

BRB No. 01-0396 BLA

JAMES FANNON)
)
 Claimant-Petitioner)
)
 v.)
)
 MOUNTAIN CONSTRUCTION)
 COMPANY)
)
 and)
)
 SECURITY INSURANCE COMPANY) DATE ISSUED:
 OF HARTFORD)
)
 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 Donald W. Mosser,
Administrative Law Judge, United States Department of Labor.

James Fannon, Baxter, Kentucky, *pro se*.

Monica J. Rice, Hazard, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2000-BLA-362) of Administrative Law Judge Donald W. Mosser 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 accepted the parties' stipulation that claimant established at least twenty-six years of coal mine employment. The administrative law judge then considered the medical evidence pursuant to 20 C.F.R. Part 718 (2000) and determined that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2000). The administrative law judge further determined that although the pulmonary function studies of record established total disability and all the physicians of record agree that claimant does not retain the respiratory capacity to perform his previous coal mine employment, the evidence does not support a finding that claimant's impairment is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2000). Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge's findings are erroneous. Employer/carrier has not responded to claimant's appeal. The Director, Office of Workers' Compensation Programs, has indicated that he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *See Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *See O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹The 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, 725, 726 (2001).

In order to establish entitlement to benefits in a living miner's claim pursuant to 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, 718.202, 718.203, 718.204 (2001). 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 issues raised on appeal, and the evidence of record, we hold that the administrative law judge's findings are rational and in accordance with law. The x-ray evidence consists of thirteen interpretations of eight x-rays. Director's Exhibits 10, 11, 13 - 18, 29 - 32. The administrative law judge found that the first four x-rays of record, dated between March 1996-1998, were each read only once and were interpreted as positive for the existence of pneumoconiosis.² Decision and Order at 9. The remainder of the subsequent x-rays, were read by physicians who were either B readers or Board-certified radiologists and were interpreted as negative for pneumoconiosis. In a rational exercise of discretion, the administrative law judge properly relied upon the numerical weight of the negative x-rays, which were read by highly qualified physicians, to determine that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) (2000). *See Staton v. Norfolk & Western Railroad 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*).

Relevant to Section 718.202(a)(2) (2000), the administrative law judge properly determined that claimant could not establish the existence of pneumoconiosis as the record did not contain biopsy evidence. *See* 20 C.F.R. §718.202(a)(2)(2000); Decision and Order at 9. The administrative law judge also properly found that claimant did not establish pneumoconiosis pursuant to Section 718.202(a)(3) (2000) as the presumptions set forth in Sections 718.304, 718.305 and 718.306 (2000) are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated

²Two of the x-rays were interpreted by physicians who were B-readers. Director's Exhibits 10, 17. A third x-ray was interpreted by a physician who is dually qualified as a board-certified radiologist and B-reader. Director's Exhibit 18.

pneumoconiosis. *See* 20 C.F.R. §§718.304, 718.305, 718.306 (2000); Decision and Order at 9.

At Section 718.202(a)(4)(2000), the administrative law judge found that Drs. Joyce, Bushey and Burki diagnosed pneumoconiosis, whereas Drs. Powell, Jarboe, Baker and Broudy did not find the presence of any chronic lung disease related to coal mine employment. Decision and Order at 10. The administrative law judge noted the high qualifications of the physicians who did not find the presence of pneumoconiosis and found they were “superior to Drs. Joyce and Bushey.”³ *Id.* The administrative law judge additionally found that the opinions of Drs. Powell, Jarboe, Baker and Broudy “are well-reasoned, and more consistent with the objective evidence, and consistently support each other.” *Id.* The administrative law judge further found that although Dr. Burki also possessed excellent credentials, his report provided little reasoning for his diagnosis of pneumoconiosis other than his positive x-ray interpretation.⁴ The administrative law

³Drs. Powell, Jarboe, Baker and Broudy are B readers who are Board-certified in internal medicine and pulmonary diseases. Director’s Exhibits 13, 15, 29; Employer’s Exhibit 1. Dr. Joyce is Board-certified in internal medicine and is a B reader. Director’s Exhibit 10. Dr. Bushey is not Board-certified in any specialty. Director’s Exhibit 11. Dr. Burki is Board-certified in internal medicine and pulmonary diseases. Director’s Exhibit 12.

⁴Dr. Burki noted a coal mine employment history of twenty-eight years and a smoking history of one pack of cigarettes per day for thirty-five years, ending one year earlier. The physician also noted symptoms and performed a physical examination.

judge gave greater weight to Dr. Broudy's opinion, which he found to be supported by his two depositions in which he explained how he arrived at his conclusions regarding claimant's condition. *Id.*

In relying upon the opinions by Drs. Powell, Jarboe, Baker and Broudy, the administrative law judge permissibly accorded deferential weight to the physicians who possess superior credentials in internal medicine and pulmonary diseases. *See Gray v. SLC Coal Co.*, 126 F.3d 382, 387, 21 BLR 2-615, 2-625-26 (6th Cir. 1999); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Furthermore, the administrative law judge rationally found that although Dr. Burki was similarly qualified, his diagnosis that claimant suffers from pneumoconiosis was supported only by a positive x-ray interpretation and therefore was substantially outweighed by the other physicians who opined that claimant did not have pneumoconiosis. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Lastly, the administrative law judge permissibly found that the opinions of the physicians who did not diagnose the presence of pneumoconiosis, including that of Dr. Broudy, as supported by his deposition testimony, were the better reasoned and documented opinions of record. *See Clark, supra; Fields, supra; Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Accordingly, because the administrative law judge properly considered the medical opinions of record, we affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000).

Under the "Diagnosis" section of the form completed by Dr. Burki, the physician stated that a radiograph reported by Dr. Woodring was consistent with simple pneumoconiosis, ILO grading 1/1, and that pulmonary function tests indicate decreased lung function and airways obstruction. Dr. Burki further opined that claimant's pulmonary impairment is caused by coal dust and that claimant does not retain the pulmonary capacity to perform his previous coal mine employment. Director's Exhibit 12.

Because the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement in this Part 718 case, we affirm the administrative law judge's finding that claimant is not entitled to benefits.⁵ *See Trent, supra; Perry, 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

BETTY JEAN HALL
Administrative Appeals Judge

⁵Claimant's failure to affirmatively establish the existence of pneumoconiosis, a requisite element of entitlement, eliminates the need to address the administrative law judge's total disability and causation determinations. *See Trent, supra; Perry, supra.*