BRB No. 99-0811 BLA

RONNIE EVERSOLE, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLEDSOE COAL CORPORATION	)	
	)	
and	)	DATE ISSUED:_____
	)	
JAMES RIVER COAL 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 Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Paul E. Jones (Baird, Baird, Baird & Jones, P.S.C.), Pikeville, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (98-BLA-0832) 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 considered the instant claim, which was filed on March 31, 1997, pursuant to the applicable regulations at 20 C.F.R. Part 718. After crediting claimant with nineteen years of coal mine employment based upon the stipulation of the parties, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4).

Accordingly, the administrative law judge denied benefits. On appeal, claimant challenges the administrative law judge's findings under Sections 718.202(a)(1) and (a)(4) and 718.204(c)(4). Employer responds in support of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend to participate 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).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the 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 establish any one of these elements precludes entitlement. *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*).

In challenging the administrative law judge's weighing of the x-ray evidence of record under Section 718.202(a)(1), claimant argues that the administrative law judge erred in crediting the numerous negative x-ray readings of record over the three positive x-ray readings of record by relying on the qualifications of the physicians reading the films and the numerical superiority of the negative readings. Claimant's contention is without merit. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises, has held that these factors must be considered by a fact-finder when weighing the x-ray evidence. *See Staton v. Norfolk & Western Railroad 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). The administrative law judge stated that the record contains twenty-two x-ray interpretations of thirteen x-rays.[1] The administrative law judge properly found

[1]The record, in fact, contains twenty-three interpretations of twelve x-ray films. Director's Exhibits 12, 13, 22, 26; Employer's Exhibits 1, 3-5, 8. The administrative law judge's inexact summary of the x-ray evidence does not constitute prejudicial error, however, inasmuch as the only x-ray reading which the administrative law judge overlooked, *i.e.*, Dr. Wiot's reading of the April 14, 1997 x-ray, was a negative reading. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Director's Exhibit 26. Additionally, although the administrative law judge did not recognize that the record contains only twelve, rather than thirteen, x-ray films, this error was harmless. While the administrative law judge inaccurately stated that the positive reading of record which was submitted by Dr. Powell corresponded to a thirteenth film dated December 9, 1996, which in fact does not exist in the record, rather than correctly stating that the film that Dr. Powell read was dated November 4, 1996, the administrative law judge did account for Dr. Powell's positive interpretation and correctly found that it was one of only three positive readings of record. *See Larioni, supra;* Decision and Order at 4, 7-8; Director's Exhibit 22. Furthermore, the November 4, 1996 film read as positive by only Dr. Powell, was re-read as negative by Dr. Fino, who, like Dr. Powell, is a B reader, and by Drs. Wiot and Spitz, who possess superior radiological qualifications as B reader/Board-certified

that only three of the interpretations of record were positive for pneumoconiosis. Decision and Order at 4, 7-8; Director's Exhibit 22. The administrative law judge properly found that, because the negative readings constitute the majority of interpretations and are verified by more highly-qualified physicians, the x-ray evidence failed to support by a preponderance of the evidence a finding of pneumoconiosis. *See Staton, supra; Woodward, supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 7-8. Inasmuch as it is supported by substantial evidence and is in accordance with law, we affirm the administrative law judge's finding that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *Staton, supra; Woodward, supra; Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); Decision and Order at 7-8; Director's Exhibits 10, 12, 14-16, 29, 30; Employer's Exhibits 2-8.

We further affirm the administrative law judge's findings that claimant did not establish the presence of pneumoconiosis pursuant to Section 718.202(a)(2)-(4), as claimant does not challenge these findings on appeal.[2] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 8.

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radiologists. Employer's Exhibits 4, 8.

[2]Similarly, we affirm the administrative law judge's length of coal mine employment finding, and the administrative law judge's findings under 20 C.F.R. §718.204(c)(1)-(3) as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 3, 9.

Claimant's only challenge to the administrative law judge's consideration of the medical opinion evidence under Section 718.202(a)(4) consists of a general suggestion that the administrative law judge may have selectively analyzed the evidence thereunder, thereby committing error. Claimant provides no support for his contention, however, and the administrative law judge's Decision and Order reflects that the administrative law judge properly considered all of the medical opinion evidence without engaging in a selective analysis, and properly found that the record is devoid of a medical opinion indicating that claimant suffers from pneumoconiosis.[3] Decision and Order at 8. We affirm, therefore, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Inasmuch as we affirm the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4), a requisite element of entitlement under Part 718, we affirm the administrative law judge's denial of benefits. *See Trent, supra; Gee, supra; Perry, supra.* We need not address, therefore, claimant's contentions under Section 718.204(c)(4).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[3]The administrative law judge properly found that Drs. Wicker and Broudy, who examined claimant, found no evidence of pneumoconiosis, as did Dr. Fino, who reviewed all of the evidence of record. Decision and Order at 5-6; Director's Exhibit 10; Employer's Exhibits 1, 8. The administrative law judge further correctly found that Dr. Powell, after reviewing all of the evidence of record on October 6, 1998, changed his opinion that claimant had pneumoconiosis, an opinion which the doctor had based upon his x-ray interpretation of a film dated November 4, 1996, and stated that claimant does not have pneumoconiosis. Director's Exhibit 22. Additionally, the administrative law judge was correct in essentially finding, when summarizing the reports of Drs. Long and Rapier, that Drs. Long and Rapier did not address the issue of the existence of pneumoconiosis. Decision and Order at 5-6; Director's Exhibit 23; Employer's Exhibit 6.

REGINA C. McGRANERY
Administrative Appeals Judge