BRB No. 99-1027 BLA

WILLARD NOBLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BUCKHORN PROCESSING COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
CYPRUS AMAX MINERALS, COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION AND ORDER
Party-in-Interest		

Appeal of the Decision and Order - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Lois A. Kitts (Baird, Baird, Baird & Jones, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (97-BLA-0605)

of Administrative Law Judge Daniel J. Roketenetz 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). The administrative law judge credited claimant with five and three-quarters years of coal mine employment and adjudicated the case pursuant to 20 C.F.R. Part 718, based on claimant's November 28, 1995 filing date. The administrative law judge found the medical evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the x-ray evidence and medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4). In addition, claimant contends that the administrative law judge erred in failing to render findings concerning total respiratory disability pursuant to 20 C.F.R. §718.204(c). In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, filed a letter stating that he will not file a response brief in this appeal.[1]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

In order to establish entitlement to benefits under Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R.

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[1] The parties do not challenge the administrative law judge's decision to credit claimant with five and three-quarters years of coal mine employment and his findings pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3). These findings, therefore, are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

§§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Id.*

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the relevant evidence of record, we conclude that substantial evidence supports the administrative law judge's findings that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4). Contrary to claimant's contention, the administrative law judge reasonably exercised his discretion in finding that a preponderance of the x-ray interpretations by the more qualified physicians was negative for the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1); Decision and Order at 4-5; *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). While noting the presence of Dr. Clarke's positive x-ray interpretation of the May 21, 1996 x-ray film, the administrative law judge nonetheless reasonably found that this interpretation was outweighed by the negative interpretations by physicians who are either B readers or dually qualified as B readers and Board-certified radiologists.[2] Decision and Order at 4-5; Director's Exhibits 11, 12, 14, 23, 24, 26, 27; Employer's Exhibit 1. Inasmuch as the administrative law judge properly weighed all of the relevant x-ray evidence, including the qualifications of the physicians providing these readings, we affirm his

[2] As the administrative law judge correctly found, the record contains twelve readings of three x-ray films, of which only the interpretation of Dr. Clarke, an A reader, was positive for the existence of pneumoconiosis. Decision and Order at 4-5; Director's Exhibit 14. The remainder of the x-ray interpretations were provided by physicians who are either B readers or dually qualified as B readers and Board-certified radiologists and were interpreted as negative for the existence of pneumoconiosis. Decision and Order at 4-5; Director's Exhibits 11, 12, 23, 24, 26, 27; Employer's Exhibit 1.

finding that the x-ray evidence of record fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). 20 C.F.R. §718.202(a)(1); *Woodward*, *supra*; *Edmiston*, *supra*; *Roberts*, *supra*.

Claimant next contends that it was error for the administrative law judge to discredit the medical opinion of Dr. Clarke because it was based on a positive x-ray interpretation. Rather, claimant contends that Dr. Clarke's opinion is sufficiently reasoned to establish entitlement to benefits. We disagree.

As the administrative law judge correctly found, the record contains five medical opinions, of which only Dr. Clarke diagnosed the existence of pneumoconiosis.[3] In weighing the medical opinions of record, the administrative law judge permissibly found that the opinion of Dr. Clarke was entitled to little weight inasmuch as his diagnosis of pneumoconiosis was based on a positive x-ray reading, which was contrary to the weight of the interpretations of that film by physicians with superior qualifications. Decision and Order at 7; Director's Exhibits 4, 23, 27; *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *see also Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). Moreover, the administrative law judge permissibly found that Dr. Clarke's opinion was not consistent with the medical evidence of record and also was not supported

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[3] The record contains five medical opinions. Dr. Westerfield, who examined claimant, diagnosed chronic obstructive pulmonary disease due to cigarette smoking and obesity. Director's Exhibit 9. Dr. Clarke, who also examined claimant, opined that claimant was totally and permanently disabled for all work in a dusty environment and all manual labor due to 1/2p, CWP. Director's Exhibit 14. Dr. Broudy examined claimant and diagnosed chronic obstructive airways disease, hypertension and bipolar affective disorder. However, Dr. Broudy opined that claimant does not have coal workers' pneumoconiosis, but rather, his chronic obstructive airways disease is due to cigarette smoking and some predisposition to asthma or bronchospasms. He further opined that there was no significant pulmonary disease or respiratory impairment which has arisen from claimant's coal mine employment. Director's Exhibit 26. In addition to these examining physicians, the record contains the medical record reviews of Drs. Branscomb and Fino, both of whom opined that there was no evidence of pneumoconiosis or any impairment or condition caused or aggravated by claimant's coal mine employment. Employer's Exhibits 4, 5.

by any other physician of record. Decision and Order at 7; *see Clark, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Pastva v. The Youghiogheny & Ohio Coal Co.*, 7 BLR 1-829 (1985); *see generally Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986). Inasmuch as the administrative law judge reasonably accorded little weight to the opinion of Dr. Clarke, the only evidence supportive of a finding of the existence of pneumoconiosis, we affirm the administrative law judge's finding that claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).[4] 20 C.F.R. §718.202(a)(4); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clarke, supra; Lucostic, supra*.

Since claimant has failed to establish the existence of pneumoconiosis, a necessary element of entitlement pursuant to Part 718, an award of benefits is precluded.[5] *Trent*, *supra*; *Perry*, *supra*.

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

SO ORDERED.

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[4] In light of the affirmance of the administrative law judge's decision to accord no weight to the medical opinion of Dr. Clarke, the only opinion supportive of a finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(4), error, if any, in the administrative law judge's crediting of the opinions of Drs. Westerfield and Broudy, that claimant was not suffering from pneumoconiosis, based on their superior professional qualifications, is harmless inasmuch as claimant has failed to sustain his burden of producing evidence supportive of a finding of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *see also Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

[5] Contrary to claimant's suggestion, the administrative law judge need not address whether the evidence was sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204, inasmuch as his finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) precluded entitlement to benefits. *Perry, supra*.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge