

BRB No. 05-0148 BLA

RENUS GIBBS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
HC COAL COMPANY)	DATE ISSUED: 08/19/2005
)	
and)	
)	
KENTUCKY COAL PRODUCERS)	
SELF-INSURANCE FUND)	
)	
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 of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

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

John T. Chafin (Chafin & Davis, P.S.C.), Prestonsburg, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-6070) of Administrative Law Judge Robert L. Hillyard 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). The administrative law judge found sixteen years of qualifying coal mine

employment¹ and that employer is the proper responsible operator. Decision and Order at 4. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.² Decision and Order at 8. The administrative law judge found that claimant failed to establish either the existence of pneumoconiosis or the presence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). Decision and Order at 9-16. Accordingly, the administrative law judge denied benefits.

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), (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. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond to claimant's appeal.³

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'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 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

¹ The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibits 3, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

² Claimant filed his claim for benefits on March 5, 2002, which was denied by the district director on April 9, 2003. Director's Exhibits 2, 30. Claimant timely requested a formal hearing before the Office of Administrative Law Judges. Director's Exhibit 31.

³ The administrative law judge's length of coal mine employment and responsible operator determinations, as well as his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3), 718.203 and 718.204(b)(2)(i)-(iii), are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered six readings of three x-rays in light of the readers' radiological qualifications. Only one reading was positive for pneumoconiosis, a "1/1" reading of the June 1, 2002 x-ray by Dr. Alexander, a Board-certified radiologist and B-reader. Director's Exhibit 26. Taking into account that the June 1, 2002 x-ray was read as negative for pneumoconiosis by Dr. Poulos, who possessed the same radiological credentials as Dr. Alexander, and as negative by Dr. Baker, the administrative law judge found that the June 1, 2002 x-ray was negative for pneumoconiosis.⁴ Directors Exhibits 12, 29. Because all of the other readings were negative, the administrative law judge found that claimant did not establish the existence of pneumoconiosis by a preponderance of the x-ray evidence. This was a proper qualitative analysis of the x-ray evidence. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, merely counted the negative readings, and selectively analyzed the readings, lack merit. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge erred in failing to accord appropriate weight to Dr. Baker's "well reasoned" opinion diagnosing pneumoconiosis. Claimant's Brief 5. We do not find merit in claimant's argument. The administrative law judge found Dr. Baker's opinion diagnosing chronic obstructive pulmonary disease and chronic bronchitis due partly to coal dust exposure "well reasoned" and gave it "some weight towards a finding of legal pneumoconiosis" Decision and Order at 12. However, he permissibly found Dr. Baker's opinion "outweighed by the better credentialed and more thoroughly supported opinions of Drs. Broudy and Westerfield" attributing claimant's pulmonary impairment solely to smoking. Decision and Order at 12; *see Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999). The administrative law judge was within his discretion to find that Drs. Broudy and Westerfield gave a "more extensive explanation of a smoking etiology" that was "more persuasive" in light of the objective data they referenced and in light of their "superior credentials" in internal medicine and pulmonary disease.⁵ Decision and Order at 12; *see*

⁴ Dr. Gaziano, a B-reader, read the June 1, 2002 x-ray for quality purposes only. Director's Exhibit 13.

⁵ Claimant does not challenge the administrative law judge's finding that Dr. Baker "presents no medical specialty credentials." Decision and Order at 12. Even had the

Director, OWCP v. Rowe, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). Substantial evidence supports the administrative law judge's finding pursuant to Section 718.202(a)(4), which we therefore affirm.

Because claimant has failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a miner's claim under Part 718, we affirm the administrative law judge's denial of benefits. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Thus, we need not address the administrative law judge's additional finding that claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2).

administrative law judge found that Dr. Baker is Board-certified in internal medicine and pulmonary disease, Director's Exhibits 24 at 12, 30 at 9, claimant does not challenge the administrative law judge's additional finding that Drs. Broudy and Westerfield rendered better explained, more persuasive opinions.

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