BRB No. 99-1031 BLA

JOE T. EVERSOLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHIPYARD RIVER COAL CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
ZEIGLER COAL HOLDING 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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Robert R. Kaplan, Jr. (Arter & Hadden LLP), Washington, D.C., for employer and carrier.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-0523) of Administrative Law Judge Joseph E. Kane denying benefits 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 15.75 years of qualifying coal mine employment, and adjudicated the

claim, filed on February 28, 1997, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found that the weight of the evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R.§718.202(a)(1)-(4), or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c)(1)-(4). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's findings pursuant to Sections 718.202(a)(1), (4), 718.204(c)(4). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[1]

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 applicable law, they are binding upon this Board and may not be disturbed. 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 be entitled to benefits pursuant to 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.,* 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

[1]We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2), (3), and insufficient to establish total respiratory disability pursuant to Section 718.204(c)(1)-(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. Claimant initially asserts that the positive x-ray interpretations of record establish the existence of pneumoconiosis at Section 718.202(a)(1), and that the administrative law judge selectively analyzed the evidence thereunder. Contrary to claimant's arguments, however, the administrative law judge accurately reviewed the x-ray interpretations of record and the relative qualifications of the physicians, and permissibly found that the weight of the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), based on a numerical preponderance of negative interpretations by the best-qualified physicians.[2] Decision and Order at 4, 8; *see Staton v. Norfolk & Western Railway 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). The administrative law judge's findings pursuant to Section 718.202(a)(1) are supported by substantial evidence, and thus are affirmed.

Claimant next maintains that the opinions of Drs. Myers and Powell are reasoned, documented, and sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), and that the administrative law judge erred in discounting these opinions because they were based in part on a positive x-ray interpretation. Claimant essentially seeks a reweighing of the evidence, which is beyond the Board's scope of review. *See Anderson, supra*; *O'Keeffe, supra.* In evaluating the medical opinions at Section 718.202(a)(4), the administrative law judge acknowledged that although the x-ray evidence was negative for pneumoconiosis, a physician's reasoned opinion may establish the presence of the disease "if it is supported by adequate rationale besides a positive x-ray interpretation." Decision

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[2]The administrative law judge determined that the record contained four negative interpretations and three positive interpretations of six films; the negative interpretations were provided by three B-readers and one dually-qualified Board-certified radiologist and B-reader, while the positive interpretations were provided by one B-reader and one physician with no special radiological qualifications. Decision and Order at 4, 8; Director's Exhibits 12-14, 25, 26, 28.

and Order at 9. The administrative law judge accurately determined, however, that Drs. Powell and Myers based their diagnoses of pneumoconiosis primarily on their own positive x-ray interpretations. Decision and Order at 9; Director's Exhibit 25; *see Anderson, supra.* The administrative law judge reasonably accorded greater weight to the contrary opinions of Drs. Dahhan, Dineen and Wicker, that claimant did not have pneumoconiosis and that his chronic bronchitis and obstructive ventilatory defect were due entirely to smoking, because their conclusions were supported by the objective evidence; Drs. Dahhan and Dineen possessed superior qualifications; and Dr. Wicker's report was corroborated by Dr. Dineen's opinion. Decision and Order at 9; Director's Exhibits 10, 26-28; *see generally Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge's findings and inferences pursuant to Section 718.202(a)(4) are supported by substantial evidence and, therefore, we affirm his finding that the weight of the evidence is insufficient to establish the existence of pneumoconiosis thereunder.

Inasmuch as claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement under 20 C.F.R. Part 718, *see Trent, supra*, we affirm the administrative law judge's denial of benefits, and need not reach claimant's arguments regarding the issue of total respiratory disability at Section 718.204(c)(4).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge