BRB No. 94-0474 BLA

ERNEST WHITE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
EASTOVER MINING CORPORATION	)	
	)	
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 Ainsworth A. Brown, Administrative Law Judge, United States Department of Labor.

Mark L. Ford, Harlan, Kentucky, for claimant.

Sirina Tsai (Arter & Hadden), Washington, D.C., for employer.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (93-BLA-0618) of Administrative Law Judge Ainsworth H. Brown 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). The administrative law judge credited claimant with twenty-two years of coal mine employment, and in accordance with the filing date, January 30, 1990, considered the claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1) and (4), and further found that claimant failed to establish a change in conditions under 20 C.F.R. §725.310. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred by failing to

find invocation of the presumption contained in 20 C.F.R. §718.305 and by finding the x-ray evidence of record insufficient to establish the existence of pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), responds by letter with respect to one issue only, asserting that the administrative law judge permissibly declined to

apply the true doubt rule to the evidence of record.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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 Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. In finding that claimant failed to establish his entitlement to benefits, the administrative law judge concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis. Claimant contends that the evidence of record was sufficient to invoke the presumption contained in 20 C.F.R. §718.305 and thus, the administrative law judge erred by failing to presume that claimant suffers from pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3).[1] We disagree. Contrary to claimant's contention, the presumption contained in Section 718.305 is inapplicable to this claim, as it was filed after January 1, 1982.[2] *See* 20 C.F.R. §718.305(e); Director's Exhibits 1, 28. Claimant's

[1] The administrative law judge's findings of twenty-two years of coal mine employment, that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and the finding of no change of conditions under 20 C.F.R. §725.310 are affirmed as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

[2] We note that the administrative law judge's failure to make any findings at 20 C.F.R. §§718.202(a)(2) and (3) is harmless error as there is no biopsy evidence in the record, and the presumptions at Sections 718.304 and 718.306 are inapplicable because claimant is living and there is no evidence in the record of complicated

contention of error on this issue is therefore rejected.

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pneumoconiosis. *See Larioni v. Director,* OWCP, 6 BLR 1-1276 (1984).

Claimant next contends that the administrative law judge erred in weighing the x-ray evidence of record by failing to consider the superior qualifications of Drs. Gordonson and Sargent or to accord greater weight to their interpretations of the 1990 x-ray. This contention is without merit, however, as the administrative law judge considered the two doctors' status as B readers and board-certified radiologists, but was not required to defer to their opinions because of their qualifications in his evaluation of the x-ray evidence. Decision and Order at 4; *see* §718.202(a)(1); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989). Claimant further contends that the administrative law judge erred by failing to apply the true doubt rule to the equally probative, conflicting interpretations of the 1990 x-ray. Claimant's contention of error on this issue is rejected, however, as the United States Supreme Court has held that the true doubt rule is not a valid rule of law. *See, Director, OWCP v. Greenwich Collieries [Ondecko],* U.S. , 114 S.Ct. 2251 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP,* 990 F.2d 730, 17 BLR 2-64 (10th Cir. 1993). Moreover, the administrative law judge in the instant case permissibly resolved the conflicting interpretations of this particular x-ray in his weighing of the x-ray evidence.[3]

Claimant next contends that the administrative law judge erred by finding that the determination by Drs. Wiot and Sargent, that the film quality of the 1992 x-ray was poor, undermined the interpretation by Drs. Marshall and Baker of that x-ray. We disagree. While the administrative law judge's Decision and Order discusses the agreement of Drs. Wiot and Sargent as to the film quality, the administrative law judge did not accord the readings of Drs. Marshall and Baker less weight on this basis, as the administrative law judge's ultimate finding at 718.202(a)(1) is based on the weight of the evidence.[4] *See* Decision and Order at 4; *Edmiston v. F & R Coal Co*., 14 BLR 1-65 (1990). Thus, we affirm, as supported by substantial evidence, the administrative law judge's finding that the x-ray evidence of record is insufficient to

[3] We note that the administrative law judge considered only the most recent x-ray readings of record in making his finding at Section 718.202(a)(1). *See* Decision and Order at 4; *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). The administrative law judge's reliance on the most recent x-ray evidence, however, is harmless error as he also considered the radiological credentials of the readers in making his finding at Section 718.202(a)(1). *See Woodward*, 991 F.2d at 321-22, 17 BLR at 85-87; *Larioni, supra*.

[4] We also note that the administrative law judge's failure to consider Dr. Sidiqui's positive reading of the 1978 x-ray, an omission unchallenged by claimant, is harmless error, as the administrative law judge relied on the interpretations of the B readers in making his finding at Section 718.202(a)(1), and Dr. Sidiqui possessed no special radiological credentials. *See Larioni, supra*.

establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). As claimant has failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a), a necessary element of entitlement under Part 718, the denial of benefits is affirmed.[5] *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[5] We also reject claimant's contention regarding the true doubt rule and its application to 20 C.F.R. §718.204(c)(2), as the true doubt rule is no longer valid. *See Ondecko, supra*.