BRB No. 06-0555 BLA

JAMES YOUNG	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KEM COAL COMPANY	)	DATE ISSUED: 11/29/2006
	)	
and	)	
	)	
JAMES RIVER COAL COMPANY c/o ACORDIA EMPLOYERS SERVICES CORPORATION	)	
	)	
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 Thomas F. Phalen, Jr., 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 (2003-BLA-6213) of Administrative Law Judge Thomas F. Phalen, Jr. 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). The administrative law judge found that claimant established a coal mine employment history of twenty-five years, but that the evidence failed to establish the

existence of coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 3-12. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in not finding the existence of pneumoconiosis established based on x-ray and medical opinion evidence and erred in not finding total respiratory disability established based on medical opinion evidence. Employer responds, urging that the denial of benefits be affirmed. The Director, Office of Workers' Compensation Programs, (the Director) has not filed a brief in this appeal.

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 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 elements of entitlement precludes an award of benefits. *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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.[1] Contrary to claimant's assertion, the administrative law judge must consider the qualifications of the physicians in weighing conflicting x-ray evidence and determining the weight to be assigned the interpretations and may consider the numerical superiority, in this case, of the negative x-ray evidence.[2] In this case, the administrative law

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[1] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

[2] Section 718.202(a)(1) provides, in pertinent part, that where two or more x-ray reports are in conflict, in evaluating such x-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such x-rays. 20 C.F.R. §718.202(a)(1).

judge considered the entirety of the x-ray evidence of record and rationally accorded greater weight to the four negative interpretations of record, Director's Exhibits 8, 21, 27; Employer's Exhibit 3, than to the two positive interpretations, Director's Exhibits 7, 8, based on the superior qualifications of the physicians rendering the negative interpretations. Decision and Order at 10-11; 20 C.F.R. §§718.102(c), 718.202(a)(1); *Staton v. Norfolk & Western Railway 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*); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Likewise, claimant's contention that the administrative law judge "may have selectively analyzed" the x-ray evidence is rejected as claimant points to no evidence or finding by the administrative law judge which supports this contention. *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). Accordingly, the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) is affirmed.

In addition, claimant's assertion that the administrative law judge erred in not finding the existence of pneumoconiosis established based upon the medical opinions of Drs.Baker and Hussain, Director's Exhibits 7, 8; Claimant's Exhibit 1, is rejected. Claimant's Brief at 4-5. In determining that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge reviewed all of the medical opinion evidence of record and properly considered the quality of the evidence in determining whether the opinions were supported by their underlying documentation and were adequately explained. The administrative law judge found the opinion of "Dr. Rosenberg" [Dr. Repsher], Employer's Exhibit 1,[3] who opined that claimant did not have coal workers' pneumoconiosis or chronic obstructive pulmonary disease arising out of coal mine employment, to be the most convincing opinion of record as "Dr. Rosenberg" [Repsher], Employer's Exhibit 1, was the best documented and reasoned opinion of record. This was proper. Decision and Order at 12; Employer's Exhibit 1; *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Worhach*, 17 BLR at 1-108; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 n.4 (1993) (administrative law judge must consider each report to determine if that report's underlying documentation supports its conclusion); *Clark*, 12 BLR at 1-155; *Dillon v. Director, OWCP*, 11 BLR 1-113, 1-114 (1988); *Kuchwara*, 7 BLR at 1-170. Contrary to

[3] The administrative law judge erred in referring to the opinion of Dr. Repsher as the opinion of "Dr. Rosenberg." This error is harmless, however, since: the opinion the administrative law judge identifies as Dr. Rosenberg's is marked as Employer's Exhibit 1 and Dr. Repsher's opinion is marked as Employer's Exhibit 1; there is no opinion in the record from "Dr. Rosenberg"; claimant does not raise this as an issue; and the administrative law judge's weighing of the medical evidence was proper.

claimant's assertion that Drs. Baker and Hussain based their opinions on a thorough review of the evidence, the administrative law judge properly concluded that these physicians' opinions, while well-documented, were insufficient to support a finding of pneumoconiosis because their diagnoses of coal worker's pneumoconiosis and pulmonary impairment due, in part, to coal mine employment, were based solely upon claimant's long history of coal mine employment, and positive x-ray readings which were subsequently read as negative by better qualified physicians. Decision and Order at 12; Director's Exhibits 7, 8, 21; 20 C.F.R. §718.104(d)(1)-(5); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *see also Jericol Mining , Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 1-62, 1-175 (4th Cir. 2000); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Moreover, the administrative law judge permissibly accorded greatest weight to the opinion of "Dr. Rosenberg" [Repsher], Emloyer's Exhibit 1, that claimant does not have pneumoconiosis, because he found that the physician was well-qualified and offered a well-documented and reasoned supported by the medical evidence of record. Decision and Order at 12; Employer's Exhibit 1; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Stephens*, 298 F.3d 511, 22 BLR 2-495; *Worhach*, 17 BLR at 1-108; *Trumbo*, 17 BLR at 1-89; *Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1986). We, thus, affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis based on medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4).

We, therefore, affirm the administrative law judge's finding that the evidence fails to establish the existence of pneumoconiosis and because the evidence fails to establish the existence of pneumoconiosis, an essential element of entitlement, we need not consider claimant's argument concerning total respiratory disability. *Anderson*, 12 BLR 1-111; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

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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BETTY JEAN HALL
Administrative Appeals Judge