BRB Nos. 06-0218 BLA
and 06-0218 BLA-A

MARVIN RAY BROWN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHARPLES COAL CORPORATION	)	DATE ISSUED: 06/12/2006
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Marvin Ray Brown, Butlerville, Indiana, *pro se*.

Natalee A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Michael J. Rutledge, Counsel of Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denying Benefits (04-BLA-5365) of Administrative Law Judge Rudolf L. Jansen 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). Claimant filed an

application for benefits on February 25, 2003. Director's Exhibit 2. The district director issued a Proposed Decision and Order awarding benefits on September 22, 2003. Director's Exhibit 24. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing, which was held on December 14, 2004. Director's Exhibits 25, 26. In a Decision and Order issued on November 1, 2005, the administrative law judge found that claimant failed to establish by a preponderance of the evidence that he has coal workers' pneumoconiosis, that he is totally disabled, and that his disability is due to pneumoconiosis. Accordingly, the administrative law judge denied benefits.

Claimant appeals, challenging the denial of his claim. Employer has filed a joint response brief and brief in support of the cross-appeal. Employer urges the Board to affirm the administrative law judge's denial of benefits. Employer's Brief at 18-23. Employer, however, maintains that the administrative law judge erred in excluding Employer's Exhibits 10-12 because he found that the evidence was proffered in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414.[1] Employer's Brief at 24-26. Employer further argues that the administrative law judge erred by failing to consider the totality of Dr. Caffrey's report as an affirmative biopsy report pursuant to 20 C.F.R. §725.414(a)(3)(i). Employer's Brief at 26-27. The Director has filed a brief in response to employer's cross-appeal, urging the Board to affirm the administrative law judge's evidentiary rulings and his treatment of Dr. Caffrey's report.[2]

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[1] Employer's Exhibits 10-12 consist of the medical report and deposition transcript of Dr. Andrew J. Ghio, and an x-ray interpretation prepared by Dr. Wiot. Although employer concedes that this evidence was proffered in excess of the evidentiary limitations, employer challenges the validity of the revised regulations and contends that all of the evidence that the administrative law judge excluded in this case pursuant to 20 C.F.R. §725.414 should be admitted under the "good cause" exception of 20 C.F.R. §725.456(b)(1) because such evidence is relevant. We reject employer's arguments based on our holding in *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004).

[2] The administrative law judge found that employer was attempting to circumvent the evidentiary limitations by designating Dr. Caffrey's report as a biopsy report and not one of its two affirmative medical reports permitted under 20 C.F.R. §725.414(a)(3)(i). The administrative noted that, in addition to reviewing the eight surgical pathology slides, Dr. Caffrey also reviewed all of the medical reports in claimant's file up until the date the doctor prepared his report. Decision and Order at 9. The administrative law judge ruled: "[s]ince Dr. Caffrey's discussion of the pathology slides can be severed from his report without affecting that doctor's opinion, it is not necessary to exclude his report in its entirety….[t]herefore, I will only consider Dr. Caffrey's final diagnosis of the microscopic examination of the biopsy evidence under Section 725.414(a)(3)(i). *Id*. Employer maintains that the administrative law judge should have considered all of Dr.

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. *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, are supported by substantial evidence, and are in accordance with law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Based on our review of the evidentiary record, the administrative law judge's Decision and Order, the briefs of the parties, and the issues presented on appeal, we affirm the administrative law judge's denial of benefits as it is supported by substantial evidence and consistent with applicable law. We specifically affirm the administrative law judge's finding that claimant failed to establish the existence of coal workers' pneumoconiosis.

In order to establish entitlement to benefits in a living miner's claim, claimant must prove that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§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 one of these elements precludes entitlement. *Id*.

In the instant case, the administrative law judge properly reviewed the medical evidence and found that claimant failed to carry his burden of proof to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Under Section 718.202(a)(1), the administrative law judge considered four readings of three x-rays relevant to whether claimant has pneumoconiosis. Decision and Order at 13. The record reflects that an April 30, 2003 x-ray was read by Dr. Powell, a B-reader, as showing

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Caffrey's report as an affirmative biopsy report, and that the administrative law judge should not have bifurcated his opinion. Employer's Brief at 26-27. Notwithstanding employer's position, based on our affirmance of the administrative law judge's denial of benefits, we decline to address whether the administrative law judge erred in bifurcating Dr. Caffrey's opinion, as any error committed by the administrative law judge in that regard would, at best, be harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant's last coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

small opacities in all lung zones, profusion 2/1. Director's Exhibit 10. In his examination report dated April 30, 2003, Dr. Powell opined that claimant's x-ray findings were consistent with interstitial fibrosis of unknown origin and "CHF." Director's Exhibit 9. Dr. Wiot, a Board-certified radiologist and B-reader, also read the April 30, 2003 x-ray, and opined that it was negative for pneumoconiosis. Employer's Exhibit 1. Dr. Lockey, a B-reader, read the August 7, 2003 x-ray as showing opacities with a profusion of 1/2, but similarly opined on the ILO sheet that the x-ray markings were inconsistent with exposure to coal dust or silica. Employer's Exhibit 2. Dr. Respher, a B-reader, additionally read an August 20, 2004 x-ray as negative for pneumoconiosis. Employer's Exhibit 3.

