

BRB No. 01-0418 BLA

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| ERNEST R. FRANKLIN            | ) |                    |
|                               | ) |                    |
|                               | ) |                    |
| Claimant-Petitioner           | ) |                    |
|                               | ) |                    |
| v.                            | ) |                    |
|                               | ) |                    |
| MARTIN COUNTY COAL COMPANY)   | ) | DATE ISSUED:       |
|                               | ) |                    |
| and                           | ) |                    |
|                               | ) |                    |
| UNDERWRITERS SAFETY & CLAIMS  | ) |                    |
|                               | ) |                    |
| 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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Ernest R. Franklin, River, Kentucky, *pro se*.

Martin E. Hall (Jackson & Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,<sup>1</sup> the Decision and Order (00-

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<sup>1</sup> Claimant was represented by counsel at the hearing. Counsel filed the Notice of Appeal on behalf of claimant and then filed a letter withdrawing as claimant's counsel. By Order dated April 18, 2001, the Board acknowledged the withdrawal of claimant's counsel and stated that it would review this appeal under a general standard of review as claimant

BLA-154) of Administrative Law Judge Daniel J. Roketenetz 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).<sup>2</sup> Based on the filing date of March 23,

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was no longer represented by counsel.

<sup>2</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, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United 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 claims, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity

1999, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge credited claimant with twenty-seven years of coal mine employment and found employer to be the responsible operator. On the merits, the administrative law judge found the evidence failed to establish the existence of pneumoconiosis and failed to establish that claimant's totally disabling respiratory impairment was due to pneumoconiosis. Accordingly, benefits were denied.<sup>3</sup>

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of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

<sup>3</sup> Claimant filed his claim on March 23, 1999. *See* Director's Exhibit 1. The district director awarded benefits on June 29, 1999 and again on October 13, 1999. *See* Director's Exhibits 13, 14. Employer requested a hearing. *See* Director's Exhibit 15.

On appeal, claimant generally challenges the findings of the administrative law judge on the existence of pneumoconiosis and causation.<sup>4</sup> 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 (the Director), has filed a letter indicating that he will not participate in this appeal.<sup>5</sup>

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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from 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 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*).

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<sup>4</sup> Since he found the evidence of record insufficient to establish the existence of pneumoconiosis, the administrative law judge did not err when he made no findings on the etiology of claimant's pneumoconiosis at 20 C.F.R. §718.203(b).

<sup>5</sup>We affirm the administrative law judge's decision to credit claimant with twenty-seven years in coal mine employment as it is rational and supported by the evidence of record. See *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order denying benefits must be affirmed as it is rational, supported by substantial evidence, and in accordance with law. The administrative law judge correctly concluded that the record contained both positive and negative x-ray interpretations regarding the existence of pneumoconiosis.<sup>6</sup> See Decision and Order at 4-5. In resolving this conflict in the x-ray evidence, the administrative law judge acted within his discretion when he accorded greater weight to the x-ray interpretations of the physicians who are B-readers and who are B-readers and Board-certified radiologists. See *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Carson v. Westmoreland Coal Co.*, 18 BLR 1-18 (1994), *modif. on recon.* 20 BLR 1-64 (1996); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 5. Thus, the administrative law judge properly found that, based on the qualifications of x-ray readers, the x-ray interpretations which were negative for pneumoconiosis outweighed the positive interpretations for pneumoconiosis, and thus, he properly found that the x-ray evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(1). *Id.*; *Perry, supra*; see Decision and Order at 6. We, therefore, affirm the findings of the administrative law judge at 20 C.F.R. §718.202(a)(1) as supported by substantial evidence and in accordance with law.

The administrative law judge also correctly found that the existence of pneumoconiosis was not established at Section 718.202(a)(2) because the record contained no biopsy evidence, and at Section 718.202(a)(3) because claimant was not entitled to the presumptions at Sections 718.304, 718.305, and 718.306 as this was a living miner's claim filed after January 1, 1982 and the record contained no evidence of complicated pneumoconiosis. See 20 C.F.R. §§718.202(a)(2), (3), 718.304, 718.305, 718.306. We, therefore, affirm the administrative law judge's findings relevant to Section 718.202(a)(2)-(3) as supported by substantial evidence.

Finally, at Section 718.202(a)(4), the administrative law judge determined that Dr. Younes opined that claimant suffered from chronic obstructive pulmonary disease (COPD) and chronic respiratory failure attributable primarily to claimant's smoking and secondarily to claimant's coal dust exposure, that, in a subsequent letter dated June 18, 1999, Dr. Younes stated that claimant's pneumoconiosis contributed to claimant's respiratory impairment, and

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<sup>6</sup>The record includes 20 interpretations of x-rays dated May 5, 1999, August 21, 1999 and February 7, 2000. See Director's Exhibits 10, 22, 25, 26; Employer's Exhibits 3, 10, 12-15, 17; Claimant's Exhibits 2, 3, 5.

that Dr. Dahhan concluded that claimant did not have coal workers' pneumoconiosis, and that his COPD, chronic bronchitis and emphysema were due to cigarette smoking. *See* Decision and Order at 7; Director's Exhibits 10, 22; Employer's Exhibits 8, 16. Additionally, the administrative law judge determined: that Dr. Branscomb, who reviewed claimant's medical file, diagnosed a severe obstructive pulmonary disease which he attributed to cigarette smoking as opposed to coal mine employment, Employer's Exhibit 10; that Dr. Castle, on review of claimant's file, opined that claimant did not suffer from coal workers' pneumoconiosis, but had "pure pulmonary emphysema related to tobacco use, Employer's Exhibit 4; that Dr. Fino, on review of claimant's file, found no occupational pulmonary condition as a result of coal mine dust, based on x-ray, and that pulmonary function studies were consistent with cigarette smoking, emphysema, chronic bronchitis, asthma, not coal workers' pneumoconiosis, and finally, that Dr. Morgan, after reviewing claimant's file, found that claimant suffered from a severe airway obstruction disease due to cigarette smoking.

On reviewing the medical opinion evidence, the administrative law judge determined that the medical opinions of Drs. Dahhan and Younes were the most probative because they were the only physicians who actually examined claimant. *See Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). The administrative law judge accorded greater weight to Dr. Dahhan's opinion because Dr. Dahhan was Board-certified in internal medicine and pulmonary disease, *see Carson, supra; Clark, supra*, and because Dr. Dahhan's opinion was supported by the well-reasoned opinions of Drs. Branscomb, Fino, Castle and Morgan, who reviewed the medical evidence. This was rational. *See Church, supra; Carson, supra; Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Director's Exhibit 26; Employer's Exhibits 2, 4, 5. We, therefore, affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis by medical opinion evidence as it is supported by substantial evidence and is in accordance with law. As claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement, we affirm the administrative law judge's denial of benefits. *Trent, supra; Perry, supra*.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge