BRB No. 98-0843 BLA

BILLY SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ABERRY COAL, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Billy Smith, Vicco, Kentucky, *pro se*.

J. Logan Griffith (Wells, Porter, Schmitt & Jones), Paintsville, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (98-BLA-0237) of Administrative Law Judge Robert L. Hillyard 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 twenty-one years of coal mine employment and based on the date of filing, adjudicated the

claim pursuant to 20 C.F.R. Part 718.[1] Decision and Order at 4. The administrative law judge concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(c). Accordingly, benefits were denied. On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he would not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 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 to establish any 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, and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. The administrative law judge rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) based on the preponderance of the negative x-ray readings by physicians with superior qualifications. Director's Exhibits 12, 13, 25, 26, 28,30, 31, 35, 36; Decision and Order at 10; *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77

[1] Claimant filed his claim for benefits on January 26, 1995, which was denied on June 30, 1995. Director's Exhibits 1, 14. On appeal, the claim was denied agin on March 1, 1996. Director's Exhibit 19.

(6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988). In addition, the administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and (3) as there is no biopsy evidence of record, this is a living miner's claim filed after January 1, 1982, and there is no evidence of complicated pneumoconiosis in the record. 20 C.F.R. §§718.304, 718.305, 718.306; Decision and Order at 11; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). Further, the administrative law judge considered the entirety of the medical opinion evidence of record and permissibly accorded greater weight to the opinions of Drs. Fritzhand, Broudy, Branscomb and Fino, finding no pneumoconiosis, than to the opinions of Drs. Myers and Lane, diagnosing pneumoconiosis, as they were better documented and reasoned. Director's Exhibits 10, 25, 28, 29, 32. Decision and Order at 12; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985). Further, the administrative law judge permissibly accorded less weight to the opinions of Drs. Lane and Myers as he found that they had based their diagnoses of pneumoconiosis solely on positive x-rays. *Worhach*, *supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fields*, *supra*.

The administrative law judge also permissibly determined that the evidence of record was insufficient to establish total disability pursuant to Section 718.204(c)(1)-(4) as poor effort was recorded on all the pulmonary function studies including the one qualifying pulmonary function study of record, the blood gas studies of record produced non-qualifying values[2] and there was no evidence of cor pulmonale with right sided congestive heart failure in the record. *See* 20 C.F.R. §718.204(c)(1)-(3); Director's Exhibits 9, 11, 25 28, 35; Decision and Order at 13-14; *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989); *Winchester v. Director, OWCP*, 9 BLR 1-777 (1986). Further, the administrative law judge properly considered the entirety of the medical opinion evidence of record and permissibly accorded greater weight to the opinions of Drs. Broudy, Lane and Fino, finding no total disability, as better supported by the objective evidence of record, than to the opinions of Drs. Fritzhand, Myers, Wicker and Branscomb. Director's Exhibits 10, 25, 28, 29, 32; Decision and Order at 15; *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985). The administrative law judge further found that Dr. Fritzhand's finding of total disability due to low back pain and blindness, and Dr. Myer's finding that respiratory impairment doesn't seem to interfere significantly with claimant's work, are insufficient to establish total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir.1989); *Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR

[2] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix B, C respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

1-11 (1991); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986). The administrative law judge also found that Dr. Branscomb's statement that he couldn't determine impairment, and Dr. Wicker's finding that respiratory impairment couldn't be determined, are not probative on the issue of disability. *Zimmerman*, *supra*; *Wright*, *supra*; *Budash*, *supra*. 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 when they are supported by substantial evidence. *See Clark*, *supra*; *Anderson*, *supra*. Consequently, we affirm the administrative law judge's findings that the evidence of record is insufficient to establish the existence of pneumoconiosis and total disability pursuant to Section 718.202(a) and 718.204(c) as they are supported by substantial evidence and in accordance with law.

Inasmuch as claimant has failed to establish the existence of pneumoconiosis and total disability, requisite elements of entitlement pursuant to Part 718, entitlement thereunder is precluded. *Trent*, *supra*; *Perry*, *supra*.

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

JAMES F. BROWN
Administrative Appeals Judge