BRB Nos. 00-1123 BLA
and 00-1123 BLA-A

VEDA G. McKINNEY (Widow of WILLIAM McKINNEY) Claimant-Petitioner v. PEABODY COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondents Cross-Petitioners and T.L.I., INCORPORATED Employer-Respondent Cross-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Cross-Respondent	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Verda G. McKinney, Nashville, Tennessee, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer, Peabody Coal Company.
Lois A. Kitts (Baird & Baird, P.S.C.), Pineville, Kentucky, for employer, T.L.I.,

Incorporated.

Mary Forrest-Doyle (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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.

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

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel, and Employer, Peabody Coal Company, cross-appeals, the Decision and Order (99-BLA-00930) of Administrative Law Judge Donald W. Mosser 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).[2] After determining that the instant claim was a duplicate claim, the administrative law judge noted the proper standard and found that the newly submitted evidence was sufficient to establish that William McKinney was a "miner" as defined under the Act and thus concluded that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Decision and Order at 3-4, 9-10. The administrative law judge found the evidence of record sufficient to establish nine years of qualifying coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part

[1]Claimant is Veda G. McKinney, the miner's widow. The miner, William McKinney, filed his initial claim for benefits on August 29, 1989, which was finally denied on February 23, 1990, as he did not meet the definition of a "miner" under the Act. Director's Exhibit 30. The miner filed the instant claim on September 11, 1996, which was denied by the district director on October 28, 1997. Director's Exhibits 1, 29. The miner died on April 25, 1998 after requesting that his case be referred to the Office of Administrative Law Judges, and claimant is pursuing the claim on his behalf. Director's Exhibits 29, 31; Claimant's Exhibit 6. -

[2]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.

718. Decision and Order at 4-7, 17. The administrative law judge determined that Peabody Coal Company would be liable for the payment of benefits and dismissed T.L.I., Incorporated, as a possible responsible operator. Decision and Order at 7-9. With respect to the merits, the administrative law judge concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis, arising out of coal mine employment and that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.203 and 718.204(b) (2000). Decision and Order at 17-21. Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer, Peabody Coal Company, responds asserting that substantial evidence supports the denial of benefits and cross-appeals contending that the administrative law judge erred in finding a material change in conditions established and in finding it to be the party responsible for the payment of benefits. Employer, T.L.I., Incorporated, responds, urging affirmance of the responsible operator determination and the denial of benefits, but agreeing that the administrative law judge erred in finding a material change in conditions established. The Director, Office of Workers' Compensation Programs, responds asserting that substantial evidence supports the administrative law judge's findings with respect to a material change in conditions and the proper responsible operator.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, 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 claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on May 21, 2001, to which employers and the Director have responded. Claimant has not responded to the Board's order.[3] Based on the briefs submitted by employers and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations.[4] Therefore, the Board will proceed

[3]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on May 21, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

[4]The Director's brief, dated June 11, 2001, asserted that the regulations at issue in the lawsuit do not affect the outcome of this case. In a brief dated June 11, 2001, employer, Peabody Coal Company, responded that the revised regulations do not affect the disposition of this case. Employer, T.L.I., Incorporated, in a brief dated June 12, 2001, asserts that it objects to the proposed regulations, but has not specifically indicated how the application of the new regulations to the facts of the case herein could affect the outcome of the instant

to adjudicate the merits of 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 findings of fact and conclusions of law if they are rational, supported by substantial evidence, and consistent with applicable 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 miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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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appeal.

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 is supported by substantial evidence and contains no reversible error therein. The administrative law judge, in the instant case, permissibly determined that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge rationally concluded that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) (2000) as the preponderance of x-ray readings by physicians with superior qualifications was negative.[5] Director's Exhibits 18, 19, 28, 30, 32; T.L.I. Exhibits 5, 10; Decision and Order at 17; *Staton v. Norfolk & Western Railroad 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); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *Trent, supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). We, therefore, affirm the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) (2000) as it is supported by substantial evidence.

Further, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) (2000) since the record does not contain any biopsy results demonstrating the presence of pneumoconiosis and the administrative law judge rationally concluded that the autopsy evidence was insufficient to establish the existence of pneumoconiosis in light of the superior credentials of Drs. Naeye and Caffrey and as these physicians reviewed all the evidence of record which provided them with a broad base of information from which to draw their conclusions. *Urgolites v. BethEnergy Mines, Inc.*, 17 BLR 1-20 (1992); *Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3 (1991); *Pershina v. Consolidation Coal Co.*, 14 BLR 1-55 (1990); *Clark, supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Piccin, supra*; Decision and Order at 17-18. Additionally, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) (2000) since none of the presumptions set forth therein are applicable to the instant claim.[6] *See* 20 C.F.R. §§718.304, 718.305, 718.306 (2000); *Langerud v.*

[5]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was employed in the coal mine industry in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[6]The presumption at 20 C.F.R. §718.304 (2000) is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 (2000) because this claim was filed after January 1, 1982. *See* 20 C.F.R. §718.305(e) (2000); Director's Exhibit 1. Lastly,

Director, OWCP, 9 BLR 1-101 (1986); Decision and Order at 18.

With respect to 20 C.F.R. §718.202(a)(4) (2000), the administrative law judge properly considered the entirety of the medical opinion evidence of record and permissibly accorded greater weight to the opinions of Drs. Fino, Aleen, Branscomb, Broudy, Caffrey and Naeye who opined that the miner did not have pneumoconiosis or any other occupationally acquired pulmonary condition, than to the contrary opinions of Drs. Heflin and Simpao, in light of their superior qualifications and as the physicians' opinions are well-documented, well reasoned and are based on the review of a great deal of medical evidence thus giving the physicians a more complete picture of the miner's health. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Perry, supra*; *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985)*; Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Wetzel, supra*; *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); Decision and Order at 18-19; Director's Exhibits 16, 30, 32; Claimant's Exhibits 1, 4, 5; T.L.I. Exhibits 3, 4, 6-8. Additionally, the administrative law judge, in a proper exercise of his discretion as fact-finder, permissibly accorded little weight to the opinion of Dr. Heflin based on the earlier date of his examination. The administrative law judge also reasonably accorded less weight to the opinion of Dr. Simpao as the physician relied upon an inaccurate coal mine employment history. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Addison v. Director*, OWCP, 11 BLR 1-68 (1988); *Perry, supra*; *Hall, supra*; *Long v. Director, OWCP*, 7 BLR 1-254 (1984); Decision and Order at 18-19.

The administrative law judge is empowered to weigh the medical opinion evidence of record and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Furthermore, since the determination of whether claimant had pneumoconiosis is primarily a medical determination, claimant's testimony alone, under the circumstances of this case, could not alter the administrative law judge's finding. 20 C.F.R. §718.202(a)(4) (2000); *Anderson, supra*. Consequently, we affirm the administrative law judge's finding that the evidence of record is

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this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (2000) as it is supported by substantial evidence and is in accordance with law.

Inasmuch as claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *Trent, supra*; *Perry, supra*. Moreover, we need not address the arguments made on cross-appeal by employer, Peabody Coal Company, challenging the administrative law judge's findings of a material change in conditions and the designation of the responsible operator since we affirm the denial of benefits. *Lewis v. Continental Bank Corp.,* 494 U.S. 472, (1990).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge