BRB No. 08-0252 BLA

J. P. Claimant-Petitioner v. LONE MOUNTAIN PROCESSING INCORPORATED, C/O ARCH OF KENTUCKY and ARCH COAL INCORPORATED, C/O UNDERWRITERS SAFETY & CLAIMS Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/30/2008 DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

Denise M. Davidson (Davidson & Associates), Hazard, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (2007-BLA-5055) of Administrative Law Judge Larry S. Merck on a claim filed on December 16, 2005,

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). Director's Exhibit 2. Based on the parties' stipulation, the administrative law judge credited claimant with sixteen years of coal mine employment. The administrative law judge, however, found that the evidence was insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings at Sections 718.202(a)(1), (4) and 718.204(b)(2)(iv).[1] Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief unless specifically requested to do so by the Board.[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, 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 suffers from pneumoconiosis arising out of coal mine employment, that he is totally disabled by a respiratory or pulmonary impairment, and that his total disability is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *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).

---

[1] In discussing the issue of total disability, claimant cites to 20 C.F.R. §718.204(c). Claimant's Brief at 5. However, under the revised regulations, which became effective on January 19, 2001, the provision pertaining to total disability, previously set forth at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b).

[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding of sixteen years of coal mine employment, and his finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (3). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

Claimant contends that the administrative law judge erred in finding that he does not have pneumoconiosis. Pursuant to Section 718.202(a)(1), claimant asserts that the administrative law judge erred because he "selectively analyzed" the x-ray evidence and improperly relied upon the physicians' qualifications and the numerical superiority of the negative x-ray interpretations. Claimant's Brief at 3. We reject claimant's contentions as they are without merit.

Under Section 718.202(a)(1), the administrative law judge found that the record contains three readings of two x-rays dated January 6, 2006 and March 30, 2006. Decision and Order at 6. The administrative law judge found that the January 6, 2006 x-ray had one quality reading by Dr. Barrett, a B reader, and a reading by Dr. Westerfield, a B reader, which was negative for pneumoconiosis. Director's Exhibits 14, 15, 17. The March 30, 2006 x-ray was also read as negative for pneumoconiosis by Dr. Jarboe, a B reader.[4] Because the administrative law judge properly determined that there was no positive x-ray evidence of record to support claimant's burden of proof, we affirm, as supported by substantial evidence, his finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1). Decision and Order at 6; *see generally Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993).

With respect to Section 718.202(a)(4), claimant makes general statements that the "the administrative law judge may not discredit an opinion of a physician whose report is based on a positive x-ray interpretation which is contrary to his findings[;]" that the administrative law judge "may not discredit a report based on a positive x-ray merely because the record contains subsequent negative x-rays[,]" and that it is error for the administrative law judge to substitute his own conclusions for those of a physician. Claimant's Brief at 4. None of claimant's arguments have merit since the record is devoid of evidence to support his burden of proof. The administrative law judge properly found that there were two medical opinions of record by Drs. Simpao and Jarboe, but that neither physician opined that claimant has clinical or legal pneumoconiosis. Decision and Order at 8-9; Director's Exhibits 14, 17. Thus, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order at 9.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element of

[4] We note that Dr. Jarboe indicated in his medical report that he read an x-ray dated March 30, 2006 as negative for pneumoconiosis, 0/0, although the record does not include an actual ILO form containing Dr. Jarboe's x-ray reading. Director's Exhibit 17.

entitlement. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Because claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement, benefits are precluded.[5] *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

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

[5] In light of our affirmance of the administrative law judge's findings pursuant to Section 718.202(a), it is not necessary that we address claimant's arguments as to whether the administrative law judge erred in failing to find that he is totally disabled. Claimant's Brief at 5-6.