

BRB No. 05-0357 BLA

WAYNE SIZEMORE)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ADDINGTON, INCORPORATED)	DATE ISSUED: 10/06/2005
)	
and)	
)	
THE PITTSTON COMPANY)	
C/O ACORDIA EMPLOYER SERVICES)	
)	
Employer/Carrier-)	
Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (2004-BLA-5139) of Administrative Law Judge Daniel J. Roketenetz 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). Based on the date of filing, July 17, 2002, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718, and found

that claimant established at least twenty-two years of coal mine employment. The administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), or the presence of a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in not finding the existence of pneumoconiosis and total disability established. Employer responds, urging affirmance of the Decision and Order as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

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. 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*).

Claimant contends that the administrative law judge should have found the existence of pneumoconiosis established based on a positive x-ray. Claimant argues that the administrative law judge "need not defer to a doctor with superior qualifications" and "need not accept as conclusive the numerical superiority of x-ray interpretations." Claimant's Brief at 3. Claimant further suggests that the administrative law judge "may" have selectively analyzed the x-ray evidence of record. Claimant's Brief at 3.

We find no merit in these assertions, however, and hold that the administrative law judge rationally credited the greater number of negative readings from those physicians with specialized qualifications in the field of radiology. Decision and Order – Denial of Benefits at 6-7; Employer's Exhibits 1, 3, 5; Director's Exhibit 11; 20 C.F.R. §718.202(a)(1); *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. 1995); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dixon v. North Camp Coal Co.*, 8 BLR 1-

344 (1985).¹ This determination is supported by the record since the majority of the negative interpretations were submitted by physicians who were either Board-certified radiologists, B-readers, or both, while the single positive reading was done by a physician who had no specialized qualifications in the field of radiology and that x-ray was re-read negative by a physician, who was both a Board-certified radiologist and a B-reader.² Employer's Exhibits 3, 4, 7; Director's Exhibits 9-11; 20 C.F.R. §718.202(a)(1). Moreover, we find no evidence to support claimant's suggestion that the administrative law judge "may" have selectively analyzed the x-ray evidence of record.³ *White v. New White Coal Co.*, 23 BLR 1-1, 1-5 (2004). Accordingly, we affirm the administrative law judge's finding that the x-ray evidence failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1).

Claimant contends that the administrative law judge should have found the existence of pneumoconiosis established based on the opinion of Dr. Simpao, diagnosing the presence of coal workers' pneumoconiosis and a pulmonary impairment related to coal mine employment, as it was a documented and reasoned opinion based on x-ray, examination, pulmonary function study, blood gas study, and work and medical histories. Claimant asserts generally that an administrative law judge may not discredit the opinion of a physician whose report is based on a positive x-ray contrary to the administrative law judge's finding that the weight of the x-ray evidence is negative and may not discredit a report based on positive x-ray evidence merely because the record contains subsequent negative x-rays.

¹ Since the miner's last coal mine employment took place in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. Director's Exhibit 3; see *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

² A B reader is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination by the National Institute of Occupational Safety and Health. See 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135 n.16, 11 BLR 2-1 n.16 (1987), *reh'g denied* 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A Board-certified radiologist is a physician who is certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the American Osteopathic Association. 20 C.F.R. §718.202(a)(ii)(C).

³ The administrative law judge's determination that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2),(3), is affirmed as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In finding that the medical opinion evidence did not establish the existence of pneumoconiosis, the administrative law judge found that the opinion of Dr. Simpao, finding coal workers' pneumoconiosis and a pulmonary impairment related to coal mine employment, and the opinions of Drs. Dahhan and Rosenberg, finding no pneumoconiosis and no pulmonary impairment related to coal mine employment, were well-documented and well-reasoned. The administrative law judge further found that all three physicians were certified in internal medicine and pulmonary diseases. Decision and Order at 8-10. Weighing the medical opinion evidence, the administrative law judge concluded that a preponderance of the medical opinion evidence failed to establish the existence of clinical and legal pneumoconiosis. This was rational. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). We, therefore, affirm the administrative law judge's finding that claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

As we have affirmed the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), an essential element of entitlement, we must also affirm the denial of benefits. *See Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1. We need not, therefore, address claimant's argument on total disability.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge