

BRB No. 01-0336 BLA

WILBURN C. BARTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SOUTH HOLLOW COAL CORPORATION )	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 of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Wilburn C. Barton, Haysi, Virginia, *pro se*.

H. Ashby Dickerson (Penn, Stuart), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (00-BLA-0335) of Administrative Law Judge John C. Holmes denying benefits on his request for modification of 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).<sup>1</sup> The administrative law judge reviewed all of the evidence submitted on motion for modification as well as the evidence previously submitted.<sup>2</sup> The administrative law judge found that pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2000). Although the administrative law judge found that the record did not establish the existence of pneumoconiosis, he further found that total disability was not established pursuant to 20 C.F.R. §718.204(c)(2000). The administrative law judge, accordingly, denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond to 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 the conclusions of law are rational, supported by substantial evidence, and in accordance with the 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

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<sup>1</sup>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 65 Fed. Reg. 80, 045-80, 107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

<sup>2</sup> Claimant filed his claim on July 29, 1985. Director's Exhibit 1. The administrative law judge found that claimant failed to establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) and failed to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). Director's Exhibit 39. On appeal, the Board affirmed the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). *Barton v. South Hollow Coal Co.*, BRB No. 91-1031 BLA (July 15, 1992)(unpub.). Thus, the Board affirmed the denial of benefits. Director's Exhibit 44. The Board's Decision and Order was affirmed by the United States Court of Appeals for the Fourth Circuit. *Barton v. South Hollow Coal Co.*, No. 92-2051 (4th Cir. Mar. 23, 1993)(unpublished).

(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 of these elements precludes entitlement.

In finding the x-ray evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)(2000), the administrative law judge considered the one hundred and fourteen interpretations of thirty-four x-rays of record. He noted that ninety-five of these interpretations were negative, while nineteen were positive. Decision and Order at 12. The administrative law judge also noted that sixty-eight of the ninety-five negative interpretations were read by physicians who are dually qualified as B-readers and Board certified radiologists. *Id.* The administrative law judge added that of the nineteen positive interpretations, only eight interpretations were rendered by physicians who are B-reader/Board certified radiologists. *Id.* Inasmuch as the administrative law judge properly relied upon the numerical superiority of the negative readings by the physicians with superior qualifications, see *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); see also *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990), we affirm his finding that the x-ray evidence of record failed to establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000).<sup>3</sup> See 20 C.F.R. §718.202(a)(1).

The administrative law judge next properly found that the record contains no

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<sup>3</sup>Although the administrative law judge properly pointed out that the six CT scans of record were all read as negative, he improperly assessed this evidence under subsection (a)(1), as opposed to subsection (a)(4), of Section 718.202 (2000). Decision and Order at 12. However, inasmuch as this does not impact the ultimate disposition of this case, any error in the administrative law judge's treatment of the CT scan evidence of record is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

autopsy or biopsy evidence, and that the presumptions at 20 C.F.R. §§718.304, 718.305 and 718.306 (2000) are inapplicable. See 20 C.F.R. §§718.202(a)(2)-(3), 718.304-306.

In finding the medical opinion evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4)(2000), the administrative law judge reviewed all of the relevant medical opinions of record.<sup>4</sup> Decision and Order at 12-14. The administrative law judge properly credited the opinions of Drs. Byers, Castle and Endres-Bercher that the miner did not suffer from pneumoconiosis because they were based upon more comprehensive documentation than the contrary opinions. See *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984). In addition, he properly rejected the contrary opinions of record. Specifically, the administrative law judge properly rejected the opinion of Dr. Robinette on the ground that his diagnosis was equivocal. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988). He properly rejected Dr. Baxter's opinion, *inter alia*, because it was based on a positive x-ray which was re-read as negative by a radiologist with superior credentials. See *Fuller v. Gibraltar Corp.*, 6 BLR 1-1291 (1984). Finally, the administrative law judge permissibly gave less weight to the opinion of Dr. Sutherland because he found that his diagnosis rested on an "unsteady foundation," including the reports and testing of Drs. Robinette and Baxter, and an inaccurate smoking history. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4)(2000). See 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's finding that the existence of pneumoconiosis has not been established, a finding of entitlement to benefits is precluded. See *Perry, supra*.

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

SO ORDERED.

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<sup>4</sup>The administrative law judge, however, noted that he would not weigh the report of Dr. Burba, Employer's Exhibit 25, as Dr. Burba evaluated the miner's kidneys, or that of Dr. Alderman, Director's Exhibit 28, because Dr. Alderman's notations were illegible. Decision and Order at 9, 11.

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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