

BRB No. 05-0359 BLA

ARTHUR MOSLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAIN CLAY, INCORPORATED	)	DATE ISSUED: 09/30/2005
	)	
and	)	
	)	
JAMES RIVER COAL COMPANY	)	
	)	
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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (2004-BLA-5884) 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, December 20, 2001, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718, and found that claimant established at least 28.92 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 of the administrative law judge 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*).

Pursuant to Section 718.202(a)(1), claimant contends 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" improperly selectively analyzed the x-ray evidence of record. Claimant's Brief at 3. We find no merit in these assertions, 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 5-7; Employer's Exhibits 3, 4, 7; Director's Exhibits 9-11; 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).<sup>1</sup> This determination is supported by the record since

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<sup>1</sup> Since the miner's last coal mine employment took place in the Commonwealth of 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*).

the majority of the negative interpretations were submitted by physicians who were either Board-certified radiologists, or B-readers, or both, while the single positive reading was interpreted by a physician who is a B-reader.<sup>2</sup> Employer's Exhibits 3, 4, 7; Director's Exhibits 9-11. Further, the administrative law judge permissibly considered that the x-ray read positive by Dr. Baker was subsequently reread negative by a better qualified reader. Director's Exhibit 10; Employer's Exhibit 7; 20 C.F.R. §718.202(a)(4). Moreover, we find no evidence to support claimant's suggestion that the administrative law judge selectively analyzed the x-ray evidence of record.<sup>3</sup> *White v. New White Coal Co.*, 23 BLR 1-1, 1-5 (2004). Accordingly, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established by x-ray evidence at Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge erroneously rejected the opinion of Dr. Baker, diagnosing the presence of pneumoconiosis, for the reason that it was based on a positive x-ray reading, 1/0, contrary to the administrative law judge's finding that the x-ray evidence as a whole was negative for pneumoconiosis and for the reason that the record contained subsequent negative x-rays. Rather, claimant contends that the administrative law judge should have credited Dr. Baker's finding of pneumoconiosis as documented and reasoned as Dr. Baker, a Board-certified internist and pulmonologist, based his diagnosis of pneumoconiosis on, in addition to an x-ray, physical examination, pulmonary function study, blood gas study, symptoms, and medical and work histories.

Contrary to claimant's contention, however, a review of Dr. Baker's opinion supports the administrative law judge's finding that Dr. Baker's diagnosis of pneumoconiosis was based solely on claimant's positive x-ray, 1/0, and history of coal dust exposure. Director's

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<sup>2</sup> 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).

<sup>3</sup> 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).

Exhibit 10.<sup>4</sup> Further, the administrative law judge acknowledged that while Dr. Baker conducted other physical and objective testing of claimant, he did not state how the results of this other testing contributed to his diagnosis of pneumoconiosis. Decision and Order at 11. We conclude, therefore, that the administrative law judge reasonably concluded that Dr. Baker's diagnosis of clinical pneumoconiosis, which was based solely on x-ray and coal mine employment history, was not sufficient to establish the existence of clinical pneumoconiosis. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985); see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Likewise, the administrative law judge reasonably found that Dr. Baker's diagnosis of bronchitis was insufficient to establish the existence of legal pneumoconiosis. 20 C.F.R. §718.201. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(4). Because claimant has failed to establish the existence of pneumoconiosis, an essential element of entitlement, we need not address claimant's argument regarding total disability. *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

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<sup>4</sup> Dr. Baker diagnosed coal workers' pneumoconiosis, category 1/0, based on abnormal x-ray and significant history of coal dust exposure, and bronchitis. When asked if claimant's disease was the result of coal dust exposure, Dr. Baker answered that claimant has x-ray evidence of pneumoconiosis, a long history of dust exposure, and no other conditions to account for the x-ray changes. Director's Exhibit 10.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge