

BRB No. 07-0156 BLA

C.E.)
)
 Claimant-Petitioner)
)
 v.)
)
 LEECO, INCORPORATED, c/o ACORDIA) DATE ISSUED: 08/30/2007
 EMPLOYERS SERVICE, SELF INSURED)
 through JAMES RIVER COAL COMPANY)
 c/o EMPLOYERS SERVICE)
)
 Self-Insured Employer-)
 Respondent)
)
 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 Robert D. Kaplan,
Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for
employer.

Sarah M. Hurley (Jonathan L. Snare, Acting Solicitor of Labor; Allen H.
Feldman, 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, SMITH and
HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2005-BLA-5235) of Administrative Law Judge Robert D. Kaplan 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 found that the record supported the parties' stipulation to a coal mine employment history of seventeen years. The administrative law judge found that the claim was timely filed, 20 C.F.R. §725.308, but found that the evidence failed to establish the existence of coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 4-12. The administrative law judge further found that because claimant could not establish the existence of pneumoconiosis or total disability, he could not establish that pneumoconiosis arose out of coal mine employment, 20 C.F.R. §718.203(b), or that total disability was due to pneumoconiosis, 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in relying almost solely on the qualifications of the physicians who read the x-rays as negative and the numerical superiority of the negative x-ray readings to find that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1). Claimant also contends that the administrative law judge may have "selectively analyzed" the x-ray evidence. Claimant further contends that the administrative law judge erred in not finding total respiratory disability established based on medical opinion evidence, 20 C.F.R. §718.204(b)(2)(iv). In addition, claimant contends that since the administrative law judge rejected Dr. Simpao's finding on the issue of pneumoconiosis and Dr. Simpao made no finding on the issue of total disability, the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b).¹ Employer responds, urging that the denial of benefits be affirmed. The Director responds, asserting that the Board should reject claimant's argument that the case must be remanded for the Director to provide claimant with a complete pulmonary evaluation. The Director contends that Dr. Simpao provided a valid opinion on the issue of pneumoconiosis, but that the administrative law judge permissibly found it outweighed by other better reasoned opinions on that issue. The Director contends, therefore, that because pneumoconiosis was not established at Section

¹ We affirm, as unchallenged on appeal, the administrative law judge's finding that the claim was timely filed, that claimant had seventeen years of coal mine employment, and that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4) or total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

718.202(a)(1)-(4), entitlement to benefits is precluded, and remand of the case for clarification of Dr. Simpao's opinion on the issue of total disability would be pointless.

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any element of entitlement precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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 of the administrative law judge is supported by substantial evidence and contains no reversible error.² Contrary to claimant's assertion, the administrative law judge properly relied upon the qualifications of the physicians in weighing the x-ray evidence and permissibly considered the numerical superiority of the negative x-ray evidence in finding that the x-ray evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(1).³ Decision and Order at 6, 10-11; 20 C.F.R. §§718.102(c), 718.202(a)(1);⁴ *Staton v. Norfolk & Western Railway Co.*, 65 F.3d 55, 19

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

³ The administrative law judge found that the October 17, 2003 x-ray was read as positive by Dr. Simpao, who had no special qualifications in x-ray interpretation, while the same x-ray was read as negative by Dr. Poulos, a dually qualified Board-certified radiologist and B reader. The administrative law judge found that the June 1, 2004 x-ray was read as completely negative by Dr. Dahhan, a B reader, and was also read as negative by Dr. Wiot, a dually qualified Board-certified radiologist and B reader. Decision and Order at 7-8.

⁴ Section 718.202(a)(1) provides that where two or more x-ray reports are in conflict, consideration *shall* be given to the radiological qualifications of the physicians interpreting such x-rays. 20 C.F.R. §718.202(a)(1).

BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Likewise, claimant's contention that the administrative law judge "may have selectively analyzed" the x-ray evidence is rejected as claimant points to no evidence or finding by the administrative law judge that supports this contention. *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). The administrative law judge's finding that the existence of coal workers' pneumoconiosis was not established by x-ray evidence at Section 718.202(a)(1) is, therefore, affirmed.

Claimant's argument that the case must be remanded for the Director to provide claimant with a complete, credible pulmonary evaluation is rejected for the reason set forth by the Director. *See* 30 U.S.C. §923(b); 20 C.F.R. §§725.405, 406; *Barnes v. ICO Corp.*, 31 F.3d 673, 18 BLR 2-319 (8th Cir. 1994); *Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25, 2-31 (8th Cir. 1984); *see also Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Clark*, 12 BLR at 1-155.

Because the evidence fails to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(4), an essential element of entitlement, we need not consider claimant's argument concerning total respiratory disability at Section 718.204(b)(2)(iv). *See Anderson*, 12 BLR at 1-113; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co. Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A Board-certified radiologist is a physician who has been certified by the American Board of Radiology as having a particular expertise in the field of radiology.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge