BRB No. 02-0413 BLA

ALBERT WELLS, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
N & W COAL, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE 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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Phillip Lewis, Hyden, Kentucky, for claimant.

Francesca L. Maggard (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (01-BLA-746) of Administrative Law Judge Thomas F. Phalen, Jr. 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).[1] Relying upon the parties stipulation, the administrative

[1] The Department of Labor has amended the regulations implementing the Federal

law judge found a coal mine employment history of at least eleven years and, based on the date of filing, he adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge concluded that the evidence of record failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Accordingly, benefits were denied.

On appeal, claimant contends that the evidence of record is sufficient to establish the existence of pneumoconiosis. The employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

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 establish 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 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*).

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.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence. Contrary to claimant's contention, the administrative law judge reasonably determined that the x-ray evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) based on the greater number of negative x-ray readings by more highly qualified physicians. Decision and Order at 8; Director's Exhibits 5, 9, 10, 13, 14, 23, 24, 26, 27; 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. 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).[2] Turning to Section 718.202(a)(4), the administrative law judge accorded greater weight to the opinion of Dr. Dahhan, finding that claimant did not suffer from pneumoconiosis, and to the opinion of Dr. Wicker, finding that claimant had no pulmonary impairment, than he accorded to the contrary opinions of Drs. Myers and Chaney, that claimant suffered from pneumoconiosis, even though Dr. Chaney was claimant's treating physician, as the former opinions were better reasoned and documented. The administrative law judge also accorded greater weight to the opinion of Dr. Dahhan, who was highly qualified, than he accorded to the opinions of Drs. Myers, Wicker, and Chaney, whose qualifications were unknown. This was rational. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, BLR (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, BLR (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 834, 22 BLR 2-320 (6th Cir. 2002); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Moreover, contrary to claimant's contention, Dr. Lane's positive x-ray reading does not constitute a medical opinion as defined at Section 718.202(a)(4) and is not, therefore, sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See Pettry v. Director, OWCP*, 14 BLR 1-98, 1-100 (1990)(*en banc*); *Anderson v. Valley Camp of Utah*, 12 BLR 1-111, 1-113 (1989). Consequently, we affirm the administrative law judge's finding that the evidence failed to establish the existence of pneumoconiosis as it is supported by substantial evidence and in accordance with law.[3]

[2] The administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and (3) as there was no biopsy evidence of record, this was a living miner's claim filed after January 1, 1982, and there was no evidence of complicated pneumoconiosis in the record, Decision and Order at 9; *see* 20 C.F.R. §§718.304, 718.305, 718.306; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986), is affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] We need not address claimant's general contention that the evidence of record is

sufficient to establish total disability as it is not sufficiently briefed, *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987), and because we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge