BRB No. 00-0750 BLA

HERMAN JOSEPH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLEDSOE COAL CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
JAMES RIVER COAL COMPANY	)	
	)	
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 of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan and Edmond Collett, Hyden, Kentucky, for claimant.

Lois A. Kitts (Baird, Baird, Baird & Jones, P.S.C.) Pikeville, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (00-BLA-0010) of Administrative Law Judge Rudolf L. Jansen 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).[1] After accepting the parties' stipulation of sixteen years of coal mine

[1] The Department of Labor has amended the regulations implementing the Federal

employment, the administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis. The administrative law judge further found that even if the evidence of record established the existence of pneumoconiosis, it would still be insufficient to establish total disability. Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in not finding the existence of pneumoconiosis and total disability established. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that she will not respond in this appeal.[2]

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which the Director has responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Employer responds, contending that several of the regulations, if applied, would affect the outcome of the case, while several would not and requests that the case be held in abeyance until the outcome of the litigation or that in the alternative, the case be remanded to the district director for further development under the amended regulations. Claimant has not responded. Based on the briefs submitted by the parties and our review, we hold that the

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Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] We affirm the findings of the administrative law judge on the length of coal mine employment and at 20 C.F.R. §§718.202(a)(2), (3)(2000), 718.204(c)(2), (3)(2000), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed to adjudicate 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 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 prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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*).

Claimant contends that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of pneumoconiosis. In finding the x-ray evidence insufficient to establish the existence of pneumoconiosis, the administrative law judge concluded that the record contained twenty-two interpretations of seven x-rays. Sixteen interpretations were negative for the existence of pneumoconiosis, six were positive. Decision and Order at 10. Based on his review of the x-ray evidence, the administrative law judge properly found that the readings by dually qualified readers were unanimously negative. *Id*. Contrary to claimant's assertion, the administrative law judge permissibly deferred to the interpretations of the more qualified readers in assessing the x-ray evidence of record. *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); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). The administrative law judge, thus, properly found that claimant failed to establish the existence of pneumoconiosis by x-ray evidence as he properly determined that the preponderance of the x-ray interpretations by highly qualified readers was negative for the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1); *Staton, supra*; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). We, therefore, affirm the administrative law judge's finding that the existence of pneumoconiosis was not established by x-ray evidence. 20 C.F.R. §718.202(a)(1).

Next claimant contends that the administrative law judge erred in not finding the existence of pneumoconiosis established based on the reports of Drs. Baker, Anderson and Myers, which were well reasoned and well documented. Drs. Baker, Anderson and Myers diagnosed the existence of coal workers' pneumoconiosis, while Drs. Rosenberg,

Branscomb, Wise and Broudy did not. Director's Exhibits 8, 9, 28; Employer's Exhibits 3, 4, 6.

The administrative law judge found the opinion of Dr. Anderson entitled to less weight, despite his impressive credentials, because it is unclear whether he understood the extent of claimant's smoking history. Decision and Order at 10. The administrative law judge found that while the reports of Drs. Baker and Myers were adequate, they were entitled to no special weight as their qualifications were not part of the record. Decision and Order at 11. The administrative law judge, however, found that the opinions of Drs. Rosenberg and Branscomb were well reasoned and documented, and entitled to additional weight since they reviewed extensive medical evidence and possessed impressive qualifications. Employer's Exhibits 3, 4; Decision and Order at 11. In addition, the administrative law judge found that the opinion of Dr. Wise entitled to the most weight because he was Board certified in both Internal Medicine and Pulmonary Disease, reviewed extensive medical records, and defended his opinion at deposition. Employer's Exhibit 6; Decision and Order at 11. Finally, the administrative law judge found that although Dr. Broudy's opinion was adequate, there was no reason to give it special weight. Director's Exhibit 28; Decision and Order at 11. Finding no reason to credit the physicians who diagnosed the existence of pneumoconiosis over those who found no evidence of the existence of pneumoconiosis, the administrative law judge properly concluded that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *Ondecko, supra*; *Carson, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). We, therefore, affirm the finding of the administrative law judge at Section 718.202(a)(4) and his finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis by a preponderance of the medical evidence. *See* 20 C.F.R. §718.202(a)(4).

As claimant has failed to establish the existence of pneumoconiosis, he has failed to establish one of the required elements of entitlement at Part 718, and we need not consider his finding that total disability was not established. *See Trent, supra*; *Perry, supra*; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1983).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge