

BRB No. 08-0658 BLA

C.J.)
)
 Claimant-Petitioner)
)
 v.)
) DATE ISSUED: 04/29/2009
 SHOSHONE COAL CORPORATION,)
 c/o ACORDIA EMPLOYERS SERVICE)
)
 and)
)
 PEABODY INVESTMENTS,)
 INCORPORATED)
)
 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 Larry S. Merck,
Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for
employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (06-BLA-5910) of
Administrative Law Judge Larry S. Merck 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 administrative law judge credited claimant with nineteen years of coal mine employment² pursuant to the parties' stipulation. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence did not establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1),(4) or total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to participate in 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'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 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).

¹ Claimant filed his claim for benefits on June 27, 2005. Director's Exhibit 2. The district director denied benefits on May 8, 2006, and claimant timely requested a hearing, which was held on August 2, 2007. Director's Exhibits 31, 32.

² The record indicates that claimant's last coal mine employment was in Wyoming. Director's Exhibits 3, 5, 17. Accordingly, the Board will apply the law of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

³ Because claimant does not challenge the administrative law judge's findings that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2),(3), we affirm them. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered four readings of two x-rays dated July 11, 2005 and August 16, 2006, and considered the readers' radiological qualifications. All of the readings were negative for pneumoconiosis.⁴ Consequently, claimant's assertions that the administrative law judge improperly relied on the readers' credentials, and "may have 'selectively analyzed'" the x-ray readings, are irrelevant and lack merit. Claimant's Brief at 3. We therefore affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *See White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered three medical opinions. Drs. Simpao, Rosenberg, and Tuteur agreed that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.201(a)(1),(2); Director's Exhibit 14; Employer's Exhibits 2, 5, 7, 8. The administrative law judge found that each opinion was well-reasoned and documented and merited "full probative weight."⁵ Decision and Order at 9, 10, 12; *see Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 873, 20 BLR 2-334, 2-338-39 (10th Cir. 1996). Because there was no medical opinion evidence of pneumoconiosis, claimant's argument that the administrative law judge may not discredit an opinion that is based on a positive x-ray interpretation contrary to the administrative law judge's findings, is irrelevant, and his assertion that the administrative law judge "appears to have" substituted his opinion for that of a medical expert, lacks merit. Claimant's Brief at 4. Consequently, we affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a miner's claim under 20 C.F.R. Part 718, we affirm the denial

⁴ As summarized by the administrative law judge, Dr. Westerfield, a B reader, and Dr. Wiot, a Board-certified radiologist and B reader, interpreted the July 11, 2005 x-ray as negative for pneumoconiosis; Dr. Barrett, also a Board-certified radiologist and B reader, reviewed the July 11, 2005 x-ray for its film quality only. Director's Exhibits 14, 15; Employer's Exhibit 1. Dr. Rosenberg, a B reader, and Dr. West, a Board-certified radiologist and B reader, interpreted the August 16, 2006 x-ray as negative for pneumoconiosis. Employer's Exhibits 2, 3.

⁵ The administrative law judge noted further that a high-resolution CT scan taken on August 16, 2006 was read as negative for pneumoconiosis by a Board-certified radiologist, Employer's Exhibit 4, and that claimant's hospitalization records and medical treatment notes did not contain a diagnosis of pneumoconiosis. Decision and Order at 12-13.

of benefits. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27. Consequently, we need not address claimant's arguments concerning the administrative law judge's finding that claimant did not establish that he is totally disabled.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge