

BRB No. 08-0777 BLA

R.R.)
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 Claimant-Petitioner)
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 v.)
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 C C COAL COMPANY)
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 and)
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 ZURICH AMERICAN INSURANCE) DATE ISSUED: 08/13/2009
 GROUP)
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 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.

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

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (2006-BLA-5668)
of Administrative Law Judge Larry S. Merck rendered on a claim filed on November 18,
2004 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). Director’s Exhibit 2. The
administrative law judge credited the parties’ stipulation to twenty-three years of coal

mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings pursuant to Sections 718.202(a)(1), (4) and 718.204(b)(iv).¹ Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief unless specifically requested to do so by the Board.²

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.³ 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish 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; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

¹ Claimant asserts that the administrative law judge erred in finding that he is not totally disabled, *citing* 20 C.F.R. §718.204(c). Claimant's Brief at 5. Under the revised regulations, which became effective on January 19, 2001, the provision pertaining to total disability, previously set forth at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b)(2).

² We affirm, as unchallenged by the parties on appeal, the administrative law judge's length of coal mine employment determination and his findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3), and total 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).

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 3.

Claimant contends that the administrative law judge erred in finding that he does not have pneumoconiosis. Pursuant to Section 718.202(a)(1), claimant asserts that the administrative law judge erred because he “selectively analyzed” the x-ray evidence and improperly relied upon the physicians’ qualifications and the numerical superiority of the negative x-ray interpretations. Claimant’s Brief at 3. We reject claimant’s contentions as they are without merit.

Pursuant to Section 718.202(a)(1), the administrative law judge found that the record contains four readings of two x-rays dated January 14, 2005 and August 9, 2007. Decision and Order at 5-6. The administrative law judge found that the January 14, 2005 x-ray had one quality reading by Dr. Barrett, a Board-certified radiologist and B reader, and negative readings for pneumoconiosis by Dr. Wiot, a Board-certified radiologist and B reader, and Dr. Broudy, a B reader. Director’s Exhibits 12, 13; Employer’s Exhibit 1. The administrative law judge also found that Dr. Jarboe, a B reader, interpreted the August 9, 2007 x-ray as negative for pneumoconiosis and that there were no contrary interpretations. Employer’s Exhibit 2. Because the administrative law judge properly determined that there was no positive x-ray evidence of record to support claimant’s burden of proof, we affirm, as supported by substantial evidence, his finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1). Decision and Order at 6; *see generally Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993).

With respect to Section 718.202(a)(4), claimant asserts that the administrative law judge may not discredit an opinion of a physician whose report is based on a positive x-ray interpretation which is contrary to his findings, and that it is error for the administrative law judge to substitute his own conclusions for those of a physician. Claimant’s Brief at 4. However, the record contains no evidence to support claimant’s burden of proof thereunder. The administrative law judge properly found that there were two medical opinions of record by Drs. Broudy and Jarboe, but that neither physician opined that claimant has clinical or legal pneumoconiosis. Decision and Order at 8-9; Director’s Exhibit 12; Employer’s Exhibits 2, 3. Thus, we affirm, as supported by substantial evidence, the administrative law judge’s finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order at 9.

Claimant has the burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element of entitlement. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Because claimant failed to establish the existence of

pneumoconiosis, a requisite element of entitlement, benefits are precluded.⁴ *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

⁴ In light of our affirmance of the administrative law judge's findings pursuant to Section 718.202(a), it is not necessary that we address claimant's arguments as to whether the administrative law judge erred in failing to find that he is totally disabled. Claimant's Brief at 5-6.