

BRB No. 09-0196 BLA

D. P.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIXIE FUEL COMPANY, LLC)	
)	DATE ISSUED: 10/26/2009
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 – Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2007-BLA-05461) of Administrative Law Judge Joseph E. Kane rendered on a claim filed on August 5, 2004, 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 credited the parties' stipulation to twenty years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that claimant failed 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 pursuant to 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).

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; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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.

¹ Claimant, citing 20 C.F.R. §718.204(c), asserts that the administrative law judge erred in finding that he is not totally disabled. Claimant's Brief at 5. 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).

² We affirm, as unchallenged by the parties on appeal, the administrative law judge's length of coal mine employment determination and his findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3), and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (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. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

Pursuant to Section 718.202(a)(1), the administrative law judge found that there are five readings of two x-rays. Decision and Order at 4; Director's Exhibits 9, 10, 27; Employer's Exhibits 2, 5. The administrative law judge found the October 4, 2004 x-ray to be negative for pneumoconiosis, based on one reading for quality by Dr. Barrett, a B reader, and negative readings by Dr. Westerfield, a B reader, and Dr. Poulos, a B reader and Board-certified radiologist. Decision and Order at 4; Director's Exhibits 9, 10, 27. The administrative law judge also found that the October 12, 2005 x-ray was read as negative by Dr. Dahhan, a B reader, and by Dr. Halbert, a B reader and Board-certified radiologist. Decision and Order at 4; Employer's Exhibits 2, 5. 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 7; *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 argues that the administrative law judge erred in rejecting the opinion of Dr. Simpao, that claimant is totally disabled due to pneumoconiosis. Claimant asserts that Dr. Simpao's opinion is well reasoned and supported by his physical examination of claimant, the review of medical and work histories and the results of pulmonary function and blood gas tests. Claimant asserts that 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, and that it is error for the administrative law judge to substitute his own conclusions for those of a physician.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Simpao, Dahhan and Rosenberg. Decision and Order at 5-6, 8-9. The administrative law judge evaluated the October 4, 2004 report in which Dr. Simpao diagnosed coal workers' pneumoconiosis and a moderate impairment based on a physical examination, pulmonary function testing, symptoms, twenty years of coal mine employment and claimant's status as a lifelong non-smoker. Decision and Order at 5; Director's Exhibit 9. The administrative law judge also considered the December 8, 2006 supplemental report by Dr. Simpao, in which he stated that claimant had coal workers' pneumoconiosis, based on his pulmonary function testing, and that claimant had restrictive airway disease, a moderate degree of obstructive airway disease, a productive cough, shortness of breath, dyspnea and wheezing at rest and with exertion. Decision and Order at 5; Director's Exhibit 37. The administrative law judge found that, in his March 15, 2007 report, Dr. Dahhan opined that the medical evidence was insufficient to justify a diagnosis of coal workers' pneumoconiosis, based on a normal clinical examination of the chest, normal pulmonary function and blood gas studies, and negative x-rays. Decision and Order at 6; Employer's Exhibit 1. The administrative law judge also found

that Dr. Dahhan opined that there are no objective findings to indicate that claimant had any pulmonary impairment or disability. *Id.* Similarly, the administrative law judge found that, in his March 27, 2007 report, Dr. Rosenberg reviewed the medical evidence of record and concluded that claimant did not have medical or legal pneumoconiosis. Decision and Order at 6; Employer’s Exhibit 6.

In weighing the medical opinion evidence, the administrative law judge found the opinion of Dr. Simpao outweighed by the contrary opinions of Drs. Dahhan and Rosenberg. Decision and Order at 8. The administrative law judge found that Dr. Simpao did not sufficiently explain his diagnosis of pneumoconiosis, legal or clinical, and, although he relied on claimant’s symptoms and pulmonary function testing, he failed to explain how those symptoms or test results are attributable to coal mine dust exposure. *Id.* In contrast, the administrative law judge reasonably found the contrary opinions by Drs. Dahhan and Rosenberg well supported by their review of all the medical evidence of record, Dr. Dahhan’s normal physical findings, and claimant’s normal objective laboratory data. *Id.* at 8-9; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge, therefore, permissibly found that the reports of Drs. Dahhan and Rosenberg were “better reasoned” and well documented and outweighed the opinion of Dr. Simpao. *Id.* 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 burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element of 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, an award of benefits is precluded.⁴

⁴ Because the administrative law judge permissibly found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a requisite element of entitlement, it is not necessary that we address claimant’s arguments that the administrative law judge erred in failing to find that he is totally disabled. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111, 1-112 (1989); *Trent*, 11 BLR at 1-27.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge