

BRB No. 09-0760 BLA

JAMES E. CRAWFORD)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
WHITAKER COAL CORPORATION)	DATE ISSUED: 08/20/2010
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS’)	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (L&L Gates LLP), Washington, D.C., for employer.

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 on Remand (2005-BLA-00030) of Administrative Law Judge Ralph A. Romano (the administrative law judge) denying benefits on a subsequent claim filed on April 22, 1986, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the

Act).¹ In the administrative law judge's first decision in this case, he awarded benefits, finding that claimant established sixteen years of qualifying coal mine employment, the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, total disability, and that the disability was due to pneumoconiosis at 20 C.F.R. §§718.202(a), 718.203(b), and 718.204(b) and (c). Pursuant to employer's appeal, the Board affirmed, in part, and vacated, in part, the administrative law judge's decision. The Board remanded the case for the administrative law judge to reconsider whether the new evidence established either pneumoconiosis or total disability at Sections 718.202(a)(4) and 718.204(b), and, therefore, a change in an applicable condition of entitlement at 20 C.F.R. §725.309.² The Board further instructed the administrative law judge to reconsider the merits of entitlement and the onset date of disability, if reached.³

On remand, the administrative law judge found that the new evidence established total disability at Section 718.204(b), and that claimant had, therefore, established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Turning to the merits, however, the administrative law judge found that pneumoconiosis was not established at Section 718.202(a). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's finding that the evidence of record failed to establish pneumoconiosis, based on x-ray and medical opinion evidence at Section 718.202(a)(1) and (4). Claimant also contends that the administrative law judge erred in not finding total disability established at Section 718.204(b). Further, claimant argues that since the administrative law judge rejected Dr. Hussain's opinion, the case must be remanded because the Department of Labor failed to provide him with a complete, credible pulmonary evaluation necessary to substantiate his claim, as required by the Act. 30 U.S.C. §923(b). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), also responds, arguing that claimant was provided with a complete pulmonary evaluation addressing all the elements of entitlement and that remand of the case for a

¹ The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as the instant claim was filed prior to January 1, 2005. Director's Exhibit 2.

² The Board affirmed, as unchallenged on appeal, the administrative law judge's finding that pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1)-(3). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ For the complete procedural history of this case, see the Board's previous Decision and Order in *J.C. [Crawford] v. Whitaker Coal Corp.*, BRB No. 07-0725 BLA (May 21, 2008) (unpub).

complete pulmonary evaluation is not, therefore, warranted.

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.⁴ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits 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. Failure to establish any one of these elements precludes entitlement. *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); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant first argues that the administrative law judge erred in finding that the x-ray evidence of record failed to establish pneumoconiosis at Section 718.202(a)(1) by relying upon the physicians' qualifications and the numerical superiority of the negative x-ray interpretations. Claimant also contends that the administrative law judge selectively analyzed the x-ray evidence.

At the outset, we note that, because the Board previously affirmed the administrative law judge's finding that pneumoconiosis was not established at Section 718.202(a)(1), that finding constitutes the law of the case. *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Moreover, claimant's allegation of error at Section 718.202(a)(1) is without merit, as the administrative law judge may consider the fact that the preponderance of the x-ray readings by physicians with superior qualifications was negative for pneumoconiosis. *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); Decision and Order at 8; Director's Exhibits 9, 10, 15. Accordingly, we reaffirm the administrative law judge's finding that claimant did not establish pneumoconiosis by x-ray evidence at Section 718.202(a)(1).

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, because claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

Claimant also argues that the administrative law judge erred in determining that Dr. Baker's opinion did not support a finding of pneumoconiosis pursuant to Section 718.202(a)(4). This contention has no merit. Contrary to claimant's contention, the administrative law judge acted within his discretion in finding that Dr. Baker's opinion, finding pneumoconiosis, was unreasoned because it was based solely on a positive x-ray and claimant's years of coal dust exposure.⁵ See *Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 575-6, 22 BLR 2-107, 1-120 (6th Cir. 2000); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Decision and Order at 7-8; Director's Exhibit 74-2; Employer's Exhibits 1-4. As claimant has not otherwise challenged the administrative law judge's weighing of the medical opinion evidence at Section 718.202(a)(4), it is affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We affirm, therefore, the administrative law judge's determination that the medical opinion evidence does not support a finding of pneumoconiosis pursuant to Section 718.202(a)(4). Because the administrative law judge found that the medical evidence of record did not establish pneumoconiosis at Section 718.202(a), an essential element of entitlement, we must affirm the administrative law judge's denial of benefits.⁶ *Trent*, 11 BLR at 1-27.

We next address claimant's contention that he did not receive a complete, credible pulmonary evaluation as required under the Act. 30 U.S.C. §923(b). Claimant asserts that this case must be remanded to the district director for a complete, credible pulmonary evaluation because the administrative law judge found that Dr. Hussein's opinion, which was provided at the request of the Department of Labor, contained deficiencies with respect to the issue of the existence of pneumoconiosis. In response, the Director contends that Dr. Hussein's opinion satisfies his obligation of providing claimant with a complete pulmonary evaluation under the Act, as it addressed all of the elements of entitlement. The Director correctly contends that the fact that the administrative law judge found it less compelling on the issue of pneumoconiosis than the opinions of Drs. Broudy and Fino does not mean that he failed to provide claimant with a complete,

⁵ Although Dr. Baker conducted a physical examination of claimant, took work and medical histories, and conducted pulmonary function and blood gas testing, the doctor specifically stated that claimant's coal workers' pneumoconiosis and respiratory disease arising out of coal mine employment were based on claimant's abnormal x-ray and significant coal dust exposure. Director's Exhibit 74 at 2-3.

⁶ Claimant argues that the administrative law judge erred in not finding total disability established. Contrary to claimant's assertion, the administrative law judge did, in fact, find total disability established on the record at Section 718.204(b). Decision and Order at 11; Claimant's Brief at 6-8.

credible pulmonary evaluation. *See Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 24 BLR 2-199 (6th Cir. 2009). Claimant's argument that he was not provided with a pulmonary evaluation sufficient to substantiate his claim is, therefore, rejected.⁷

Accordingly, the administrative law judge's Decision and Order on Remand 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

⁷ Claimant does not allege any errors in the administrative law judge's evaluation of the opinions of Drs. Hussein, Broudy and Fino. Claimant's Brief at 6.