

BRB No. 06-0363 BLA

WINSTON GIBBS, JR.)
)
 Claimant-Petitioner)
)
 v.)
)
 ARCH OF KENTUCKY, INCORPORATED) DATE ISSUED: 10/31/2006
)
 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 on Remand-Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Susan Turner Landis (Turner Landis & Turner, P.S.C.), Harlan, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd, PLLC), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand-Denial of Benefits (97-BLA-1947) of Administrative Law Judge Robert L. Hillyard 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 The Board vacated the administrative law

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant 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 2.

judge's 2003 Decision and Order on Remand Denying Employer's Request for Modification and remanded the case for reconsideration of whether employer established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. *Gibbs v. Arch Kentucky, Inc.*, BRB No. 03-0843 BLA (Sep. 22, 2004)(unpub.).² On remand, the administrative law judge conducted a *de novo* review of the evidence, weighed the newly submitted opinions against the previously submitted opinions, and made credibility determinations as instructed by the Board. *Id.* The administrative law judge determined that employer established a mistake in a determination of fact, as claimant does not have pneumoconiosis and is not totally disabled due to pneumoconiosis.

On appeal, claimant contends that the administrative law judge did not properly weigh the evidence relevant to 20 C.F.R. §§718.202(a)(1), (a)(4) and 718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not submit a response brief on the merits of this appeal.³

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'Keeffe 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 one of these elements precludes entitlement. *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).

Claimant argues that the administrative law judge's finding pursuant to Section 718.202(a)(1) must be vacated, as the administrative law judge erred in relying upon the

² The procedural history is summarized in the administrative law judge's Decision and Order at 1-3 and in *Gibbs v. Arch Kentucky, Inc.*, BRB No. 03-0843 BLA (Sep. 22, 2004) (unpub.), slip op. at 2-5.

³ We affirm the administrative law judge's finding that employer could not establish a change in conditions in this case and his determination that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (a)(3), or that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), as these findings are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

physicians' qualifications and the numerical superiority of the negative x-ray interpretations. Claimant also contends that the administrative law judge selectively analyzed the x-ray evidence. These allegations of error are without merit. The administrative law judge acted within his discretion as fact-finder in determining that the x-ray evidence of record, as a whole, did not establish the existence of pneumoconiosis based upon the preponderance of negative readings performed by physicians with superior qualifications. Decision and Order at 25; *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); *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*). We affirm, therefore, the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis under Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), claimant maintains that the administrative law judge erred in discrediting the reports in which Drs. Baker, Anderson, and Myers diagnosed clinical pneumoconiosis. This contention is without merit. The administrative law judge determined correctly that the diagnoses of Drs. Baker, Anderson, and Myers constituted restatements of their positive x-ray readings, which were contradicted by the interpretations of physicians with superior radiological qualifications. The administrative law judge rationally found that their diagnoses of clinical pneumoconiosis were, therefore, entitled to little weight. Decision and Order at 30-33; *Anderson*, 12 BLR at 1-113. The administrative law judge also determined correctly that Drs. Baker, Anderson, and Myers did not diagnose legal pneumoconiosis, as they did not relate any of the pulmonary conditions that they diagnosed to dust exposure in coal mine employment. *Id.*; 20 C.F.R. §718.201(a)(2). Thus, we affirm the administrative law judge's weighing of the opinions of Drs. Baker, Anderson, and Myers and his finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Because claimant has failed to prove that he has pneumoconiosis under Section 718.202(a), a necessary element of entitlement in a miner's claim under Part 718, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge