BRB No. 98-1354 BLA

DOUGLAS L. SIMMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK 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 - Denying Benefits of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

Douglas L. Simms, Madisonville, Kentucky, *pro se*.

Natalie D. Brown (Jackson & Kelly), Lexington, Kentucky, for employer.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denying Benefits (98-BLA-0129) of Administrative Law Judge J. Michael O'Neill 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 claim in March 1996. Director's Exhibit 1. The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied. Claimant, on appeal, contends generally that the administrative law judge erred in denying benefits. Employer has submitted a response brief supporting affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has submitted a letter stating that he will not respond to the appeal unless specifically requested to do so by the Board.

In an appeal by a claimant proceeding 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 under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish the existence of 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 prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

With respect to Section 718.202(a)(1), the administrative law judge determined that there were twenty-one readings of ten x-rays. The administrative law judge properly found that of these readings, only two were positive for pneumoconiosis.[1] Director's Exhibit 28. The administrative law judge correctly found that neither of the positive interpretations was by a physician who was specially qualified to read x-rays for the presence of pneumoconiosis. Moreover, the administrative law judge properly found that all of the physicians who are B readers and/or Board-certified radiologists interpreted the x-rays as negative for pneumoconiosis. The record contains seven negative x-ray interpretations by physicians who are both B readers and Board-certified in radiology, as well as six negative interpretations by physicians who are solely B readers. Director's Exhibits 14, 30, 31, 33; Employer's Exhibits 1, 4, 11, 12. We affirm, as supported by substantial evidence, the administrative law judge's finding that, given "the overwhelming majority" of negative x-rays and the qualifications of the physicians rendering the interpretations of those x-rays, the preponderance of the x-ray evidence fails to establish the presence of pneumoconiosis under Section 718.202(a)(1). Decision and Order at 6-7; *see Staton v. Norfolk & Western Railway* Co., 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991)(*en banc*).

With regard to Section 718.202(a)(2)-(3), the administrative law judge correctly found that there is no biopsy or autopsy evidence, and that none of the referenced

[1] In addition, there are state workers' compensation opinions that refer to a 1/1 interpretation by Dr. Baker. Director's Exhibits 3, 29. We hold that any error by the administrative law judge in not discussing this interpretation is harmless, inasmuch as the weight of the evidence supports the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988).

presumptions is applicable. We, therefore, affirm the administrative law judge's findings that the existence of pneumoconiosis is not established pursuant to Section 718.202(a)(2)-(3).

With regard to Section 718.202(a)(4), the administrative law judge properly found that Drs. Simpao and Houser were the only physicians to diagnose pneumoconiosis.[2] Decision and Order at 12; Director's Exhibit 28. The administrative law judge permissibly credited the negative opinions of Drs. Jarboe, Selby and Branscomb based on their superior credentials. Decision and Order at 12; Director's Exhibit 31; Employer's Exhibit 10, Deposition at 7; *see Staton*, *supra*; *Woodward*, *supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We, therefore, affirm the administrative law judge's finding that the evidence was insufficient to establish the presence of pneumoconiosis pursuant to Section 718.202(a)(4).[3]

[2] The record contains a medical report by Dr. Johnson who noted "black lung" as a medical problem. Director's Exhibit 28. Dr. Johnson did not provide any documentation or reasoning for this diagnosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Dr. Traughber diagnosed "severe primarily obstructive air-way disease possibly some of it being due to long term welding exposure..." Director's Exhibit 12.

[3] In addition, the administrative law judge discredited the opinions of Drs. Simpao and Houser because they were premised primarily on their positive x-ray interpretations. Decision and Order at 12. We decline to address whether this finding was proper, since the administrative law judge has provided a valid alternative basis for his finding that the existence of pneumoconiosis is not established at 20 C.F.R. §718.202(a)(4). *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). The administrative law judge also found that Dr. Traughber opined that claimant did not suffer from any disease or impairment attributable to his coal dust exposure. The administrative law judge further discounted

Since we affirm the administrative law judge's findings that the evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(4), a requisite element of entitlement, we affirm the administrative law judge's denial of benefits. *See Perry, supra.*

Dr. Morgan's negative opinion on the basis that his explanation that claimant worked on the surface was an insufficient basis for his opinion that claimant does not have pneumoconiosis. Decision and Order at 12.

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge