

BRB No. 03-0190 BLA

RAYMOND H. ECKERT)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 11/19/2003
)	
READING ANTHRACITE COMPANY,)	
INCORPORATED)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT OF)	
LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Maureen Hogan Krueger, Jenkintown, Pennsylvania, for claimant.

Frank L. Tamulonis, Jr. (Zimmerman, Lieberman, Tamulonis & Crossen), Pottsville, Pennsylvania, for employer.

Timothy S. Williams (Howard M. Radzely, Acting 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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order (2001-BLA-1020) of Administrative Law Judge Robert D. Kaplan denying benefits 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).¹ Based on the date of filing, the administrative law judge adjudicated this claim pursuant to 20 C.F.R Part 718.² The administrative law judge credited claimant with forty-five years of coal mine employment and found employer to be the responsible operator. The administrative law judge considered entitlement on the merits and found that claimant did not establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1)-(4), 718.203(b) 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).³ Accordingly, benefits were denied.

¹The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

²Claimant initially filed an application for benefits on March 2, 1999, which was denied by the district director on August 26, 1999, due to claimant's failure to establish any required element of entitlement. Director's Exhibits 1, 22. On August 31, 1999, claimant requested a formal hearing. However, on August 22, 2000, claimant requested withdrawal of his claim before the hearing could take place. Director's Exhibits 23, 75. On August 25, 2000, Administrative Law Judge Ralph A. Romano issued an order dismissing the claim, rather than granting claimant's request to withdraw the claim. Director's Exhibit 76. Claimant filed the present petition for modification on November 10, 2000, which was denied by the district director on April 20, 2001, due to claimant's failure to establish total disability due to pneumoconiosis, although claimant was able to establish the presence of coal workers' pneumoconiosis. Director's Exhibits 79, 83. Claimant thereafter requested a formal hearing. Director's Exhibit 85.

³At the hearing before the administrative law judge, the parties noted that the procedural posture of the case was somewhat unclear because Judge Romano's order dismissing the claim was not responsive to claimant's request to withdraw the claim. *See* Director's Exhibits 76, 77. The parties decided that the petition for modification should be treated as a duplicate claim, as it was filed more than a year after the district director denied benefits. The administrative law judge concurred with the parties. Decision and Order at 5; Hearing Transcript at 17-21. We hold that error, if any, in the application of the duplicate claims analysis in this case is harmless, in light of the administrative law

On appeal, claimant challenges the findings of the administrative law judge that the evidence is insufficient to establish the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter asserting that remand is required as the administrative law judge should have addressed factors other than whether the physicians providing x-ray readings were Board-certified radiologists and/or B readers.⁴

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 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*).

Pursuant to Section 718.202(a)(1), claimant contends that the administrative law judge erred in restricting the record to three interpretations of each x-ray pursuant to the revised provisions of 20 C.F.R. §725.414(a) and in excluding from consideration the x-ray readings submitted when the claim was before Judge Romano prior to claimant's motion to withdraw his claim and the administrative law judge's subsequent dismissal of the claim. Claimant fails to recognize that the hearing conducted by the administrative law judge was *de novo*. 20 C.F.R. §725.455. Accordingly, the administrative law judge acted within his discretion in reaching his own decision as to the amount of evidence that he would admit into the record. Moreover, his action was consistent with the provisions of the Administrative Procedure Act (APA), 5 U.S.C. §557 (c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). *See*

judge's consideration of entitlement based upon the merits of the case. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

⁴We affirm the findings of the administrative law judge regarding the length of coal mine employment, the designation of employer as the responsible operator, and at 20 C.F.R. §§718.202(a)(2), (3), 718.203(b), and 718.204(b)(2)(ii)-(iv), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

North American Coal Co. v. Miller, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989);⁵ *see also Underwood v. Elkay Mining, Inc.*, 105 F.3d, 21 BLR 2-23 (4th Cir. 1997); *Cline v. Westmoreland Coal Co.*, 21 BLR 1-69 (1997).

Claimant also contends that the administrative law judge erred by failing to set forth specific reasons for finding that the equal number of positive and negative x-ray readings canceled each other out and, therefore, did not satisfy claimant's burden of proving the existence of pneumoconiosis. The Director concurs with claimant, asserting that the administrative law judge should have relied upon physician qualifications in addition to B-reader status and Board certification in radiology or the assessments of the quality of the films to resolve the conflict in the x-ray evidence. We disagree. The Decision and Order indicates that the administrative law judge accurately considered each x-ray reading of record and considered the radiological qualifications of each reader in accordance with the provisions of Section 718.202(a)(1). Moreover, neither claimant nor the Director have specifically identified any relevant evidence regarding the quality of the x-ray films or the qualifications of the readers that the administrative law judge failed to address. We hold, therefore, that substantial evidence supports the administrative law judge's determination that the x-ray readings were in equipoise and, therefore, insufficient to establish the existence of pneumoconiosis.⁶ Decision and Order at 7, 11; 20 C.F.R. §718.202(a)(1); *Simpson v. Director, OWCP*, 9 BLR 1-99 (1986); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985).

We similarly reject claimant's contention that the administrative law judge erred in his consideration of the remaining evidence and elements of entitlement since "those findings are necessarily tainted by his erroneous x-ray findings." Claimant's Brief at 7. Because there is no error in the administrative law judge's weighing of the x-ray readings of record, the remainder of the administrative law judge's findings were not negatively affected. Thus, pursuant to Section 718.202(a)(4), the administrative law judge acted within his discretion in finding that the opinion in which Dr. Tavarria diagnosed pneumoconiosis was outweighed by the contrary opinions of Drs. Levinson and Fino, as

⁵Since the miner's last coal mine employment took place in the Commonwealth of Pennsylvania, the Board will apply the law of the United States Court of Appeals for the Third Circuit. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

⁶The record includes thirty interpretations of five x-rays dated between April 23, 1997 and June 21, 2001. For each film, the record contains three positive readings submitted by claimant and three negative readings submitted by employer. Director's Exhibits 43, 44, 48, 49, 51, 52, 58, 62, 63, 66-68; Claimant's Exhibits 1-3, 7-12; Employer's Exhibits 5, 10-12. Each film was interpreted by a physician who is a Board-certified radiologist and a B reader.

Drs. Levinson and Fino based their conclusions upon a consideration of claimant's subjective symptoms and greater amount of objective data. *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); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985). We affirm, therefore, the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4).

We also find no merit in claimant's contention that the administrative law judge erred by adopting employer's proposed Decision and Order Denying Benefits without independently assessing the evidence of record, which is a violation of the provisions of the APA. The record indicates that the administrative law judge thoroughly considered the evidence of record and provided a statement of his findings of fact and conclusions of law. Thus, the administrative law judge complied with the provisions of the APA. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Hall v. Director, OWCP*, 12 BLR 1-80 (1988).

Because we have affirmed the administrative law judge's finding on the merits that claimant did not establish the existence of pneumoconiosis, an essential element of entitlement, we must affirm the denial of benefits under Part 718. *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1. We need not address, therefore, the administrative law judge's findings under Section 718.204(b)(2). *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

