

BRB No. 06-0909 BLA

L.P.)
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED: 05/25/2007
)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Living Miner's Benefits of John M. Vittone, Chief Administrative Law Judge, United States Department of Labor.

L.P., Mesa, Arizona, *pro se*.

Rita Roppolo (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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: McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Living Miner's Benefits (05-BLA-5803) of Chief Administrative Law Judge John M. Vittone 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). In a Decision and Order dated August 14, 2006, the administrative law judge credited the miner with four years of coal mine employment,¹ as established by Social Security

¹ The record indicates that claimant was engaged in coal mine employment in Colorado. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of

Administration earnings records and claimant's testimony, and found that the evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. The Director, Office of Workers' Compensation Programs, responds urging affirmance of the denial of benefits.

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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). The Board must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

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 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).

In finding the x-ray evidence insufficient to establish the existence of pneumoconiosis, the administrative law judge properly found that there are no positive x-ray readings of record. Decision and Order at 6. A May 25, 2004 x-ray was read twice as negative by Dr. Lynch and Dr. Navani, who are both B readers and Board-certified radiologists.² Decision and Order at 6; Director's Exhibits 14, 29. The administrative law judge properly concluded, based on the absence of positive x-ray readings, that claimant failed to meet his burden of proof to establish the existence of pneumoconiosis by x-ray evidence, *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); Decision and Order at 6. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1). See 20 C.F.R. §718.102(b).

the United States Court of Appeals for the Tenth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

² The May 25, 2004 x-ray was also read a second time for quality only (Quality 2) by Dr. Navani. Director's Exhibit 15.

The administrative law judge also found, correctly, that the record contains no biopsy evidence to be considered pursuant to 20 C.F.R. §718.202(a)(2), and that the presumptions set forth at 20 C.F.R. §§718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. See 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306; Decision and Order at 5 n.3.

Finally, relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical reports of Drs. Rose and Baratz. The administrative law judge found that Dr. Rose, a Board-certified pulmonologist, conducted a physical examination and objective testing, including an x-ray that was negative for pneumoconiosis. Decision and Order at 7; Director's Exhibits 10, 11. In a report dated July 1, 2004, Dr. Rose diagnosed severe obstruction and restriction, based on the pulmonary function study results, but stated that the etiology of claimant's lung condition was "unclear" based on the lack of imaging findings suggestive of pneumoconiosis, and claimant's limited history of coal dust exposure. Decision and Order at 7; Director's Exhibit 10 at 4. Dr. Rose concluded, based on her evaluation, that "there are no clear findings to support a diagnosis of coal worker's [sic] pneumoconiosis (Black Lung)." Decision and Order at 7; Director's Exhibit 11 at 5.

Reviewing the report of Dr. Baratz, also a Board-certified pulmonologist, the administrative law judge found that the physician conducted a physical examination and objective testing, including a high resolution computerized tomography (CT) scan that showed no evidence of interstitial lung disease. Decision and Order at 8; Director's Exhibit 23; Claimant's Exhibit 1. In a report dated December 23, 2004, Dr. Baratz diagnosed moderate airflow obstruction and restrictive lung disease, based on the pulmonary function studies. Decision and Order at 8; Director's Exhibit 23. Dr. Baratz concluded that "[t]he exact etiology for the lung disease has not been able to be determined," and explained that while claimant did not have evidence of interstitial lung disease or changes consistent with typical black lung disease, there remained a concern that claimant's airflow obstruction "may have been related to occupational exposure." Decision and Order at 8; Director's Exhibit 23 at 2. Dr. Baratz further opined that claimant's airflow obstruction "probably has multiple etiologies including cigarette smoke and mining exposure," and concluded that he could not "confirm nor exclude the possibility that mining exposure, in addition to his cigarettes, are the cause of the patient's dyspnea." *Id.*

After summarizing the findings of the physicians, the administrative law judge permissibly found that, because neither Dr. Rose nor Dr. Baratz could unequivocally state that claimant suffered from clinical pneumoconiosis, or that his diagnosed lung condition is causally related to coal dust exposure, the medical opinion evidence did not support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). See *Andersen v.*

Director, OWCP, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006); *Mangus v. Director, OWCP*, 882 F.2d 152, 13 BLR 2-9 (10th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Decision and Order at 8; Director's Exhibits 10, 11, 23.

Because substantial evidence supports the administrative law judge's finding as to the relevant medical opinions, we affirm his finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). We must affirm, therefore, the administrative law judge's finding that claimant did not prove that he is suffering from pneumoconiosis under 20 C.F.R. §718.202(a), an essential element of entitlement. *See Trent*, 11 BLR at 1-27.

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge