

BRB No. 09-0525 BLA

KENNETH MCINTOSH)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
LOCUST GROVE, INCORPORATED)	
)	
and)	
)	
KENTUCKY EMPLOYERS MUTUAL)	DATE ISSUED: 02/24/2010
INSURANCE)	
)	
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 Living Miner's Benefits of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

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

Todd P. Kennedy (Jones, Walter, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Living Miner's Benefits (2008-BLA-05263) of Administrative Law Judge Kenneth A. Krantz on a claim filed on February 16, 2007, 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 credited claimant with twenty-four years of coal mine employment and adjudicated this claim under the regulations at 20 C.F.R. Part 718. The administrative law judge determined that claimant failed to satisfy his burden to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

Claimant appeals, asserting that the administrative law judge erred in evaluating the x-ray and medical opinion evidence as to the existence of pneumoconiosis, and that he erred in finding that claimant is not totally disabled. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

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

To establish entitlement 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 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).

Claimant contends that the administrative law judge erred in failing to find that he has pneumoconiosis. Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered four readings of three x-rays dated April 16, 2007, May 3, 2007 and March 27, 2008, all of which were negative for pneumoconiosis. Decision and Order at 6; Director's Exhibits 9, 11, 12; Employer's Exhibit 1. Because there are no positive x-ray readings of record, claimant's general assertions that the administrative law judge "may have selectively analyzed the x-ray evidence," and that he was not required to "defer to a [reader] with superior qualifications" or "rely on the numerical superiority of the x-ray interpretations" have no merit. Claimant's Brief at 3; *see White v. New White Coal Co.*, 23 BLR at 1-1, 1-4-5 (2004); Director's Exhibits 9, 11, 12; Employer's Exhibit 1. We

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

therefore affirm the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).²

Furthermore, contrary to claimant's assertion, the administrative law judge properly found that none of the physicians of record has diagnosed the claimant with either clinical or legal pneumoconiosis.³ Decision and Order at 10; Director's Exhibits 9, 11; Employer's Exhibit 1. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis based on the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). *See generally Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

As there is no evidence in the record to establish that claimant has pneumoconiosis, a necessary element of entitlement in a miner's claim under Part 718, benefits are precluded. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

² We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

³ Dr. Rasmussen examined claimant on May 3, 2007, at the request of the Department of Labor, and opined that there was insufficient evidence to justify a diagnosis of either clinical or legal pneumoconiosis. Director's Exhibit 9. Dr. Dahhan examined claimant on April 16, 2007, and opined that claimant did not have pneumoconiosis or any respiratory condition due to coal dust exposure. Director's Exhibit 11. Similarly, Dr. Jarboe examined claimant on March 27, 2008, and opined that there was insufficient evidence to justify a diagnosis of either clinical or legal pneumoconiosis. Employer's Exhibit 1.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge