BRB No. 07-0161 BLA

E.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	DATE ISSUED: 08/28/2007
	)	
and	)	
	)	
JAMES RIVER COAL COMPANY	)	
	)	
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 Denying Benefits of Robert D. Kaplan, 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.

Barry H. Joyner (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2005-BLA-05366) of Administrative Law Judge Robert D. Kaplan 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 that the parties stipulated to a coal mine history of twenty-nine years, and found that the evidence failed to establish the existence of coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 4-12. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in not finding the existence of pneumoconiosis established based on x-ray evidence, 20 C.F.R. §718.202(a)(1), and erred in not finding total respiratory disability established based on medical opinion evidence, 20 C.F.R. §718.204(b)(2)(iv). In addition, claimant contends that since the administrative law judge properly noted that Dr. Simpao made no finding concerning whether or not claimant was totally disabled from a pulmonary standpoint, the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b). Employer responds, urging that the denial of benefits be affirmed. The Director responds, asserting that the Board should reject claimant's argument that the Director failed to provide him with a complete pulmonary evaluation. The Director contends that he is only required to provide claimant with a complete and credible examination, not a dispositive one and the fact that the administrative law judge found Dr. Simpao's diagnosis of pneumoconiosis to be outweighed by the contrary opinion of Dr. Broudy is sufficient to support the administrative law judge's denial of benefits. The Director argues that remand for a complete, credible pulmonary evaluation is unnecessary as claimant has not alleged that he was not provided a complete, credible pulmonary evaluation on the issue of pneumoconiosis. The Director further contends that because the administrative law judge's finding that pneumoconiosis was not established is dispositive, any defect in the administrative law judge's consideration of Dr. Simpao's opinion on the issue of total disability would be moot.[1]

[1] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination and the finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4) or total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 elements of entitlement precludes an award of benefits. *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); *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 reversible error.[2] Contrary to claimant's assertion, the administrative law judge properly relied upon the qualifications of the physicians in weighing the x-ray evidence and in determining the weight to be assigned the x-ray interpretations and permissibly considered the numerical superiority of the negative x-ray evidence in finding that the x-ray evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(1).[3] Decision and Order at 6, 10-11; 20 C.F.R. §§718.102(c), 718.202(a)(1);[4] *Staton v. Norfolk & Western Railway Co.*, 65 F.3d 55, 19 BLR 2-271 (6th

[2] 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.

[3] In considering the x-ray evidence, the administrative law judge found that Dr. Wiot, a B reader and Board-certified radiologist, read a February 23, 2004 x-ray as negative, Employer's Exhibit 7; that Dr. Simpao, a physician with no particular expertise in interpreting x-rays, read a September 2, 2004 film as positive, Director's Exhibit 11, while Dr. Wiot, a B reader and Board-certified radiologist, read the same film as negative, Employer's Exhibit 6 and that Dr. Broudy, a B reader, read a May 18, 2005 film as negative. Employer's Exhibit 2.

[4] Section 718.202(a)(1) provides that where two or more x-rays reports are in conflict, consideration *shall* be given to the radiological qualifications of the physicians interpreting such x-rays. 20 C.F.R. §718.202(a)(1).

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*); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Likewise, claimant's contention that the administrative law judge "may have selectively analyzed" the x-ray evidence is rejected as claimant points to no evidence or finding by the administrative law judge that supports this contention. *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). We also reject claimant's argument that he was not provided with a complete, credible pulmonary evaluation for the reasons set forth by the Director. *See* 30 U.S.C. §923(b); 20 C.F.R. §§725.405, 406; *Barnes v. ICO Corp.*, 31 F.3d 673, 18 BLR 2-319 (8th Cir. 1994); *Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25, 2-31 (8th Cir. 1984); *see also Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989). 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) is, therefore, affirmed.

We, therefore, affirm the administrative law judge's finding that the evidence fails to establish the existence of pneumoconiosis. Because the evidence fails to establish the existence of pneumoconiosis, an essential element of entitlement, we need not consider claimant's argument concerning total respiratory disability. *Anderson*, 12 BLR at 1-113; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co. Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A Board-certified radiologist is a physician who has been certified by the American Board of Radiology as having a particular expertise in the field of radiology.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

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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BETTY JEAN HALL
Administrative Appeals Judge