BRB No. 05-0300 BLA

LAVONNA SUE CALDWELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LESLIE HAULERS, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 09/22/2005
	)	
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 – 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.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order – Denial of Benefits (03-BLA-5809) of Administrative Law Judge Daniel J. Roketenetz on a miner's 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). The administrative law judge credited the miner with "at least nine years" of coal mine employment. Decision and Order at 4. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). *Id.* at 7-12. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to Section 718.202(a)(1). Claimant's Brief at 2-3. Additionally, claimant contends that the administrative law judge erred in failing to find that claimant has established total respiratory disability based on the medical opinion evidence. *Id.* at 4-6. Claimant further asserts that because the administrative law judge found Dr. Hussain's opinion to be unreasoned and undocumented, the Director, Office of Workers' Compensation Programs (the Director), failed to provide claimant with a complete and credible pulmonary evaluation as required under the Act. *Id.* at 4. Employer and the Director respond, urging affirmance of the administrative law judge's denial of benefits.[2]

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements

[1]Claimant is Lavonna Sue Caldwell, the miner, who filed her claim for benefits on June 25, 2001. Director's Exhibit 2.

[2]We affirm the administrative law judge's finding of "at least nine years" of coal mine employment and his finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(a)(4), as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant initially contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge considered four readings of two x-rays, taken on September 19, 2001 and October 25, 2001.[3] Of these four x-ray interpretations, the administrative law judge noted that Dr. Hussain, who is neither a B reader[4] nor a Board-certified radiologist, read the September 19, 2001 x-ray as positive for the existence of pneumoconiosis and Dr. Scott, whose qualifications are not in the record, interpreted this x-ray as negative. Decision and Order at 6. The administrative law judge also noted that Drs. Lockey and Wiot, who are B readers, read the October 25, 2001 x-ray as negative. *Id.* The administrative law judge found "that the preponderance of the negative readings by B readers outweigh[s] the positive x-ray interpretation by a lesser qualified radiologist." *Id.* Accordingly, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *Id.* at 6-7.

Claimant contends that the administrative law judge erred in considering the qualifications of the physicians in weighing the x-ray evidence, in placing substantial weight on the numerical superiority of the x-ray readings, and in selectively analyzing the x-ray evidence. Claimant's Brief at 3. Contrary to claimant's assertion, the administrative law judge permissibly considered the radiological qualifications of the x-ray readers. *See Johnson v. Island Creek Coal Co.*, 846 F.2d 364, 11 BLR 2-161 (6th

[3]The record also contains an interpretation of a July 20, 1994 x-ray by Dr. Daly in which he found that no active disease was present. Director's Exhibit 22. Additionally, the record contains a negative reading of the September 19, 2001 x-ray by Dr. Wheeler and a reading of this x-ray for film quality only by Dr. Sargent. Employer's Exhibit 1; Director's Exhibit 14. We deem any error the administrative law judge may have made in failing to consider this x-ray evidence to be harmless, because these interpretations, if considered by the administrative law judge, would not support claimant in establishing the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[4]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 established 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 Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

Cir. 1988); *Creech v. Benefits Review Board*, 841 F.2d 706, 11 BLR 2-86 (6th Cir. 1988); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Similarly, because the administrative law judge considered the x-ray readers' qualifications, he did not rely solely on the numerical superiority of the negative readings in rendering his finding. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995). Additionally, claimant's bald assertion that the administrative law judge selectively analyzed the x-ray evidence is without merit, because the administrative law judge thoroughly considered both the positive and negative x-ray interpretations in the record. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984); *see generally Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Therefore, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[5]

Claimant additionally argues that, given the administrative law judge's finding at Section 718.202(a)(4) that Dr. Hussain's opinion is neither reasoned nor documented, the Director failed to provide her with a complete and credible pulmonary evaluation as required under Section 413(b) of the Act.[6] The Director states that he has met his statutory obligation to provide claimant with a complete and credible pulmonary evaluation, by virtue of Dr. Hussain's September 19, 2001 evaluation of claimant. The Director specifically argues that Dr. Hussain "reasonably diagnosed clinical pneumoconiosis based on the information before him. That the doctor's finding does not necessarily equate to a reasoned finding of legal pneumoconiosis does not amount to a section 413(b) failure." Director's Brief at 2. We agree with the Director, whose duty it is to ensure the proper enforcement and lawful administration of the Act. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-87 (1994); *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989)(Order)(*en banc*). Therefore, we decline to remand this case pursuant to 30 U.S.C. §923(b).

[5]Although claimant states in her brief that "[p]ursuant to §725.414, there are limitations to the amount of evidence that each party can submit," claimant does not allege any error committed by the administrative law judge with regard to 20 C.F.R. §725.414. *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

[6]Claimant selected Dr. Hussain to perform a pulmonary evaluation on her. Director's Exhibit 9. By report dated September 19, 2001, Dr. Hussain diagnosed pneumoconiosis due to dust exposure and indicated that claimant has a mild impairment. Director's Exhibit 10.

Because claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), a requisite element of entitlement under Part 718, we affirm the administrative law judge's denial of benefits.[7] *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

_____
JUDITH S. BOGGS
Administrative Appeals Judge

[7]In light of the foregoing, it is unnecessary for us to address claimant's assertions regarding total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), as a finding of entitlement is precluded in this case. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).