

BRB Nos. 05-0630 BLA  
and 05-0630 BLA-A

DANNY K. FRANCE	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION OF KENTUCKY, INCORPORATED	)	DATE ISSUED: 12/29/2005
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
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.

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

Natalee A. Gilmore (Jackson & Kelly PLLC), Lexington, Kentucky, for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; 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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order – Denying Benefits (04-BLA-5009) of Administrative Law Judge Rudolf L. Jansen with respect to 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). In his Decision and Order, the administrative law judge accepted the parties' stipulation to 18.87 years of coal mine employment and considered the claim, filed on August 2, 2002, pursuant to the regulations set forth in 20 C.F.R. Part 718. Director's Exhibit 1. The administrative law judge determined that claimant did not establish that he has pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) or that he is totally disabled due to pneumoconiosis under 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1) and total disability due to pneumoconiosis under Section 718.204(b)(2)(iv) and (c). Claimant also argues that remand is required because the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. Employer responds, urging affirmance of the denial of benefits. In its cross-appeal, employer alleges that the administrative law judge erred in applying the evidentiary limitations set forth in 20 C.F.R. §725.414 and in his weighing of the medical opinions of Drs. Simpao and Jarboe. The Director, Office of Workers' Compensation Programs (the Director), has also responded and maintains that a remand for a complete pulmonary evaluation is not warranted in this case.<sup>1</sup> With respect to employer's cross-appeal, the Director urges the Board to find no merit in employer's arguments regarding Section 725.414.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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 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*

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<sup>1</sup> The parties do not challenge the administrative law judge's decision to credit claimant with 18.87 years of coal mine employment, or his findings pursuant to 718.202(a)(2)-(a)(3), and 718.204(b)(2)(i)-(iii). We therefore affirm these findings as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

*Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to Section 718.202(a)(1), the record contains four interpretations of three x-rays. The administrative law judge found that three of the interpretations were negative for pneumoconiosis and that these readings were submitted by physicians who are Board-certified radiologists and/or B readers. Decision and Order at 9; Director's Exhibit 10; Employer's Exhibits 1-3. The administrative law judge indicated that the sole positive reading of record was performed by Dr. Simpao, who holds no special radiological qualifications. Decision and Order at 9; Director's Exhibit 16. The administrative law judge concluded that because the preponderance of readings by physicians with special radiological qualifications was negative, claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *Id.*

Claimant argues that the administrative law judge's finding must be vacated, as the administrative law judge erred in 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. Claimant's allegations of error are without merit. The administrative law judge acted within his discretion as fact-finder in determining that the x-ray evidence did not establish the existence of pneumoconiosis, based upon the preponderance of negative readings performed by physicians with superior qualifications. Decision and Order at 9; *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); *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*). We affirm, therefore, the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis under Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), the administrative law judge weighed the medical report in which Dr. Simpao diagnosed pneumoconiosis and the medical reports in which Drs. Jarboe and Repsher determined that the disease was not present. The administrative law judge determined that each opinion was reasoned and documented. Decision and Order at 10-11; Director's Exhibit 10; Employer's Exhibits 1, 2. The administrative law judge concluded that the medical opinion of Dr. Repsher, as supported by Dr. Jarboe's diagnoses, outweighed Dr. Simpao's opinion, as it was better supported by the objective evidence of record. Decision and Order at 11. Accordingly, the administrative law judge found that claimant did not establish the existence of pneumoconiosis under Section 718.202(a)(4). *Id.* Claimant has not challenged the administrative law judge's determination under Section 718.202(a)(4). It is, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Because we have affirmed the administrative law judge's findings that the medical evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement, we must also affirm the denial of benefits. *Trent*, 11 BLR at 1-27. In light of this disposition of claimant's appeal, we need not reach claimant's arguments concerning the administrative law judge's weighing of the evidence under Section 718.204(b)(2) and (c), or the arguments raised in employer's cross-appeal.

We must, however, address claimant's contention that he did not receive a complete pulmonary evaluation as required under the Act. Claimant asserts that we are required to remand this case to the district director because the administrative law judge found that Dr. Simpao's opinion, which was provided at the request of the Department of Labor, contained deficiencies with respect to the issues of total disability and total disability due to pneumoconiosis. The Director responds that he is required to give claimant a complete and credible examination, not one that results in an award of benefits. The Director also states that he met his statutory obligation because Dr. Simpao provided a credible diagnosis of pneumoconiosis.

The Act requires that "[e]ach miner who files a claim...be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord 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).

The record reflects that Dr. Simpao conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. Director's Exhibit 10; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). As indicated, with respect to the issue of pneumoconiosis, the administrative law judge found that Dr. Simpao's diagnosis was well-reasoned, but was outweighed by the opinions of Drs. Repsher and Jarboe, which were better supported by the objective data. Decision and Order at 11. Because Dr. Simpao's opinion was merely found outweighed on the issue of pneumoconiosis, there is no merit to claimant's argument that the administrative law judge's treatment of Dr. Simpao's opinion establishes that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. 20 C.F.R. §725.406(a); *Hodges*, 18 BLR at 1-93.

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge