repsher’s opinion pursuant to 20 C.F.R. §725.414. The Director has declined to address the merits of entitlement.

¹ Claimant does not challenge the administrative law judge’s finding that he was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3) or that he failed to establish a totally disabling respiratory or pulmonary impairment based on all of the pulmonary function study and arterial blood gas study evidence, which was non-qualifying for total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii). Claimant does not challenge the administrative law judge’s finding that he was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 9, 15-16.

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

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish the existence of 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 prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the evidence of record, we affirm as supported by substantial evidence the administrative law judge's denial of benefits. Specifically, we reject claimant's contention that the administrative law judge erred in weighing the x-ray evidence at 20 C.F.R. §718.202(a)(1). Claimant's Brief at 2-4. The administrative law judge correctly noted that the record included seven readings of three x-rays, of which there were four negative and two positive readings, and one quality reading. He then properly assigned greatest probative weight to the negative readings for pneumoconiosis by those physicians who were both Board-certified radiologists and B-readers. See *Staton v. Norfolk & Western Railway Co.*, 65 F.3d 55, 59-60, 19 BLR 2-271, 2-279-281 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); Decision and Order at 8. Because he found that the preponderance of the x-ray readings by the more qualified physicians was negative for pneumoconiosis, the administrative law judge determined that claimant failed to carry his burden of proof at 20 C.F.R. §718.202(a)(1). This finding is affirmed as it is supported by substantial evidence.

Likewise, contrary to claimant's contention, the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis based on the medical opinion evidence at 20 C.F.R. §718.202(a)(4). The administrative law judge rejected Dr. Baker's opinion that claimant has pneumoconiosis because he found that Dr. Baker based his diagnosis of pneumoconiosis primarily upon his own positive x-ray reading of the March 31, 2001 x-ray, and the administrative law judge found that Dr. Baker did not explain the basis for his opinion.² Decision and Order at 13. The

² The administrative law judge was not required to accord greater weight to the opinion of Dr. Baker based on his status as a treating physician. The Sixth Circuit has

administrative law judge also permissibly found Dr. Simpao's opinion that claimant had both clinical and legal pneumoconiosis, to be outweighed by the contrary opinions of Drs. Broudy and Rosenberg, that claimant had no evidence of pneumoconiosis, because he found the opinions of Drs. Broudy and Rosenberg to be better supported by the normal objective evidence. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 15. The administrative law judge was also persuaded by Dr. Broudy's deposition testimony explaining why he opined that claimant's chronic bronchitis was due to smoking and not coal dust exposure. Decision and Order at 15. We thus affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) as it is supported by substantial evidence.

Because claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement, our review could stop here. Notwithstanding, the administrative law judge also assumed *arguendo* that claimant had pneumoconiosis and therefore weighed the evidence relevant to total disability. Claimant does not challenge the administrative law judge's finding that he failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). His sole contention is that the administrative law judge erred in weighing the opinions of Drs. Baker and Simpao at 20 C.F.R. §718.204(b)(2)(iv). Claimant's Brief at 7-10. This argument is rejected as without merit. The administrative law judge properly found that Dr. Baker's opinion advising against further coal dust exposure did not constitute an opinion that claimant was totally disabled by a respiratory or pulmonary impairment. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 56, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Company, Inc.*, 12 BLR 1-83 (1988); Decision and Order.18. The administrative law judge also properly found that Dr. Simpao failed to explain how claimant was totally disabled for his usual coal mine work by a mild respiratory impairment. *King v. Cannelton Industries, Inc.*, 8 BLR 1-146 (1985); *Massey v. Eastern Associated Coal Corp.*, 7 BLR 1-37 (1984); *Moore v. Hobet Mining & Construction Co.*, 6 BLR 1-706 (1983). Decision and Order at 18. In contrast, the administrative law judge permissibly assigned controlling weight to the opinions of Drs. Broudy and Rosenberg, that claimant is not

held that there is no rule requiring deference to the opinion of a treating physician. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Rather a treating physician should be given deference based upon their power to persuade. *Id.* In this case, the administrative law judge also found Dr. Baker's opinion to be conclusory and unreasoned as Dr. Baker check-marked "yes" on a form asking whether claimant's "disease" was the result of "coal dust exposure." The administrative law judge properly found that Dr. Baker failed to provide any discussion as to how he reached his medical conclusions. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 15.

totally disabled, as he found their opinions were reasoned and better-supported by the objective evidence overall. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 18. Consequently, we affirm as supported by substantial evidence, the administrative law judge's finding that claimant was not totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Because claimant was unable to establish the existence of pneumoconiosis and his total disability, requisite elements of entitlement, benefits were precluded. *See Trent*, 11 BLR at 1-26; *Perry*, 9 BLR at 1-1. As we affirm the administrative law judge's denial of benefits, we decline to address the arguments raised by employer on cross-appeal.³

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

³ We note that any error committed by the administrative law judge in excluding Dr. Repsher's report was at best harmless error, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), given that the administrative law judge denied benefits based on his crediting of employer's remaining evidence.