BRB No. 03-0793 BLA

GEORGE WAYNE WHITE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 04/29/2004
	)	
C. C. COAL COMPANY	)	
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
	)	
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.

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

Lois A. Kitts (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 (2002-BLA-5076) of Administrative Law Judge Daniel J. Roketenetz denying benefits 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).[1] The administrative law judge credited claimant with nineteen and one-half years of qualifying coal mine employment based on the evidence of record and a stipulation by the parties and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence was insufficient to establish both 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)(2)(i)-(iv). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b)(2)(i)-(iv) and 718.204(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated 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 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 in a living miner's claim 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 of claimant 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).

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] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, are found at 20 C.F.R. Parts 718, 722, 725, and 726, and apply to this claim filed on February 7, 2001.

Claimant contends that the administrative law judge erred in finding that the x-ray evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Claimant asserts that the administrative law judge improperly relied on the superior qualifications of the readers that did not interpret the x-rays as positive, that he improperly gave greater weight to the numerical superiority of the x-ray readings that were not positive and selectively analyzed the evidence. We disagree.

In his consideration of the x-ray evidence, the administrative law judge noted that the April 16, 2001, x-ray was interpreted as negative and of questionable quality by one physician, Dr. Baker, who possessed no special radiological qualifications. The April 2001 x-ray was also interpreted as negative by Dr. Wiot, a dually qualified physician, i.e., a physician who is a Board-certified radiologist and B reader. Decision and Order at 5; Director's Exhibit 14; Employer's Exhibit 3. The administrative law judge next noted that the February 20, 2002, x-ray was interpreted as negative by Dr. Wiot and positive by Dr. Alexander, a dually qualified physician. Decision and Order at 5; Claimant's Exhibit 1; Employer's Exhibit 2.

The administrative law judge rationally found that the preponderance of the x-ray evidence was insufficient to establish the existence of pneumoconiosis in light of the three negative readings and only one positive reading. 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); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Trent*, 11 BLR 1-26; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 6. As the administrative law judge weighed all of the x-ray evidence and reasonably concluded that it was insufficient to establish the existence of pneumoconiosis, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

We also reject claimant's argument that the administrative law judge provided an invalid reason for discounting Dr. Baker's diagnosis of bronchitis due, in part, to coal mine dust exposure, which falls within the legal definition of pneumoconiosis at Section 718.201(a)(1), pursuant to Section 718.202(a)(4). The administrative law judge permissibly found that Dr. Baker's diagnosis of bronchitis was not persuasive because the physician did not indicate what other evidence he relied upon in reaching his conclusion, apart from claimant's own subjective complaints. Decision and Order at 7; Director's Exhibit 14; *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). The administrative law judge then acted within his discretion in according determinative weight to the contrary opinions of Drs. Dahhan and Renn, both of whom are highly qualified, which the administrative

law judge found were well-reasoned and documented. Decision and Order at 8-9; *see Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge's finding that the newly submitted medical opinions of record are insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4) is supported by substantial evidence, and thus is affirmed.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element of entitlement. *See Trent*, 11 BLR 1-26; *White v. Director, OWCP*, 6 BLR 1-368 (1983). Furthermore, the administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Anderson*, 12 BLR 1-111; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987). Claimant's failure to establish the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement, precludes an award of benefits under 20 C.F.R. Part 718, and we need not address claimant's other arguments on appeal regarding total disability at Section 718.204(b)(2). *Anderson*, 12 BLR 1-111; *Trent*, 11 BLR 1-26. Consequently, we affirm the administrative law judge's denial of benefits as it is supported by substantial evidence.

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