In evaluating the x-ray evidence, the administrative law judge permissibly stated that he "assigned heightened weight" to the readings by those physicians who qualified as either a Board-certified radiologist or B-reader, but "greatest weight to interpretations of physicians with both of these qualifications." Decision and Order at 13. Because Dr. Wiot is a dually qualified physician, the administrative law judge properly credited Dr. Wiot's negative reading of the April 30, 2003 x-ray. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Moreover, as the administrative law judge rationally found that claimant's x-rays were read as negative for *coal workers*' pneumoconiosis,[4] we affirm his findings pursuant to Section 718.202(a)(1).

[4] The Board has held that a physician's comments that address the source of a pneumoconiosis diagnosed by x-ray are not relevant to the issue of the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Rather, those comments are to be considered at 20 C.F.R. §718.203. *See Cranor v. Peabody Coal Co.*, 21 BLR 1-201 (1999). The administrative law judge erred by not addressing the physicians' opinions relevant to the source of the profusion identified on claimant's x-rays pursuant to Section 718.203. However, on the facts of this case, since all of the physician of record are in agreement that claimant's x-ray findings are not consistent with coal workers' pneumoconiosis or any coal dust-related respiratory condition, the administrative law judge's error at Section 718.202(a)(1) is harmless. *See Larioni,* 6 BLR at 1-1276. (1984). Assuming that claimant established the existence of pneumoconiosis at Section 718.202(a)(1), and that he was entitled to the ten year presumption that his pneumoconiosis arose out of coal mine employment as provided by Section 718.203, the presumption is rebutted by the unanimous physicians' opinions, which conclude that the x-ray findings are not consistent with coal dust exposure or *coal workers*' pneumoconiosis.

With respect to Section 718.202(a)(2), the administrative law judge found that the record contained a Surgical Radiology Report of a transbronchial lung biopsy of the middle and right upper lobe dated June 10, 1994 from Columbus Regional Hospital. Director's Exhibit 15; Decision and Order at 9. The biopsy report dated June 13, 1994 was prepared by Dr. Brown and diagnosed claimant with mild interstitial fibrosis. *Id*. The administrative law judge properly found that since Dr. Brown did not diagnose a coal dust-related lung disease or otherwise address the etiology of claimant's interstitial fibrosis, the doctor's opinion was insufficient to support a finding that claimant has pneumoconiosis. Decision and Order at 9. The administrative law judge further discussed Dr. Caffrey's review of claimant's biopsy slides, noting that Dr. Caffrey specifically opined that there was no evidence of pneumoconiosis. Employer's Exhibit 4; Decision and Order at 9. Although Dr. Caffrey indicated that there was a minimal amount of anthracotic pigment visible in the lung tissue, the administrative law judge properly determined that Dr. Caffrey's opinion was likewise insufficient to carry claimant's burden of proof at Section 718.202(a)(2) since a finding of anthracotic pigmentation, standing alone, does not establish the existence of pneumoconiosis.[5] *See* 20 C.F.R. §718.202(a)(2); Decision and Order at 10.

As the record was devoid of evidence to establish that claimant suffers from complicated pneumoconiosis, and he was unable to avail himself of the presumptions set forth at 20 C.F.R. §§718.305 or 718.306, the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(3). Decision and Order at 14. Furthermore, since none of the three physicians who offered opinions in this case, including Drs. Powell, Lockey and Respher, opined that claimant had either clinical or legal pneumoconiosis, the administrative law judge properly determined that claimant failed to carry his burden of proof at Section 718.202(a)(4). Director's Exhibits 9, Employer's Exhibits 2, 3; Decision and Order at 14-15. Finally, weighing all of the evidence together under Sections 718.202(a)(1)-(4), the administrative law judge also permissibly found that claimant failed to establish that he has pneumoconiosis.[6] Decision and Order at 16.

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[5] Section 718.202(a)(2) specifically provides: "A biopsy or autopsy conducted and reported in compliance with [Section] 718.106 may be the basis for a finding of the existence of pneumoconiosis. A finding in an autopsy or biopsy of anthracotic pigmentation, however, shall not be sufficient, by itself, to establish the existence of pneumoconiosis." 20 C.F.R §718.202(a)(2).

[6] The administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis is supported by a preponderance of the evidence including two negative x-ray readings, a negative CT scan, the negative biopsy evidence for a coal-dust related respiratory condition, and all of the medical opinion evidence stating that

Consequently, we affirm as supported by substantial evidence the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Since claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement, benefits are precluded. *Trent*, 11 BLR at 1-26; *Perry*, 9 BLR at 1-1.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed.

SO ORDERED.

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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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JUDITH S. BOGGS
Administrative Appeals Judge

claimant does not have pneumoconiosis. Director's Exhibits 9, 15; Employer's Exhibits 1, 3.