BRB No. 03-0407 BLA

JERRY LYNN ASHER	)	
	)	
Claimant - Petitioner	)	
	)	
v.	)	
	)	
RAY FINLEY TRUCKING, INCORPORATED	)	DATE ISSUED: 09/29/2003
	)	
and	)	
	)	
WAUSAU INSURANCE COMPANIES	)	
	)	
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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan, Hyden, Kentucky, for claimant.

Francesca L. Maggard and W. Barry Lewis (Lewis and Lewis), Hazard, Kentucky, for employer.

Sarah Hurley (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (02-BLA-5025) of Administrative Law Judge Daniel J. Roketenetz rendered 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).[1] Claimant filed for benefits on February 10, 2001. Director's Exhibit 1. Following a denial of benefits by the district director, claimant requested a formal hearing. Director's Exhibits 13, 14.

Because this claim was filed after March 31, 1980, it was adjudicated under Part 718. Consistent with the stipulation of the parties, the administrative law judge found that claimant worked as a coal miner for thirteen years. However, the administrative law judge denied benefits, finding that claimant failed to establish the existence of pneumoconiosis.[2]

On appeal, claimant contends that the administrative law judge erred in finding that he failed to establish the existence of pneumoconiosis or a totally disabling respiratory impairment. Employer responds asking the Board to affirm the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in the merits of this appeal.

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 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis arising out of coal mine employment; and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir.

[1] 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.

[2] While denying benefits since claimant failed to establish the threshold issue of the existence of pneumoconiosis, the administrative law judge nevertheless proceeded to find that claimant also failed to establish that he was totally disabled due to pneumoconiosis.

1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

With respect to the weighing of the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1), claimant asserts that the administrative law judge erred in deferring to the physicians with superior qualifications and in placing substantial weight on the numerical superiority of the x-ray interpretations. However, the administrative law judge correctly found that this record contains only four x-ray readings. Dr. Sargent read an x-ray for "quality only," while Drs. Hussain, Dahhan and Wheeler all read x-rays as negative for the existence of pneumoconiosis. *See* Director's Exhibits 11, 12; Employer's Exhibits 1, 2. Since none of the x-rays of record were positive for the existence of pneumoconiosis, the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See generally Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). We, therefore, affirm this finding.

In addition, since the record does not contain any autopsy or biopsy evidence, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2). Moreover, since this case involves a claim filed by a living miner after January 1, 1982, and there is no evidence of complicated pneumoconiosis, we also affirm the finding that none of the presumptions of 20 C.F.R. §718.202(a)(3) is applicable. 20 C.F.R. §718.202(a)(3)

Claimant asserts that the administrative law judge "selectively analyzed" the medical opinion evidence when weighing the evidence pursuant to Section 718.202(a)(4). However, there are only two medical reports of record and the administrative law judge correctly found that neither established the existence of pneumoconiosis. Although Dr. Hussain noted the presence of chronic obstructive pulmonary disease, he attributed this disease to cigarette smoking. Dr. Hussain specifically read an x-ray as negative for pneumoconiosis and opined that the miner suffered from no occupational lung diseases caused by coal mine employment. Director's Exhibit 11. Dr. Dahhan also read an x-ray as negative for pneumoconiosis and concluded that the miner did not suffer from any occupationally acquired lung disease nor any respiratory or pulmonary impairment. Employer's Exhibit 1. Inasmuch as these are the only medical reports of record, and neither contained a diagnosis of pneumoconiosis, the administrative law judge properly found that the evidence fails to establish that claimant suffers from pneumoconiosis or any occupationally acquired lung disease. *See Cornett v. Benham Coal Inc.*, 227 F.3d 569, 22 BLR 2-111 (6th Cir. 2000). Consequently, since claimant has not established the existence of pneumoconiosis, he has failed to establish entitlement to benefits.[3]

[3] The administrative law judge also correctly found that all of the pulmonary functions and blood gas studies failed to produce values indicative of total disability and

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

that the record did not contain any evidence of cor pulmonale with right-sided congestive heart failure or any medical opinion diagnosing claimant as totally disabled from a respiratory condition. Thus, the administrative law judge properly found that claimant failed to establish a totally disabling respiratory impairment under 20 C.F.R. §718.204(b).