BRB No. 02-0376 BLA

BIGE MESSER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ANDALEX RESOURCES, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC 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 Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant. Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (01-BLA-0465) of Administrative Law Judge Rudolf L. Jansen on a claim[1] 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.

[1] Claimant, Bige Messer, filed his application for benefits on February 1, 2000. Director's Exhibit 1.

§901 *et seq*. (the Act).[2] The administrative law judge initially credited the parties' stipulation that claimant established fourteen years of qualifying coal mine employment. Next, the administrative law judge found that while claimant established that he suffers from a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), claimant failed to establish the existence of pneumoconiosis and disability causation pursuant to 20 C.F.R. §§718.202(a), 718.204(c). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis established by x-ray and medical opinion evidence under Sections 718.202(a)(1) and (a)(4) and total respiratory disability under Section 718.204(b). Employer/carrier respond, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating his intention not to participate in this appeal.[3]

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 the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

---

[2] 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.

[3] We affirm the administrative law judge's determinations regarding length of coal mine employment and pursuant to 20 C.F.R. §§718.202(a)(2)-(3), 718.204(b)(2)(i)-(iii), and 718.204(c) because these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 3, 7, 9.

In challenging the administrative law judge's finding pursuant to Section 718.202(a)(1), claimant argues that the administrative law judge erred in finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis by relying too heavily on the qualifications of the physicians and the numerical superiority of the negative x-ray interpretations. Contrary to claimant's argument, however, where the x-ray evidence is in conflict, consideration shall be given to the readers' radiological qualifications. 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); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Moreover, in the instant case, contrary to claimant's argument, the administrative law judge found that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis inasmuch as all of the interpretations contained in the record were negative for the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1); *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Langerud v. Director, OWCP*, 9 BLR 1-101, 1-103 (1986); Decision and Order at 7; Director's Exhibits 7,8, 16-19. We, therefore, affirm that finding. *See* 20 C.F.R. §718.202(a)(1); *Staton*, *supra*.[4]

Relevant to Section 718.202(a)(4), claimant avers that the administrative law judge erred by failing to credit the opinion of Dr. Baker, who diagnosed the presence of pneumoconiosis, inasmuch as Dr. Baker's opinion is well reasoned. Specifically, claimant argues that the administrative law judge erred in interpreting medical evidence and substituting his conclusion for the opinion of the physician when he discredited Dr. Baker's opinion because it was based on a positive x-ray interpretation, contrary to the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis. Contrary to claimant's argument, however, a review of Dr. Baker's x-ray interpretation

[4] Claimant generally argues, "it appears that Judge Jansen may have 'selectively analyzed' the x-ray evidence," however, claimant failed to provide a basis for this argument. Memorandum Brief in Support of Claimant's Petition for Review and Appeal at 3. Notwithstanding claimant's failure to adequately raise and brief this allegation of error, claimant's assertion lacks merit inasmuch as there is no conflicting x-ray evidence of record. Decision and Order at 7.

reveals a reading of "0/1" pneumoconiosis, which does not constitute a positive interpretation under the regulations and is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See* 20 C.F.R. §§718.102(b), 718.202(a)(1). Moreover, a review of the Decision and Order reveals that the administrative law judge did not discredit Dr. Baker's opinion based on the x-ray interpretation that accompanied his report. Decision and Order at 8. The administrative law judge found that Dr. Baker's opinion was well reasoned and documented, but rationally accorded less weight to his opinion because the record was devoid of evidence demonstrating Dr. Baker's medical credentials. The administrative law judge properly found the opinions of Drs. Broudy, Dahhan, and Jarboe, who opined that claimant did not have pneumoconiosis, were more persuasive and, therefore, entitled to dispositive weight because these physicians are Board-certified in internal medicine and the subspecialty of pulmonary diseases. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); Decision and Order at 8; Director's Exhibits 16, 17, 20. Inasmuch as this determination is rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant failed to affirmatively establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Trumbo, supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985).

Consequently, we affirm the administrative law judge's determinations that claimant failed to affirmatively establish the existence of pneumoconiosis pursuant to Section 718.202(a) as this finding is rational, contains no reversible error, and is supported by substantial evidence. Inasmuch as claimant has failed to satisfy his burden of affirmatively establishing the existence of pneumoconiosis, a requisite element of entitlement under Part 718, we affirm the administrative law judge's finding that claimant is not entitled to benefits.[5] *See* 20 C.F.R. §718.202(a); *Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

[5] Claimant's failure to affirmatively establish the existence of pneumoconiosis, a requisite element of entitlement, obviates the need to address claimant's argument regarding the administrative law judge's disability determination. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge