BRB No. 97-1613 BLA

ROBERT M. TOWNSELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY 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 of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Robert M. Townsell, Madisonville, Kentucky, *pro se.*

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (96-BLA-0041) of Administrative Law Judge Mollie W. Neal 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 at least nineteen years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[1]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See 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).

Initially, we note that claimant appeared before the administrative law judge without the assistance of counsel. Based on the facts of the instant case, we hold that there was a valid waiver of claimant's right to be represented, *see* 20 C.F.R. §725.362(b), and that the administrative law judge provided claimant with a full and fair hearing. *See Shapell v. Director, OWCP*, 7 BLR 1-304 (1984); Transcript at 6-8, 11-27.

[1]Inasmuch as the administrative law judge's length of coal mine employment finding, which is not adverse to this *pro se* claimant, is not challenged on appeal, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

We next address the administrative law judge's consideration of the claim on the merits pursuant to 20 C.F.R. Part 718. After considering the x-ray evidence of record, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Of the nineteen readings of nine x-rays, twelve readings are negative for pneumoconiosis, Director's Exhibits 14-16, 35-39; Claimant's Exhibit 1; Employer's Exhibits 1, 2, and seven readings are positive, Director's Exhibits 17, 20; Claimant's Exhibit 1. The administrative law judge properly accorded greater weight to the negative x-ray readings provided by physicians who are B-readers and/or Board-certified radiologists.[2] *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Moreover, since twelve of the nineteen interpretations of record are negative for pneumoconiosis, 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)(1), as supported by substantial evidence. See *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994).

We also affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) because she correctly found that the record does not contain any biopsy or autopsy results demonstrating the presence of pneumoconiosis. Decision and Order at 7. Further, we affirm the administrative law judge's finding that claimant could not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) since none of the presumptions set forth therein is applicable to the instant claim. *See* 20 C.F.R. §§718.304, 718.305, 718.306; Decision and Order at 7. The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Similarly, claimant is not entitled to the presumption at 20 C.F.R. §718.305 because he filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, this claim is not a survivor's claim;

[2]The administrative law judge stated that "ten of the thirteen physicians who are B-readers and/or Board-certified radiologists offered opinions that the x-rays were negative for pneumoconiosis." Decision and Order at 7. The administrative law judge also accurately stated that "all of the physicians who are dually qualified B-readers and Board-certified radiologists found the x-rays to be negative." *Id*.

therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

Finally, in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge considered the relevant medical opinions of record. Whereas Drs. Anderson, Baker and Simpao opined that claimant suffers from pneumoconiosis, Director's Exhibits 12, 13, 20; Employer's Exhibit 4, Drs. Gallo and Lane opined that claimant does not suffer from pneumoconiosis, Director's Exhibit 11; Employer's Exhibit 1. The administrative law judge properly accorded greater weight to the opinions of Drs. Gallo and Lane than to the contrary opinions of Drs. Anderson, Baker and Simpao because she permissibly found the former opinions to be better supported by the underlying documentation.[3] *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Duke v. Director, OWCP*, 6 BLR 1-673 (1983).[4] In addition, the administrative law judge properly discounted the opinions of Drs. Anderson, Baker and Simpao because their diagnoses of pneumoconiosis were

[3]The administrative law judge stated that the opinions of Drs. Gallo and Lane "are supported by the underlying documentation." Decision and Order at 11. The administrative law judge observed that Dr. Gallo noted that "[c]laimant's chest x-ray was negative for pneumoconiosis, and his pulmonary function studies did not reveal optimum tracings." *Id*. at 10. Further, the administrative law judge observed that Dr. Lane noted that "[c]laimant's [chest x-ray] was negative for pneumoconiosis; (sic) and his pulmonary function study was invalidated due to poor effort." *Id*. at 9.

[4]The administrative law judge erroneously accorded greater weight to the opinions of Drs. Lane and Gallo than to the contrary opinions of Drs. Anderson, Baker and Simpao because she found the former opinions to be consistent with her finding that the overwhelming weight of the x-ray evidence is negative for pneumoconiosis. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986). Nonetheless, since the administrative law judge provided a valid alternate basis for according greater weight to the opinions of Drs. Lane and Gallo than to the contrary opinions of Drs. Anderson, Baker and Simpao, *see Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), in that she accorded greater weight to the opinions of Drs. Lane and Gallo because she found them to be better supported by the underlying documentation, *see Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Duke v. Director, OWCP*, 6 BLR 1-673 (1983), the administrative law judge's error in this regard is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

based in part on positive interpretations of x-rays that were subsequently reread as negative by physicians with superior qualifications.[5] *See Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). Further, the administrative law judge properly discounted the opinion of Dr. Anderson because she found Dr. Anderson's opinion to be based on an inaccurate smoking history.[6] *See Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Additionally, the administrative law judge properly discounted the opinion of Dr. Baker because she found Dr. Baker's opinion to be based on an inaccurate coal mine employment history.[7] *See Hunt v. Director, OWCP*, 7 BLR 1-709 (1985). Thus, 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)(4), as supported by substantial evidence.

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[5]Whereas Dr. Anderson, who is not a B-reader or a Board-certified radiologist, read x-rays dated June 15, 1992 and October 9, 1992 as positive for pneumoconiosis, Director's Exhibit 20, Dr. Sargent, who is B-reader and Board-certified radiologist, reread the same x-rays as negative, Director's Exhibits 38, 39. In addition, whereas Dr. Simpao, who is not a B-reader or a Board-certified radiologist, read the July 5, 1994 x-ray as positive for pneumoconiosis, Director's Exhibit 17, Dr. Sargent reread the same x-ray as negative, Director's Exhibits 14, 15. Similarly, whereas Dr. Simpao read the November 26, 1996 x-ray as positive for pneumoconiosis, Claimant's Exhibit 1, Dr. Wiot, who is a B-reader and a Board-certified radiologist, reread the same x-ray as negative, Employer's Exhibit 3. Moreover, Dr. Baker read the November 18, 1992 x-ray as positive for pneumoconiosis. Director's Exhibit 20. Although Dr. Baker is a B-reader, he is not a Board-certified radiologist. However, the same x-ray that Dr. Baker read as positive was reread as negative by Drs. Sargent and Barrett, who are B-readers and Board-certified radiologists. Director's Exhibits 35, 37. Finally, whereas Dr. Baker read the June 15, 1992 x-ray as positive for pneumoconiosis, Director's Exhibit 20, Dr. Sargent reread the same x-ray as negative, Director's Exhibit 38.

[6]The administrative law judge stated that "Dr. Anderson's opinion is not as well reasoned...because he arrived at his diagnosis of pneumoconiosis, relying on an erroneous smoking history, i.e., that Claimant smoked cigarettes only 'occasionally.'" Decision and Order at 10. The administrative law judge permissibly found that claimant "has a smoking history of one half packs of cigarettes daily for thirteen years." Decision and Order at 3.

[7]The administrative law judge stated that "[t]he probative weight accorded to Dr. Baker's opinion is diminished by the fact that he relied on an erroneously inflated coal mine employment history (i.e. 32 years viz 19 to 21 years.)." Decision and Order at 10.

Since claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement, the administrative law judge properly denied benefits under 20 C.F.R. Part 718. *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

REGINA C. McGRANERY
Administrative Appeals Judge