BRB Nos. 00-1124 BLA
and 00-1124 BLA-A

THOMAS E. SWINDALL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED:_____
	)	
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 on Remand of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Thomas E. Swindall, Clintwood, Virginia, *pro se*.

Timothy W. Gresham, Abingdon, Virginia, for employer.

Dorothy Page (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals and employer cross-appeals the Decision and Order on Remand (1998-BLA-0429) of Administrative Law Judge John C.

Holmes denying benefits on a petition for modification 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). This is the second time this case has been before the Board. By Decision and Order dated March 10, 2000, the Board vacated the administrative law judge's Decision and Order denying modification of the previous denial and remanded the case for further consideration. The Board instructed the administrative law judge to make a specific finding as to the number of years claimant was exposed to coal dust and to reconsider Dr. Robinette's medical opinion. *Swindall v. Clinchfield Coal Co.*, BRB No. 98-1337 BLA (Mar. 10, 2000)(unpublished). On remand, the administrative law judge credited claimant with fourteen years of qualifying coal mine employment/coal dust exposure and reiterated his finding that claimant's totally disabling pulmonary impairment was caused by smoking. Further, the administrative law judge found, based upon a consideration of all of the evidence of record, that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). Accordingly, the administrative law judge denied benefits. Claimant appeals, generally challenging the denial of benefits.[2] In response, employer argues that the administrative law judge's denial of benefits is supported by substantial evidence. Additionally, in its cross-appeal, employer challenges the administrative law judge's finding that claimant worked as a miner under the terms of the Act and the number of years credited as qualifying coal mine employment. The Director, Office of Workers' Compensation Programs, did not file a brief on the merits of this appeal.[3]

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[1]This claim, filed on June 20, 1994, was denied by the administrative law judge on September 30, 1996. The administrative law judge found that claimant was a coal miner for a "significant time" during his thirty-eight year tenure with employer, that employer conceded that claimant was totally disabled by a pulmonary impairment, but the evidence was insufficient to establish the existence of pneumoconiosis. Director's Exhibit 52. Claimant petitioned for modification of that denial on July 30, 1997. Director's Exhibit 53. The administrative law judge issued a Decision and Order denying modification on June 15, 1998.

[2]On November 13, 2000, claimant's counsel, Lawrence L. Moise, III, filed a Petition for Review and brief and a motion requesting the Board to accept the pleading although filed out of time. The Board accepted claimant's brief on appeal and gave employer thirty days from receipt of claimant's brief to respond and file its cross-appeal and brief. By motion dated June 25, 2001, Lawrence L. Moise, III, requested the Board to allow him to withdraw as claimant's counsel of record. On July 17, 2001, the Board granted counsel's motion to withdraw as claimant's counsel of record and considered claimant to be proceeding without the assistance of counsel.

[3]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on

January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. The Director and employer have responded asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Claimant has not responded to the Board's order. Claimant's failure to submit a brief following the receipt of the Board's order is construed as a position that the challenged regulations will not affect the outcome of this case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider whether the Decision and Order below is supported by substantial evidence. *See 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 supported by substantial evidence, are rational, and are consistent with applicable 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 (1985).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, 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 (2000); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the evidence of record, we conclude that the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) is supported by substantial evidence. The administrative law judge correctly found that the newly submitted x-ray readings are uniformly negative for pneumoconiosis. Decision and Order on Remand at 11; Director's Exhibits 53, 56, 60, 61; Employer's Exhibits 2-11. Further, with respect to the previously submitted x-ray evidence, the administrative law judge correctly found that forty-seven of the fifty-four readings by B readers were negative for pneumoconiosis. September 30, 1996 Decision and Order at 5; Director's Exhibits 12-14, 25-29, 32, 33,36, 39-44. The administrative law judge properly found that the x-rays read as positive for pneumoconiosis were subsequently reread as negative by numerous dually qualified physicians.[4] September 30, 1996 Decision and Order

[4]A dually qualified physician is a B reader and a Board-certified radiologist. A "B-reader" is a physician who has demonstrated proficiency in evaluating chest roentgenograms for roentgenographic quality and in the use of the ILO-U/C classification for interpreting chest roentgenograms for pneumoconiosis and other diseases by taking and passing a specially designed proficiency examination given on behalf of or by the Appalachian Laboratory for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E) (2000); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n. 16, 11 BLR 2-1, 2-16 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A designation of "Board-certified" means certification in radiology or diagnostic roentgenology by the American Board of Radiology,

at 5; Director's Exhibits 14, 28, 33. As the majority of qualified physicians interpreted the x-ray evidence as negative for the existence of pneumoconiosis, we affirm the administrative law judge finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); Decision and Order on Remand at 11.

Further, because the record contains no biopsy evidence or evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304 (2000), and the presumptions at 20 C.F.R. §§718.305 and 718.306 (2000) are inapplicable to this claim filed after January 1, 1982, the administrative law judge properly found that the evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(2) and (3) (2000). Decision and Order on Remand at 11.

Inc. or the American Osteopathic Association. *See* 20 C.F.R. §718.202(a)(1)(ii)(C) (2000).

With respect to Section 718.202(a)(4) (2000), the administrative law judge properly found that the medical opinions of record are insufficient to establish the existence of pneumoconiosis. The administrative law judge noted Dr. Robinette's status as claimant's treating physician and that he was the only physician of record to diagnose pneumoconiosis, the administrative law judge acted within his discretion in according less weight to Dr. Robinette's opinion because, *inter alia*, he failed to fully consider claimant's smoking history and his diagnosis of pneumoconiosis was based, in part, on a positive x-ray interpretation when the vast majority of x-ray readings and CT scan readings are negative for pneumoconiosis.[5] *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *see also U.S. Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); Decision and Order on Remand at 13. Decision and Order on Remand at 11-13; Director's Exhibits 26, 53, 62.

[5]The administrative law judge found that the physicians examining claimant recorded smoking histories ranging form one-fourth to three packs of cigarettes for thirty-seven to forty-one years. The administrative law judge acted rationally in crediting claimant's earlier reports of smoking two to three packs per day for forty years, based upon claimant's admission that in his more recent encounters with physicians he adjusted his smoking history downward. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order on Remand at 12. Dr. Robinette recorded a smoking history of twenty-five pack years.

Moreover, the administrative law judge properly found that Dr. Robinette's opinion was outweighed by the contrary opinions of Drs. Monahan, Paranthaman, Kanwal, and Iosif, who examined claimant and Dr. Fino, who reviewed the available medical records, as the objective evidence of record supports their diagnosis that claimant does not suffer from pneumoconiosis.[6] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order on Remand at 11-13; Director's Exhibits 10, 25, 39, 44, 45, 59; Employer's Exhibits 20, 22. Finally, the administrative law judge properly determined that the CT scan readings of record do not establish the presence of pneumoconiosis. Decision and Order on Remand at 11. Although Drs. Navani and Epling described "interstitial markings," neither physician diagnosed pneumoconiosis. Director's Exhibit 56, 60. Accordingly, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a) (2000).

Inasmuch as substantial evidence supports the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement, the denial of benefits under 20 C.F.R. Part 718 is affirmed. *See Trent, supra*; *Gee, supra*. Therefore, we need not address employer's arguments on cross-appeal.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[6]The administrative law judge also credited the opinion in which Dr. Sargent found that claimant does not have pneumoconiosis. Decision and Order on Remand at 11-12. Dr. Sargent's opinion appears to contradict the holdings of the United States Court of Appeals for the Fourth Circuit in *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996) and *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), inasmuch as he indicated that a restrictive impairment *must* be present in order for a diagnosis of a coal dust related impairment to be made. Error, if any, by the administrative law judge in crediting Dr. Sargent's opinion is harmless, however, as the administrative law judge correctly identified the five medical opinions discussed *supra*, which outweighed Dr. Robinette's diagnosis of pneumoconiosis. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge