

BRB No. 02-0291 BLA

HOMER R. PREECE)
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 Claimant-Petitioner)
)
 v.) DATE ISSUED:
)
 BILL MONT COAL COMPANY,)
 INCORPORATED)
)
 and)
)
 KENTUCKY EMPLOYERS MUTUAL)
 INSURANCE 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 Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Billy J. Moseley (Webster Law Offices), Pikeville, Kentucky, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2001-BLA-0651) of Administrative Law Judge Rudolf L. Jansen 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).¹ The administrative law judge credited claimant with twenty-eight years and eleven months of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence of record was insufficient to 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)(i)-(iv). Accordingly, benefits were denied. 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) and (4).² Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

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 the 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must prove 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, 718.201, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002).

² The administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2)-(3) are unchallenged on appeal and are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

(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 that there is no reversible error contained therein. Claimant contends that the administrative law judge erred in his evaluation of the x-ray evidence, asserting that Dr. Westerfield's positive x-ray reading establishes the existence of pneumoconiosis. We disagree. In his consideration of the evidence pursuant to Section 718.202(a)(1), the administrative law judge discussed the seventeen x-ray readings of five x-rays, as well as the qualifications of the readers. Decision and Order at 5-6, 9-10; Director's Exhibits 11-12, 19, 21, 23, 26-28, 31, 34; Employer's Exhibits 1, 3. The administrative law judge correctly found that all of the x-ray readings were negative for the presence of pneumoconiosis, except the three readings by Drs. Westerfield, Sundaram and Myers. Decision and Order at 10. The administrative law judge assigned diminished weight to the interpretations by Drs. Sundaram and Myers because their qualifications were unknown. *Id.* Furthermore, in light of the negative readings by two dually qualified B readers and Board-certified radiologists of the February 10, 1997 x-ray that Dr. Westerfield read as positive, the administrative law judge rationally found the interpretations in equipoise. *Id.* The administrative law judge thus reasonably found that the preponderance of the x-ray interpretations by the readers with superior qualifications failed to establish the existence of pneumoconiosis. See *Staton v. Norfolk & Western Railway 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); *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*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 10. We, therefore, affirm the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) as it is supported by substantial evidence.

Moreover, the administrative law judge rationally concluded that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) as he found that the credible medical opinions failed to establish the existence of pneumoconiosis. See 20 C.F.R. §718.202(a)(4); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Perry, supra*; Decision and Order at 10-12. Contrary to claimant's assertion that Dr. Sundaram's opinion establishes the existence of pneumoconiosis, the administrative law judge acted within his discretion as fact-finder in discounting Dr.

Sundaram's opinion, despite his status as claimant's treating physician, because the opinion was insufficiently documented regarding claimant's smoking history. See *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002); *Clark, supra*; Decision and Order at 11-12. Moreover, the administrative law judge noted that Dr. Sundaram's qualifications were not in the record. Decision and Order at 12. After considering the contrary opinions of Drs. Broudy and Westerfield, who had examined claimant, the administrative law judge exercised his discretion in according them greatest weight based on their superior qualifications as Board-certified pulmonologists and the documentation and reasoning in their reports. *Groves, supra*; *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *McMath, supra*; Decision and Order at 11.

The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *Anderson, supra*; *Trent, supra*.

In addition, the administrative law judge permissibly found that the evidence was insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iv) since none of the credible pulmonary function study or blood gas study evidence was qualifying, there was no evidence of cor pulmonale and none of the credible physicians' opinions concluded that claimant was totally disabled due to a respiratory or pulmonary impairment. Decision and Order at 12-14; Director's Exhibits 8-10, 19, 23, 25, 28-29, 34; Employer's Exhibits 1-2; see *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986).

Inasmuch as the administrative law judge properly considered all of the evidence of record and determined that it failed to establish the existence of pneumoconiosis or total disability, requisite elements of entitlement pursuant to 20 C.F.R. Part 718, and these findings are supported by substantial evidence, we affirm the administrative law judge's denial of benefits. *Anderson, supra*; *Trent, supra*.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief

Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge