

BRB No. 05-0352 BLA

JAMES D. LOCKARD)
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 Claimant-Petitioner)
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 v.)
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 PATTON, INCORPORATED) DATE ISSUED: 09/23/2005
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 and)
)
 STATE OF WEST VIRGINIA)
)
 Employer/Carrier-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Billy J. Moseley (Webster Law Offices), Pikeville, Kentucky, for claimant.

Robert Weinberger (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (04-BLA-5062) of Administrative Law Judge Robert L. Hillyard 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). Claimant filed a claim for benefits on September 11, 2001. Director's Exhibit 2. The administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and a totally disabling

respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, benefits were denied.

Claimant appeals, arguing that under Section 718.202(a)(1) the administrative law judge should have found that he established the existence of pneumoconiosis based on a single positive x-ray reading. Claimant's Brief at 5. Claimant also argues that the administrative law judge erred by not crediting Dr. Hussain's diagnosis of pneumoconiosis under Section 718.202(a)(4). Claimant's Brief at 6. Claimant further asserts that the administrative law judge erred in finding that he was not totally disabled. *Id.* Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that he or she is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove 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*).

Claimant generally argues under Section 718.202(a)(1) that he established the existence of pneumoconiosis based on a single positive x-ray reading. Claimant's Brief at 5. We disagree. While Section 718.202(a)(1) permits the administrative law judge to find pneumoconiosis based on a chest x-ray, such a finding is not required whenever there is qualifying positive x-ray evidence in the record. *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). In this instance, the administrative law judge properly noted that the record contained an x-ray dated October 15, 2003, which was read by Dr. Zaldivar as negative for pneumoconiosis, and an x-ray dated November 28, 2001, which was read as positive by Dr. Hussain, and negative for pneumoconiosis by Dr. Binns. Director's Exhibit 11; Employer's Exhibits 1, 2; Decision and Order at 7. Comparing the relative qualifications of the readers, the administrative law judge properly assigned less probative weight to Dr. Hussain's positive reading of the November 28, 2001 x-ray as Dr. Hussain had "no radiographic specialty credentials." Decision and Order at 7. In contrast, the administrative law judge permissibly credited Dr. Binns' negative reading of that same film based on Dr. Binns' superior qualifications as a Board-certified radiologist and B-reader, and thus found that the November 28, 2001 x-ray was negative for pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir.

1992); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); Decision and Order at 7. Because substantial evidence supports the administrative law judge's conclusion that the x-ray evidence was negative for pneumoconiosis, we affirm his finding at 20 C.F.R. §718.202(a)(1).

We also reject claimant's contention that the administrative law judge erred by not crediting Dr. Hussain's opinion relevant to whether he has pneumoconiosis. In weighing the conflicting medical opinions at Section 718.202(a)(4), the administrative law judge properly considered the qualifications of the two examining physicians' opinions, and chose to credit Dr. Zaldivar's opinion, that claimant does not have legal or clinical pneumoconiosis, because Dr. Zaldivar's credentials showed that he was Board-certified in internal and pulmonary medicine, while Dr. Hussain's qualifications were not of record. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323, (4th. Cir. 1998); Decision and Order at 8. Furthermore, citing *Cornett v. Benham Coal Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir 2000),¹ the administrative law judge also permissibly rejected Dr. Hussain's opinion as being not well reasoned because he found that "Dr. Hussain state[d] no reasons for his diagnosis of pneumoconiosis beyond the x-ray and exposure history. Decision and Order at 9; *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). We therefore affirm as supported by substantial evidence the administrative law judge's finding that claimant failed to establish pneumoconiosis based on the medical opinion evidence at 20 C.F.R. §718.202(a)(4).

Furthermore, with respect to the issue of total disability at Section 718.204(b)(2)(iv), we reject claimant's contention that the administrative law judge failed to give proper consideration to claimant's testimony that he was unable to walk more than 75 to 100 feet, climb, lift, or perform any physical activity without experiencing shortness of breath.² Claimant's Brief at 6; Hearing Transcript at 9-12. The Board has

¹ Although claimant worked in Kentucky, his last coal mine employment occurred in West Virginia; therefore, appellate jurisdiction for this case resides with the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-201 (1989) (*en banc*).

² The administrative law judge noted that there was no biopsy evidence to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and that claimant was unable to avail himself of any of the applicable presumptions at 20 C.F.R. §718.202(a)(2), which would enable him to establish the existence of pneumoconiosis under that Section. Decision and Order at 7. The administrative law judge found that there were two pulmonary function and two arterial blood gas studies of record, all of which were non-qualifying for total disability pursuant to 20 C.F.R. §718.203(b)(2)(i), (ii). Director's Exhibit 11; Employer's Exhibit 2; Decision and Order at 5. Furthermore, since there was no evidence of record that claimant suffered from cor pulmonale, the

held that in a living miner's case, lay testimony is generally insufficient to establish total respiratory disability unless it is corroborated by at least a quantum of medical evidence. *Madden v. Gopher Mining Co.*, 21 BLR 1-122 (1999). In this case, none of the medical opinion evidence corroborates claimant's testimony that he was totally disabled. The administrative law judge correctly noted that Dr. Zaldivar opined that claimant had no respiratory or pulmonary impairment. Employer's Exhibit 2; Decision and Order at 10-11. Moreover, although Dr. Hussain diagnosed a mild respiratory impairment, Dr. Hussain also specifically opined that claimant could return to coal mine work. Director's Exhibit 11; Decision and Order at 11. Consequently, we affirm as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Because claimant failed to establish the existence of pneumoconiosis and total disability, requisite elements of entitlement, the administrative law judge properly found that benefits are precluded. *See Trent*, 11 BLR at 1-26; *Perry*, 9 BLR at 1-1. We therefore affirm as supported by substantial evidence the administrative law judge's denial of benefits.

administrative law judge found that claimant was unable to establish a totally disabling pulmonary or respiratory impairment at 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 6. We affirm the administrative law judge's findings at 20 C.F.R. §§718.202(a)(2), (3), and 718.204(b)(2)(i)-(iii) as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Accordingly, the Decision and Order – Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge