BRB No. 07-0828 BLA

J.L. Claimant-Petitioner v. SOUTHERN HILLS MINING COMPANY, INCORPORATED and KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/21/2008 DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

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

David H. Neeley (Neeley Law Office, P.S.C.), Prestonsburg, Kentucky, for employer.

Jeffrey S. Goldberg (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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-Denying Benefits (2006-BLA-5298) of Administrative Law Judge Alan L. Bergstrom 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 claimant established a qualifying coal mine employment history of twenty-six and two-thirds 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 the presence of a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), (c). Decision and Order at 3-18. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in not finding the existence of pneumoconiosis established based on x-ray evidence at 20 C.F.R. §718.202(a)(1), and erred in not finding total respiratory disability established based on medical opinion evidence at 20 C.F.R. §718.204(b)(iv). In addition, claimant contends that because the administrative law judge rejected Dr. Rasmussen's medical opinion on the issue of pneumoconiosis, the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation on the issue of pneumoconiosis pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b). Employer responds, urging that the denial of benefits be affirmed. The Director responds, asserting that the Board should reject claimant's argument that he failed to provide claimant with a complete pulmonary evaluation on the issue of pneumoconiosis.[1] The Director contends that he is only required to provide claimant with a complete, credible evaluation, not a dispositive one.[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,

[1] The Director, Office of Workers' Compensation Programs, further argues that, even if the administrative law judge had credited Dr. Rasmussen's opinion on the issue of pneumoconiosis, claimant would not be entitled to benefits because the record does not contain any evidence supportive of a totally disabling coal mine related disease. Director's Letter at 2.

[2] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination and the finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any element of entitlement precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Claimant first contends that the administrative law judge erred in relying on the qualifications of the physicians who interpreted the x-rays and the weight of the x-ray evidence to find that it did not establish pneumoconiosis at Section 718.202(a)(1). In this case, however, the administrative law judge properly found that the x-ray evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(1), as it was all read as negative for pneumoconiosis.[4] Decision and Order at 6-7; 20 C.F.R. §§718.102(c), 718.202(a)(1); *Staton v. Norfolk & 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). Further, claimant's contention that the administrative law judge "may have selectively analyzed" the x-ray evidence is rejected as claimant points to no evidence or finding by the administrative law judge that supports this contention. *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). The administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) is, therefore, affirmed.

Claimant also contends that because the administrative law judge rejected Dr. Rasmussen's opinion on the issue of pneumoconiosis, the Director failed to provide him

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

[4] In considering the x-ray evidence, the administrative law judge accurately found that Dr. Rasmussen, a B reader, read an April 20, 2005 x-ray as negative for pneumoconiosis, Director's Exhibit 12, and that Dr. Halbert, also a B reader, read the same x-ray as negative for the disease. Director's Exhibit 28. The administrative law judge further properly found that Dr. Dahhan, a B reader, read an April 14, 2005 x-ray as negative for pneumoconiosis, Director's Exhibit 26, and that Dr. Halbert read the same x-ray as negative for the disease, Employer's Exhibit 1.

with a complete, credible pulmonary evaluation on the issue, as required under the Act. We agree with the Director, however, that it is unnecessary to address this argument because, even if the administrative law judge had credited Dr. Rasmussen's diagnosis of legal pneumoconiosis, at Section 718.202(a)(4), "the [a]dministrative law judge's denial of benefits would still stand[,]" as Dr. Rasmussen, like Drs. Dahhan and Westerfield, concluded that claimant was not totally disabled and the record contained no contrary medical evidence. Director's Letter at 2; *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1985).[5]

Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement under 20 C.F.R. Part 718, we must affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112. Consequently, we need not address claimant's argument concerning total disability at Section 718.204(b)(2)(iv). *See Anderson*, 12 BLR at 1-112.

[5] The record consists of two pulmonary function studies and two blood gas studies, all of which were non-qualifying for the presence of a totally disabling respiratory impairment. Further, the record contains the medical opinions of Drs. Rasmussen, Dahhan, and Westerfield, Director's Exhibits 12, 26, 29. These physicians all opined that claimant was not totally disabled from coal mine employment. *Id.* While claimant argues that the administrative law judge has erred in concluding that claimant failed to establish total respiratory disability because he did not consider the exertional requirements of claimant's coal mine employment, we reject this argument as there is no medical support for a finding of total disability. 20 C.F.R. §718.204(b)(2)(i)-(iv); *see Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997)

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge