

BRB No. 06-0447 BLA

EARNEST BAKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NALLY & HAMILTON ENTERPRISES	)	DATE ISSUED: 12/22/2006
	)	
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-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.  
H. Brett Stonecipher (Ferreri and Fogle), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (04-BLA-5469) of Administrative Law Judge Rudolf L. Jansen rendered 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). Claimant filed this claim for benefits on May 31, 2002. Director’s Exhibit 2. The administrative law judge credited the claimant with 11.69 years of coal mine employment.<sup>1</sup> Decision and Order at 6. The administrative law

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<sup>1</sup> The record indicates that claimant’s last coal mine employment occurred in Kentucky. Director’s Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*)

judge found that claimant failed to establish either the existence of pneumoconiosis, or that he is totally disabled by a respiratory impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray evidence and medical opinion evidence when he found that claimant did not establish the existence of pneumoconiosis. Claimant also contends that the administrative law judge erred in his consideration of the medical opinion evidence when he found that claimant did not establish that he is totally disabled. Additionally, claimant contends that the administrative law judge erred because he allowed employer to submit two rebuttal x-ray interpretations of a film submitted by claimant. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a substantive response in this appeal.

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. 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered four readings of one x-ray in light of the readers' radiological qualifications. Two of the readings were negative, one was positive, and the fourth was read for quality only. The administrative law judge found that Dr. Simpao, with no radiological specialty credentials, read the September 17, 2002 x-ray as positive for pneumoconiosis. Director's Exhibit 9. The administrative law judge noted, however, that Dr. Spitz and Dr. Wiot, both Board-certified radiologists and B-readers, read the September 17, 2002 x-ray as negative for pneumoconiosis. Decision and Order at 10; Director's Exhibit 11; Employer's Exhibit 1. Because the negative readings constituted the majority of the interpretations, and were provided by doctors who are more highly-qualified than Dr. Simpao, the administrative law judge found that claimant did not establish the existence of pneumoconiosis by the x-ray evidence. Decision and Order at 10.

The administrative law judge based his finding on a proper quantitative and qualitative analysis of the x-ray evidence. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, merely counted the negative readings, and that he "may have 'selectively analyzed'" the readings, lack merit. Claimant's Brief at 4. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Claimant also contends that the employer submitted two rebuttal interpretations of the September 17, 2002 x-ray in violation of 20 C.F.R. §725.414(a)(3)(ii). Claimant's Brief at 3-4. Claimant's contention that the administrative law judge erred in not striking one of the x-ray interpretations from Dr. Wiot or Dr. Spitz is without merit. Employer may submit two x-ray interpretations in support of its affirmative case, pursuant to Section 725.414(a)(3)(i). The two x-rays interpretations of the September 17, 2002 x-ray fall within these limitations. *See Dempsey v. Sewell Coal Corp.* 23 BLR 1-47, 1-56-57 (2004).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered two medical opinions. Dr. Simpao diagnosed claimant with pneumoconiosis, while Dr. Broudy concluded that he does not have pneumoconiosis. Director's Exhibit 9; Employer's Exhibit 2.

Claimant contends that the administrative law judge erred in "rejecting" the report of Dr. Simpao. In addition, Claimant contends that the administrative law judge erred because he discredited Dr. Simpao's report as it relied on an x-ray interpretation that was contrary to the administrative law judge's findings. Claimant's Brief at 5. Contrary to the claimant's contention, the administrative law judge did not "reject" Dr. Simpao's report, but found it to be documented and reasoned, and accorded it additional weight because Dr. Simpao is a pulmonary specialist. Decision and Order at 11. However, the administrative law judge permissibly found that the report of Dr. Broudy was better supported by the objective medical evidence of record, including the negative x-ray interpretation of Dr. Spitz and the normal pulmonary function tests. Employer's Exhibit 2.

Claimant essentially requests a reweighing of the evidence, which we cannot do. *Anderson*, 12 BLR at 1-113. Substantial evidence supports the administrative law judge's permissible determination that Dr. Broudy's opinion was entitled to more weight as it was better supported by the objective medical data of record. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). Consequently, we affirm the

administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a miner's claim under Part 718, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*). Consequently, we need not address claimant's arguments concerning the administrative law judge's finding that claimant did not establish that he is totally disabled.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge