BRB No. 97-1715 BLA

ROBERT B. NAPIER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAIN CLAY, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
TRANSCO ENERGY 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 of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Lois A. Kitts (Baird, Baird, Baird & Jones, P. S. C.), Pikeville, Kentucky, for employer/carrier.

Before:

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-1715) of Administrative Law Judge Donald W. Mosser denying benefits on a claim[1] 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, based on the parties' stipulation, credited claimant with thirteen years

[1]Claimant filed his first application for benefits on August 8, 1995. Director's Exhibit 1.

of qualifying coal mine employment, and properly adjudicated this claim pursuant to 20 C.F.R. § Part 718. The administrative law judge then found the evidence of record insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a), or total respiratory disability under 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant argues that the administrative law judge erred in his weighing of the x-ray evidence under Section 718.202(a)(1) and in failing to find total disability under Section 718.204(c). Employer responds, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs, has decline to participate in this appeal.[2]

In order to establish entitlement to benefits under Part 718 in a living miner's claim, claimant must establish the existence of 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 prove any one of these elements precludes entitlement. *Trent v. Director, OWCP,* 9 BLR 1-1 (1986)(*en banc*)

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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[2]We affirm the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), 718.204(c)(1)-(3), and 725.309(d) inasmuch as these determinations are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant challenges the administrative law judge's weighing of the x-ray evidence. Under 20 C.F.R. §718.202(a)(1). Initially, claimant argues that the administrative law judge was not required to rely on the numerical superiority of the negative x-ray interpretations or the relative qualifications of the physicians. Although claimant is correct that the administrative law judge was not required to rely on the above factors, the administrative law judge was within the bounds of his discretion as the trier of fact in according great weight to the numerical superiority of the negative readings, *see Edmiston v. F&R Coal Co.,* 14 BLR 1-65 (1990), and in deferring to the physicians of record with the most impressive credentials. *see Trent, supra; Robert v. Bethlehem Mines Corp.,* 8 BLR 1-211 (1985). Claimant also contends that the administrative law judge nay has selectively analyzed the x-ray evidence. We disagree. Initially, claimant fails to identify with specifically any error on the part of the administrative law judge, as is required to invoke Board review. *See Cox v. Benefits Review Board,* 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP,* 10 BLR 1-119 (1987); *Fish v. Director, OWCP,* 6 BLR 1-107 (1983). Moreover, the administrative law judge properly considered all of the x-ray readings of record, and his reliance on the weight of the negative readings provided by doctors who are Bd-certified radiologists and/or b-readers is supported by substantial evidence. *See Worhach v. Director, OWCP,* 17 BLR 1-105 (1993); *Roberts, supra;* Decision and Order at 6-7; Director's Exhibits 13, 15, 24, 25; Claimant's Exhibits 1, 3, 4; Employer's Exhibits 1-3. We therefore affirm the administrative law judge's findings that claimant failed to carry his burden under Section 718.202(a)(1). *See Director, OWCP v. Greenwich Collieries [Ondecko],* 117 S.Ct. 2251, 18 BLR 2A-1 (1994). Because claimant failed to establish the

existence of pneumoconiosis under 20 C.F.R. §718.202(a), a requisite element of entitlement under Part 718, *see Trent, supra; Perry, supra*, the administrative law judge properly denied benefits in this case,[3] and his decision is therefore affirmed.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

[3]Moreover, with regard to 20 C.F.R. §718.204(c), we affirm the finding that claimant failed to establish total disability. Since none of the pulmonary function study or blood gas study demonstrated the existence of a totally disabling respiratory or pulmonary impairment, Director's Exhibits 9, 12, 24, and as the record does not contain evidence of cor pulmonale, we affirm the administrative law judge's findings under 20 C.F.R. §718.204(c)(1)-(3). Decision and order at 8-9. Relevant to 20 C.F.R. §718.204(c)(4), inasmuch as the only physicians of record to diagnose pneumoconiosis recanted his opinion, the administrative law judge properly found the claimant failed to carry his burden under this subsection as well. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 117 S.Ct. 2251, 18 BLR 2A-1 (1994); Director's Exhibits 10, 11, 24, Employer 4.