BRB No. 99-1157 BLA

FOSTER D. COMPTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KENNEDY COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	DATE ISSUED:
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 Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Foster D. Compton, Honaker, Virginia, *pro se.*

John D. Maddox (Arter & Hadden), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (97-BLA-1697) of Administrative Law Judge Clement J. Kichuk 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). Claimant filed his initial application for benefits on January 25, 1983. Director's Exhibit 31. This claim was denied by the district

director on January 24, 1984, due to claimant's failure to submit to a pulmonary examination as required by the Director, Office of Workers' Compensation Programs (the Director).[1] Director's Exhibit 31. Claimant filed the present duplicate claim on October 7, 1992. Director's Exhibit 1. In a Decision and Order issued on November 23, 1994, Administrative Law Judge Edith Barnett credited claimant with thirty-one and one-quarter years of coal mine employment, and found that the evidence of record was sufficient to establish the presence of totally disabling pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. Part 718. Accordingly, benefits were awarded. On appeal, the Board vacated the award of benefits, and remanded the case for the administrative law judge to reconsider whether claimant established a material change in conditions pursuant to 20 C.F.R. §725.309(d), in light of the holding in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied*, 519 U.S. 1090 (1997), issued subsequent to the administrative law judge's Decision and Order, and for the administrative law judge to properly weigh and characterize the x-ray readings and medical reports of record.[2] *Compton v. Kennedy Coal Company*, BRB No. 95-0761 BLA (July 20, 1995)(unpub.).

On remand, Judge Barnett again found claimant entitled to benefits. On appeal, the Board vacated and remanded the case to the administrative law judge for reconsideration of her findings pursuant to Section 725.309(d), and also instructed the administrative law judge to reweigh the evidence pursuant to Section 718.202(a)(1), (4), and Section 718.204(b), (c), and provide a rationale for her findings. *Compton v. Kennedy Coal Company*, BRB No. 97-1697 BLA (Aug. 28, 1998)(unpub.).

On remand, the case was transferred to Administrative Law Judge Kichuk (the administrative law judge) who issued a Decision and Order on July 30, 1999, finding that

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[1]The record contains no medical evidence submitted in conjunction with claimant's original claim.

[2]The instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, inasmuch as claimant's coal mine employment occurred in the Commonwealth of Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 3, 31.

claimant failed to establish any required element of entitlement pursuant to Part 718, and thus, failed to establish a material change in conditions. Accordingly, benefits were denied.

In the instant appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director has not participated 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 are 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).

To be entitled to benefits under Part 718, claimant must establish total respiratory disability due to pneumoconiosis arising out of coal mine employment. 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)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Trent, supra; Perry, supra.*

After consideration of the administrative law judge's findings and the evidence of record, we conclude that substantial evidence supports the administrative law judge's determination that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1)-(4). At Section 718.202(a)(1), the administrative law judge weighed the conflicting interpretations of the x-rays of record, and accorded determinative weight to the greater number of negative readings performed by physicians who are both B readers and board-certified radiologists.[3] Thus, the administrative law judge properly found that claimant did not satisfy his burden of proof at Section 718.202(a)(1). Decision and Order at 6-8; Director's Exhibits 18, 19, 29; Employer's Exhibits 1, 3, 8, 9, 11, 13, 15, 17, 20. As the administrative law judge's findings pursuant to this subsection are rational and supported by substantial evidence, they are affirmed. *Director, OWCP v. Greenwich Collieries*

[3]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 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 n.16, 11 BLR 2-1 n.16 (1987), *reh'g denied* 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

[Ondecko], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-61 (4th Cir. 1992); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988).

We also affirm the administrative law judge's finding that the requirements of Section 718.202(a)(2)-(3) were not met since the record contains no biopsy evidence, and the regulatory presumptions contained at 20 C.F.R. §§718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. Decision and Order at 10; Director's Exhibit 1; *see Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

Pursuant to Section 718.202(a)(4), the administrative law judge rationally determined that Dr. Forehand's diagnosis of pneumoconiosis was entitled to little weight since this physician relied on a positive x-ray reading which was re-read as negative by more qualified readers, and which was contrary to the administrative law judge's finding that the x-ray evidence as a whole was negative for the presence of pneumoconiosis. The administrative law judge also accorded less weight to this opinion since Dr. Forehand indicated that he relied on his pulmonary function studies and his physical examination, although objective tests are not diagnostic of the presence or absence of the disease, and he did not indicate any abnormal physical findings during his exam. Decision and Order at 10-11, 13-15; Director's Exhibits 10, 11, 14; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark, supra; Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Trent, supra*; *Morgan v. Bethlehem Steel Corporation*, 7 BLR 1-226 (1984). Moreover, it was within the administrative law judge's discretion to credit the reports of Drs. Sargent and Fino, both of whom found no evidence of pneumoconiosis, as well documented and reasoned, and based upon their qualifications as Board-certified pulmonologists.[4] Employer's Exhibits 1, 22; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Trumbo, supra; Clark supra*; *Dillon, supra*. Accordingly, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4). Inasmuch as claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement under Part 718, *see Trent, supra*, we affirm the administrative law judge's finding that claimant is not entitled to benefits, and we need not reach the remaining issues of etiology at Section 718.203, disability and causation at Section 718.204, and a material change in conditions at Section 725.309.

[4]The record indicates that Dr. Forehand is board-certified only in the areas of pediatrics, allergy and immunology. Director's Exhibit 10.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge