

BRB No. 05-0986 BLA

ROY E. DAVIDSON)
)
 Claimant-Petitioner)
)
 v.)
)
 MOUNTAIN CLAY, INCORPORATED)
)
 and) DATE ISSUED: 05/30/2006
)
 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/carrier.

Barry H. Joyner (Howard M. Radzely, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (04-BLA-5715) of Administrative Law Judge Daniel J. Roketenetz with respect to 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). The administrative law judge accepted the parties’ stipulation to nineteen years of coal mine employment and considered the claim, filed on May 24, 2002, under the regulations set forth in 20 C.F.R. Part 718. The administrative law judge determined that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability under 20 C.F.R. §718.204(b)(2). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge’s finding that the evidence of record is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1) and (a)(4) and total disability due to pneumoconiosis under Section 718.204(b)(2)(iv). Claimant also argues that remand is required because the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers’ Compensation Programs (the Director), has also responded and maintains that a remand for a complete pulmonary evaluation is not warranted in this case.¹

The Board’s scope of review is defined by statute. The administrative law judge’s Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable 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).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must establish 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. *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

¹ We affirm, as unchallenged on appeal, the administrative law judge’s decision to credit claimant with nineteen years of coal mine employment, and his findings pursuant to 718.202(a)(2)-(a)(3), and 718.204(b)(2)(i)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to Section 718.202(a)(1), claimant argues that the administrative law judge's finding must be vacated, as the administrative law judge erred in relying upon the physicians' qualifications and the numerical superiority of the negative x-ray interpretations. Claimant also contends that the administrative law judge selectively analyzed the x-ray evidence. These allegations of error are without merit. The administrative law judge acted within his discretion as fact-finder in determining that the x-ray evidence did not establish the existence of pneumoconiosis based upon the preponderance of negative readings performed by physicians with superior qualifications. Decision and Order at 6; *see 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. 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*). We affirm therefore the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis under Section 718.202(a)(1).

Claimant also maintains that the administrative law judge erred in finding that Dr. Simpao's opinion did not support a finding of pneumoconiosis pursuant to Section 718.202(a)(4). This contention has no merit. The administrative law judge determined correctly that Dr. Simpao diagnosed clinical pneumoconiosis based upon his positive reading of a chest x-ray and claimant's history of coal mine employment.² Decision and Order at 10; Director's Exhibit 10. The administrative law judge acted within his discretion in finding that Dr. Simpao's opinion was outweighed by the contrary probative evidence of record, including the negative rereading of the x-ray obtained by Dr. Simpao, which was performed by a physician with superior radiological qualifications, and the opinions of Drs. Broudy and Rosenberg, which were better supported by the objective evidence of record. Decision and Order at 10-11; Director's Exhibit 10; Employer's Exhibits 4, 5, 10; *Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113

² "Clinical pneumoconiosis" is defined in 20 C.F.R. §718.201(a)(1) as consisting of:

[T]hose diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(1989). Thus, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Because the administrative law judge's findings that the medical evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement, have been affirmed, we must also affirm the denial of benefits. *Trent*, 11 BLR at 1-27. In light of this disposition of claimant's appeal, we need not reach claimant's arguments concerning the administrative law judge's weighing of the evidence under Section 718.204(b)(2), as error, if any, in the administrative law judge's findings would be harmless. *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

With respect to claimant's contention that the Director did not provide him with a complete pulmonary evaluation as is required under the Act, claimant asserts that this case must be remanded to the district director because the administrative law judge found that Dr. Simpao's opinion, which was provided at the request of the Department of Labor, contained deficiencies with respect to the issues of the existence of pneumoconiosis and total disability. Both the Director and employer urge the Board to reject claimant's argument.

The Act requires that "[e]ach miner who files a claim...be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105(8th Cir. 1990); *Newman v. Director, OWCP*, 745 F. 2d 1162, 7 BLR 2-25, 2-31 (8th Cir. 1984).

As indicated, with respect to the issue of pneumoconiosis, the administrative law judge found that Dr. Simpao's diagnosis of the clinical form of the disease was outweighed by the opinions of Drs. Broudy and Rosenberg, which were better supported by the objective data. Decision and Order at 11. Because Dr. Simpao's opinion was merely found outweighed on the issue of pneumoconiosis, there is no merit to claimant's argument that the administrative law judge's treatment of Dr. Simpao's opinion establishes that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation with respect to the element which defeated entitlement in this case. 20 C.F.R. §725.406(a); *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105(8th Cir. 1990); *Newman v. Director, OWCP*, 745 F. 2d 1162, 7 BLR 2-25, 2-31 (8th Cir. 1984).

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