

BRB No. 04-0594 BLA

JAMES JOSEPH MULLIN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DELAWARE AND HUDSON RAILROAD)	DATE ISSUED: 12/17/2004
GUILFORD TRANSPORTATION)	
INDUSTRY)	
)	
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 of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Harry T. Coleman, Scranton, Pennsylvania, for claimant.

Anthony J. Piazza, Jr. (Murphy, Piazza & Genello, P.C.), Scranton, Pennsylvania, for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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 (2003-BLA-06687) of Administrative Law Judge Robert D. Kaplan 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, based on the date of filing, adjudicated this claim pursuant to 20 C.F.R. Part 718.¹ Decision and Order at 4. The administrative law judge initially determined that claimant failed to establish that he was a miner within the meaning of the Act and further concluded, after considering all of the evidence of record, that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 3-8. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find that he was a miner under the Act. Employer responds, urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs responds, asserting that the administrative law judge's denial of benefits should be affirmed.

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 filed 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 entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (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

¹ Claimant filed his claim for benefits with the Department of Labor on November 14, 2002, which was denied by the district director on May 23, 2003. Director's Exhibits 2, 21. Claimant subsequently requested a formal hearing before the Office of Administrative Law Judges on May 30, 2003. Director's Exhibit 22.

² This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was last employed in the coal mine industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

On appeal, claimant does not challenge the findings of the administrative law judge on claimant's failure to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). We therefore affirm these findings as unchallenged on appeal.³ *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). As claimant has failed to establish the existence of pneumoconiosis, an essential element of entitlement under Part 718, entitlement thereunder is precluded *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. In view of our disposition of this case, we need not address claimant's argument that the administrative law judge erred in failing to find that claimant performed the work of a miner.

³ In any event, review of the record reflects that the administrative law judge permissibly found that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) in light of the negative interpretation by Dr. Lautin, who has superior qualifications. Employer's Exhibit 3; Decision and Order at 5-6; *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 (1988)(*en banc*). In addition, the administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3) as there is no biopsy of record, this is a living miner's claim filed after January 1, 1982, and there is no evidence of complicated pneumoconiosis in the record. 20 C.F.R. §§718.304, 718.305, 718.306; Decision and Order at 6; *Langerud v. Director*, OWCP, 9 BLR 1-101 (1986). In determining whether the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge permissibly accorded greater weight to the opinion of Dr. Levinson, who opined that claimant did not have pneumoconiosis, than to the contrary opinion of Dr. Talati, as Dr. Levinson offered a well reasoned and documented opinion which was supported by laboratory testing and clinical findings. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark*, 12 BLR at 1-155; *Hutchens v. Director*, OWCP, 8 BLR 1-16 (1985); Decision and Order at 7-8; Director's Exhibit 11; Employer's Exhibit 1.

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