BRB No. 02-0419 BLA

TERRY THACKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNT CALVARY COAL COMPANY	)	DATE ISSUED:
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

John W. Mann (Kirk Law Firm), Paintsville, Kentucky, for claimant.

David S. Panzer and Laura M. Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (00-BLA-0957) of Administrative Law Judge Joseph E. Kane 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 filing date of November 1, 1999, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge accepted the parties' stipulation of an eight year coal mine employment history as supported by the

[1] The 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.

evidence of record and employer's post-hearing concession that claimant was totally disabled. On the merits, however, the administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis as defined by the Act at Section 718.202(a)(4). 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 (the Director), has filed a letter indicating that he will not participate in this appeal.[2]

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*).

[2] We affirm the findings of the administrative law judge on the length of coal mine employment and at 20 C.F.R. §§718.202(a)(1)-(3) as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

While claimant refers to positive x-rays by Drs. Younes and Brandon, he does not allege that the administrative law judge erred in finding that the existence of pneumoconiosis was not established by x-ray evidence. Claimant's Brief at 2, 4 (unpaginated). *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986).

Claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of pneumoconiosis. Specifically, claimant contends that the administrative law judge applied too strict a definition of pneumoconiosis, and that claimant's chronic obstructive pulmonary disease is substantially related to or aggravated by the presence of pneumoconiosis. Contrary to claimant's assertion, however, the administrative law judge reasonably considered the medical opinion of Dr. Younes, that claimant's respiratory impairment was secondarily due to coal dust exposure, but found it to be conclusory and to be outweighed by the preponderance of the medical opinion evidence by Drs. Dahhan, Caffrey, Branscomb, Hansbarger and Fino, who were well-qualified in their fields; they opined that claimant did not have pneumoconiosis, or any respiratory impairment related to his coal mine employment, Decision and Order at 22; Director's Exhibits 11, 26; Employer's Exhibits 3, 5, 8, 10, 14, 15. Specifically, the administrative law judge noted that he was particularly persuaded by the opinions of Drs. Caffrey and Branscomb, which explained that "the giant bullous emphysema and pneumothoraxes" claimant had were "unrelated to coal dust exposure." Decision and Order at 22. Thus, while, as claimant correctly contends, the existence of pneumoconiosis is established if the evidence shows a respiratory impairment which arose at least in part out of coal mine employment, 20 C.F.R. §718.201(a); *see Southard v. Director, OWCP*, 732 F.2d 66, 72, 6 BLR 2-26, 2-35 (6th Cir. 1984); here, where the administrative law judge found that the evidence relating the respiratory impairment to coal mine employment was not credible he properly found that claimant failed to establish the existence of pneumoconiosis as defined by the Act. 20 C.F.R. §718.201(a); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 114 (1988).

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). We, therefore, affirm the administrative law judge's consideration of the medical opinion evidence and his finding that claimant has failed to establish the existence of pneumoconiosis as defined by the Act. 20 C.F.R. §§718.201(a); 718.202(a)(4).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge