

BRB No. 04-0592 BLA

CURTIS OSBORNE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INC.	)	DATE ISSUED: 12/13/2004
	)	
and	)	
	)	
ACORDIA EMPLOYERS SERVICE	)	
	)	
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 – Denial of Benefits of Daniel J. Roketenetz, 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.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (2003-BLA-05238) 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). The administrative law judge found twenty-three years of

qualifying coal mine employment pursuant to the parties' stipulation and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.<sup>1</sup> Decision and Order at 2, 4-5; Hearing Transcript at 11. The administrative law judge determined, after considering all of the evidence of record, that claimant failed to establish the existence of pneumoconiosis or total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.204. Decision and Order at 5-14. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) and in failing to find total disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs has filed a letter indicating that he will not respond to the instant appeal.<sup>2</sup>

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. 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. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish 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*).

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

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<sup>1</sup> Claimant filed his claim for benefits with the Department of Labor on February 14, 2001, which was denied by the district director on September 16, 2002. Director's Exhibits 2, 34. Claimant subsequently requested a formal hearing before the Office of Administrative Law Judges.

<sup>2</sup> The administrative law judge's length of coal mine employment determination, as well as his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(b)(2)(i)-(iii), are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

reversible error.<sup>3</sup> Claimant's assertion that the administrative law judge erred in failing to find the existence of pneumoconiosis established lacks merit. The administrative law judge rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). He permissibly found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) because the preponderance of x-ray readings by physicians with superior qualifications was negative. Director's Exhibits 7, 8, 28, 33; Employer's Exhibit 2; Decision and Order at 5-7; *Staton v. Norfolk & Western Railroad 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); *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 (1988)(*en banc*). We therefore reject claimant's argument and affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established based upon the medical opinion of Dr. Simpao. Claimant's Brief at 4-5. We disagree. In determining whether the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge reviewed all of the medical opinion evidence of record and rationally considered the quality of the evidence in determining whether the opinions were supported by their underlying documentation and were adequately explained. *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Worhach*, 17 BLR at 1-108; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark*, 12 BLR at 1-155; *Kuchwara*, 7 BLR at 1-170; Decision and Order at 7-11. The administrative law judge acted within his discretion, as fact-finder, in concluding that Dr. Simpao's opinion was insufficient to meet claimant's burden of proof because the physician's diagnosis of pneumoconiosis was based upon an inaccurate smoking history, and upon Dr. Simpao's positive x-ray reading, which was reread as negative by Dr. Wiot, a highly qualified expert.<sup>4</sup> *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Worhach*, 17 BLR at 1-108; *Trumbo*, 17 BLR at 1-89; *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988);

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<sup>3</sup> 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 the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

<sup>4</sup>The record does not indicate that Dr. Simpao has any special qualifications for the interpretation of x-ray readings. Director's Exhibit 7. Dr. Wiot is a B-reader and a board-certified radiologist. Director's Exhibit 28.

*Clark*, 12 BLR at 1-155; *Stark v. Director, OWCP*, 9 BLR 1-136 (1986); *Fitch v. Director, OWCP*, 9 BLR 1-45 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); *see also Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Decision and Order at 9-10; Director's Exhibit 7.

Moreover, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Rosenberg and Broudy that claimant does not have pneumoconiosis because he found that the physicians offered well reasoned and documented opinions that were supported by the objective medical evidence of record, the negative CT scan interpretation by Dr. Wiot, and the physicians' superior qualifications.<sup>5</sup> *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Worhach*, 17 BLR at 1-108; *Trumbo*, 17 BLR at 1-89; *Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wetzel*, 8 BLR 1-139; Decision and Order at 10; Director's Exhibit 28; Employer's Exhibits 2, 4, 7, 8. We therefore affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge permissibly concluded that the evidence of record does not establish the existence of pneumoconiosis, claimant has not met his burden of proof on all the elements of entitlement. *Clark*, 12 BLR at 1-155; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Because claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement in a miner's claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded and we need not address the administrative law judge's additional findings pursuant to 20 C.F.R. §718.204. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

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<sup>5</sup>Dr. Broudy is board-certified in Internal Medicine and Pulmonary Disease. Employer's Exhibits 2, 8. Dr. Rosenberg is board-certified in Internal Medicine, Pulmonary Disease and Occupational Medicine. Employer's Exhibits 4, 7. The record indicates that Dr. Simpao is not board-certified in either Internal Medicine or Pulmonary Disease. Claimant's Exhibit 1; Director's Exhibit 7.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge