BRB No. 08-0820 BLA
and 08-0846 BLA

D.B.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
KLINE COAL COMPANY	)	
	)	DATE ISSUED: 08/06/2009
Employer-Respondent	)	
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 Denying Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

D.B., Oliver Springs, Tennessee, *pro se*.[1]

John R. Sigmund (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

Helen H. Cox (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, Associate Solicitor; 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.

[1]Jerry Murphee, Benefits Counselor at Stone Mountain Health Services in St. Charles, Virginia, requested that the Board review the administrative law judge's decision on behalf of claimant, but Mr. Murphee is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995).

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals, and employer cross-appeals the Decision and Order Denying Benefits (07-BLA-5893) of Administrative Law Judge Linda S. Chapman 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). This case involves a claim filed on December 2, 2005. After crediting claimant with twenty-one years of coal mine employment,[2] the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Claimant also specifically contends that the administrative law judge erred in allowing employer to submit two "rebuttal readings" of a February 28, 2006 x-ray. Employer responds in support of the administrative law judge's denial of benefits. Employer has also filed a cross-appeal,[3] contending that the administrative law judge erred in designating it as the responsible operator. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief, contending that employer's x-ray submissions comply with the evidentiary limitations set forth at 20 C.F.R. §725.414. The Director further responds in support of the administrative law judge's denial of benefits and her designation of employer as the responsible operator.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider 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, 1-177 (1989). 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 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).

[2] The record reflects that claimant's coal mine employment was in Tennessee. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] By Order dated November 10, 2008, the Board consolidated claimant's appeal (BRB No. 08-0820 BLA) with employer's cross-appeal (08-0846 BLA).

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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Admissibility of Evidence

We initially reject claimant's argument that the administrative law judge erred in allowing employer to submit two interpretations of a February 28, 2006 x-ray. Employer submitted Dr. Wheeler's negative interpretation of claimant's February 28, 2006 x-ray, Employer's Exhibit 17, as one of its two permissible affirmative x-ray interpretations. 20 C.F.R. §725.414(a)(3)(i). Moreover, because the February 28, 2006 x-ray was submitted by the Director as part of his obligation to provide claimant with a complete pulmonary evaluation pursuant to 20 C.F.R. §725.406, employer was entitled to submit a rebuttal x-ray interpretation. *See* 20 C.F.R. §725.414 (a)(3)(ii). In this case, employer designated Dr. Scott's negative interpretation of the February 28, 2006 x-ray, Director's Exhibit 21, as its permissible rebuttal reading. Consequently, employer's submission of its two interpretations of the February 18, 2006 x-ray complies with the evidentiary limitations set forth at 20 C.F.R. §725.414.

Section 718.202(a)(1)

In her consideration of the merits of the 2005 claim, the administrative law judge addressed the x-ray evidence. The administrative law judge considered ten interpretations of four x-rays taken on August 1, 2005, February 28, 2006, July 21, 2006, and August 20, 2007.[4] The administrative law judge properly accorded greater weight to the interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 15-16.

Because equally qualified physicians interpreted the August 1, 2005, July 21, 2006, and August 20, 2007 x-rays as both positive and negative for pneumoconiosis,[5] the

[4] The administrative law judge also accurately noted that none of the x-ray interpretations found in claimant's treatment records is positive for pneumoconiosis. Decision and Order at 16; Employer's Exhibits 2, 4, 6, 10, 11, 16.

[5] Dr. Alexander, a B reader and Board-certified radiologist, interpreted the August 1, 2005 x-ray as positive for pneumoconiosis, Director's Exhibit 19, and Dr. Scott, an equally qualified physician, interpreted the same x-ray as negative for pneumoconiosis. Director's Exhibit 23.

administrative law judge properly found that the interpretations of these x-rays were "in equipoise," and that these x-rays did not support a finding of pneumoconiosis. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); Decision and Order at 15-16.

Because a majority of the best-qualified physicians rendered negative interpretations of the February 28, 2006 x-ray,[6] the administrative law judge permissibly found that this x-ray is negative for pneumoconiosis. *Sheckler*, 7 BLR at 1-131; Decision and Order at 15-16.

Considering the x-rays both individually and as a group, the administrative law judge found that they did not establish the existence of pneumoconiosis:

> [N]one of the individual . . . x-ray interpretations establish the existence of pneumoconiosis. Viewing this x-ray evidence as a whole, I find that the interpretations, positive and negative, are at best in equipoise, and thus do not establish the existence of pneumoconiosis.

Decision and Order at 16.

In this case, the administrative law judge properly considered the number of x-ray interpretations, along with the readers' qualifications, the dates of the x-rays, and the actual readings. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984); *see generally Gober v. Reading Anthracite Co.*, 12 BLR 1-67 (1988). Because it is supported by substantial evidence, we affirm the administrative law

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Dr. Miller, a B reader and Board-certified radiologist, interpreted the July 21, 2006 x-ray as positive for pneumoconiosis, Director's Exhibit 19, and Dr. Wheeler, an equally qualified physician, interpreted the same x-ray as negative for pneumoconiosis. Director's Exhibit 23.

Dr. Ahmed, a B reader and Board-certified radiologist, interpreted the August 20, 2007 x-ray as positive for pneumoconiosis, Claimant's Exhibit 2, and Dr. Wheeler, an equally qualified physician, interpreted the same x-ray as negative for pneumoconiosis. Employer's Exhibit 1.

[6] While Dr. Ahmed, a B reader and Board-certified radiologist, and Dr. Baker, a B reader, interpreted the February 28, 2006 x-ray as positive for pneumoconiosis, Director's Exhibit 12; Claimant's Exhibit 1, Drs. Wheeler and Scott, each qualified as a B reader and Board-certified radiologist, interpreted the same x-ray as negative for pneumoconiosis. Director's Exhibit 21; Employer's Exhibit 17.

judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Section 718.202(a)(2), (3)

Because there is no biopsy evidence of record, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 16. Furthermore, the administrative law judge properly found that claimant is not entitled to any of the statutory presumptions set forth at 20 C.F.R. §718.202(a)(3).[7] *Id.*

Section 718.202(a)(4)

A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[8] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In considering whether the medical opinion evidence established the existence of clinical pneumoconiosis, the administrative law judge reviewed the reports of Drs. Baker, Bruton, and Dahhan. The administrative law judge permissibly found that Dr. Baker's diagnosis of coal workers' pneumoconiosis was not well reasoned because it was based in part upon a positive x-ray interpretation that was called into question by the administrative law judge's earlier finding that the x-ray evidence did not support a finding of pneumoconiosis.[9] *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000); *see also Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 17; Director's Exhibit 12.

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[7] Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed this claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, because this claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

[8] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[9] In addition, as noted above, the administrative law judge permissibly found that the February 28, 2006 x-ray that Dr. Baker interpreted as positive for pneumoconiosis was interpreted by a majority of better-qualified physicians as negative for pneumoconiosis, thus calling into question the reliability of Dr. Baker's opinion. *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983).

Because Dr. Bruton did not provide any explanation for his statement, that claimant was being "followed" for coal workers' pneumoconiosis, the administrative law judge permissibly found that his opinion was not sufficiently reasoned. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); Decision and Order at 18; Claimant's Exhibit 5. The record does not contain any other evidence supportive of a finding of clinical pneumoconiosis.[10] Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

The administrative law judge next considered whether the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Dr. Baker diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) and chronic bronchitis due, at least in part, to coal mine dust exposure. 20 C.F.R. §718.201(a)(2); Director's Exhibit 12. Dr. Meece opined that claimant's respiratory symptoms are due, in part, to his coal mine dust exposure. Claimant's Exhibit 4. The administrative law judge, however, found that neither Dr. Baker nor Dr. Meece provided any explanation for attributing the miner's lung conditions to coal mine dust exposure. Decision and Order at 17-18. The administrative law judge, therefore, permissibly found that the opinions of Drs. Baker and Meece were insufficiently reasoned to support a finding of legal pneumoconiosis. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155. Because there is no other medical opinion evidence supportive of a finding of legal pneumoconiosis, we affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's finding that the evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits in the miner's claim. *See Anderson*, 12 BLR at 1-114; *Trent*,

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[10] Kellie Brooks, a nurse, also reported that claimant suffers from coal workers' pneumoconiosis. However, because Ms. Brooks is not a physician, and because she did not list any clinical or testing results to support her "diagnosis," the administrative law judge permissibly accorded her opinion "little, if any weight." *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); Decision and Order at 18; Claimant's Exhibit 5.

Dr. Dahhan opined that clamant does not suffer from clinical pneumoconiosis. Employer's Exhibit 1.

11 BLR at 1-27. Because of our affirmance of the administrative law judge's denial of benefits on the merits, we need not address employer's contention that the administrative law judge erred in designating it as the responsible operator. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge