BRB Nos. 99-0815 BLA
and 99-0815 BLA-A

ROGER K. AMOS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NALLEY & HAMILTON ENTERPRISES	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	DATE ISSUED:
	)	
Employer/Carrier-Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Deron L. Johnson (Boehl, Stopher & Graves), Prestonsburg, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (98-BLA-0706) of Administrative Law Judge Joseph E. Kane 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). The administrative law judge found eighteen

years of coal mine employment established and determined that, inasmuch as the instant claim was a duplicate claim,[1] claimant must establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) in accordance with the standard enunciated by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). The administrative law judge considered the newly submitted evidence pursuant to 20 C.F.R. Part 718 and found it sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Thus, the administrative law judge found that a material change in conditions was established pursuant to Section 725.309 and, therefore, considered all of the evidence of record, including the evidence submitted with claimant's prior claim, *de novo*, to determine whether the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(1)-(4) on the merits of entitlement, *see Ross*, *supra*. The administrative law judge found that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1)-(4). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1) and (4). On cross-appeal, employer contends that the administrative law judge erred in finding total disability established by the newly submitted evidence pursuant to

[1] Claimant originally filed a claim on October 10, 1991, Director's Exhibit 30. In a Decision and Order issued on March 14, 1994, Administrative Law Judge Ralph A. Romano found eighteen years of coal mine employment established and adjudicated the claim pursuant to 20 C.F.R. Part 718. Judge Romano found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(4) and that total disability was not established pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied. Claimant appealed and the Board affirmed Judge Romano's finding that total disability was not established pursuant to Section 718.204(c)(1)-(4) and, therefore, the administrative law judge's Decision and Order denying benefits. *Amos v. Nalley & Hamilton Enterprises*, BRB No. 95-0944 BLA (July 28, 1995)(unpub.). Claimant filed the instant, duplicate claim on August 22, 1997, Director's Exhibit 1.

Section 718.204(c). The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, has not responded to claimant's appeal and employer's cross-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).

Pursuant to Section 718.202(a)(1), the administrative law judge considered all of the x-ray evidence of record on the merits. In order to establish entitlement to benefits under Part 718 in a living miner's claim, it must be established that claimant suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Failure to prove any one of these elements precludes entitlement, *id*.

The administrative law judge noted that the previously submitted x-ray evidence consisted of thirty-one readings of ten x-rays, only four of which were read as positive, none by either a board-certified radiologist or B-reader,[2] *see* Director's Exhibit 30; Decision and Order at 18. The record contains fourteen negative readings of the ten x-rays previously submitted by either a board-certified radiologist or B-reader, *see* Director's Exhibit 30. The administrative law judge further noted that the newly submitted x-ray evidence consisted of fourteen x-ray readings, only two of which were read as positive, none by either a board-certified radiologist or B-reader. On the other hand, the newly submitted evidence contains ten negative readings by either a board-certified radiologist or B-reader, *see* Director's

[2] A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

Exhibits 14-15, 29, 32; Employer's Exhibits 2-3, 6. Thus, inasmuch as the most highly qualified readers unanimously read the x-rays of record as negative, the administrative law judge found the weight of the x-ray evidence failed to establish the existence of pneumoconiosis.

Claimant contends that the administrative law judge "need not" rely on the qualifications of the x-ray readers or the numerical superiority of the x-ray evidence. In addition, claimant contends that the administrative law judge "may" have selectively analyzed the x-ray evidence. Contrary to claimant's contentions, the administrative law judge, within his discretion, permissibly found that the existence of pneumoconiosis was not established under subsection (a)(1) based on the weight and numerical superiority, *see Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990), of the negative x-rays from readers who were both board-certified radiologists and/or B-readers due to their superior qualifications, *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Trent, supra*. Inasmuch as the administrative law judge considered the qualifications of the physicians and weighed the results of all of the x-ray evidence, his finding is in accord with the holding of the Sixth Circuit Court in *Woodward, supra*. Consequently, inasmuch as the administrative law judge's finding that the existence of pneumoconiosis was not established by the x-ray evidence under Section 718.202(a)(1) is supported by substantial evidence, it is affirmed.

The administrative law judge also properly found that there is no relevant biopsy evidence of record pursuant to 20 C.F.R. §718.202(a)(2) and that none of the available presumptions under 20 C.F.R. §718.202(a)(3) are applicable, *see* 20 C.F.R. §718.202(a)(3).[3] Decision and Order at 17. Inasmuch as the administrative law judge's findings that the existence of pneumoconiosis was not established under Section 718.202(a)(2)-(3) are not challenged by claimant on appeal, they are affirmed, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Finally, pursuant to Section 718.202(a)(4), the administrative law judge noted that the

[3] Inasmuch as there is no evidence of complicated pneumoconiosis in the record, the irrebuttable presumption at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, is inapplicable, *see* 20 C.F.R. §718.304, the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, is inapplicable to this claim filed after January 1, 1982, *see* 20 C.F.R. §718.305(a), (e); Director's Exhibit 1, and, finally, the presumption at Section 411(c)(5) of the Act, 30 U.S.C. §921(c)(5), as implemented by 20 C.F.R. §718.306, is also inapplicable in this living miner's claim.

previously submitted medical opinion evidence of record consisted of eleven physicians' opinions, five of whom, *i.e.*, Drs. Wicker, Bushey, Clarke, Wright and Myers, diagnosed pneumoconiosis, *see* Director's Exhibit 30. Decision and Order at 18. The administrative law judge further noted that the newly submitted medical opinion evidence of record consisted of eight physicians' opinions, of whom only Drs. Wright and Myers diagnosed pneumoconiosis, similar to their previously submitted opinions, *see* Director's Exhibits 9-10.

The administrative law judge found that the record does not reflect any particular qualifications of Drs. Wright and Myers, or Drs. Wicker, Bushey and Clarke, that would entitle their opinions to additional weight, Decision and Order at 19. The administrative law judge had noted the qualifications of physicians who did not find evidence of pneumoconiosis, *i.e.*, that Drs. Vuskovich, Broudy, Director's Exhibit 29, and Jarboe, Director's Exhibit 32, were B-readers, *see* Decision and Order at 5-7, and that Dr. Powell, Director's Exhibit 29, was board-certified in pulmonary medicine, *see* Decision and Order at 11. Moreover, the administrative law judge found that none of the physicians who diagnosed pneumoconiosis provided any reasoning to show that coal dust exposure played a role in claimant's pulmonary condition, whereas Dr. Jarboe provided reasons for his opinion that claimant's pulmonary condition was due to his smoking. Thus, the administrative law judge found that the weight of the medical opinion evidence failed to establish the existence of pneumoconiosis.

Claimant contends that the opinions of Drs. Wicker, Bushey, Clarke, Wright and Myers, who all diagnosed pneumoconiosis, are adequately documented. In addition, claimant contends that an administrative law judge may not discredit medical opinions diagnosing pneumoconiosis based on positive x-ray readings which are contrary to the administrative law judge's x-ray findings or subsequent negative x-rays. Finally, claimant contends that interpretation of medical evidence is for the medical experts and not the administrative law judge.

Contrary to claimant's contentions, the administrative law judge did not discredit the medical opinions diagnosing pneumoconiosis because they were based on positive x-ray readings, nor did he interpret the medical evidence. Moreover, it is for the administrative law judge, as the trier-of-fact, to determine whether an opinion is documented and reasoned, *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark*, *supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Ultimately, the administrative law judge found that the preponderance of the medical opinion evidence, *see Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986); *Sheckler v. Director, OWCP*, 7 BLR 1-

128 (1984); *see also Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993),[4] from those physicians with superior qualifications, *see McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Thus, inasmuch as the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) is supported by substantial evidence, *see Snorton*, *supra*; *Sheckler*, *supra*; *see also Ondecko*, *supra*, it is affirmed. Consequently, inasmuch as claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement, entitlement under Part 718 is precluded, *see Trent*, *supra*; *Perry*, *supra*.[5]

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[4] In *Ondecko*, the Supreme Court held that the reference to the "burden of proof" in Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d), refers to the burden of persuasion, and therefore held that when the evidence is evenly balanced, the claimant must lose pursuant to Section 7(c), *see Ondecko*, *supra*.

[5] Inasmuch as we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4) on the merits, we need not address the administrative law judge's findings and employer's contentions pursuant to Section 718.204 (c)(1)-(4) and Section 725.309(d), *see Trent*, *supra*.