BRB No. 97-1516 BLA

ROBERT POLANDER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BETHENERGY MINES, INCORPORATED	)	
	)	
	)	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 - Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Robert Polander, Jefferson, Pennsylvania, *pro se*.

Carl J. Smith, Jr. (Richman & Smith), Washington, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appears without the assistance of counsel and appeals the Decision and Order - Denying Benefits (96-BLA-1508) of Administrative Law Judge Daniel L. Leland with respect to 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).[1] The administrative law judge credited claimant with thirty-four years of coal mine employment and considered the claim, filed on July 14, 1995, pursuant to the regulations set forth in 20 C.F.R. Part 718. The administrative law judge determined that the evidence of record was insufficient to support a finding of pneumoconiosis under 20 C.F.R. §718.202(a). Accordingly, benefits

[1]Claimant was represented by counsel at the hearing before the administrative law judge. Hearing Transcript at 4.

were denied. Employer has responded to claimant's appeal and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

In an appeal by a claimant filed without the assistance of counsel, the Board will consider 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). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

In order to establish entitlement to benefits under 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. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Upon review of the administrative law judge's findings and the evidence of record, we affirm the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a), as this finding is rational and supported by substantial evidence. With respect to Section 718.202(a)(1), the administrative law judge acted within his discretion in concluding that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis, inasmuch as the preponderance of interpretations by physicians qualified as Board-certified radiologists and/or B readers is negative for pneumoconiosis. Decision and Order at 6-7; *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-68 (1985). The administrative law judge's failure to consider the positive reading proffered by Dr. Kroh does not constitute error requiring remand, as Dr. Kroh's qualifications with respect to the interpretation of x-rays are not of record and his positive interpretation does not alter the administrative law judge's finding that the majority of readings by highly qualified readers is negative for pneumoconiosis.[2] Director's Exhibit 31; *see Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984).

[2]The administrative law judge permissibly found that the x-ray readings that were not classified in accordance with the quality standards set forth in 20 C.F.R. §718.102 do not constitute evidence relevant to 20 C.F.R. §718.202(a)(1). Decision and Order at 3, n.3;

Turning to Section 718.202(a)(2), claimant cannot establish the existence of pneumoconiosis pursuant to this subsection, as the record does not contain any biopsy evidence. 20 C.F.R. §718.202(a)(2). Regarding Section 718.202(a)(3), the presumptions set forth in 20 C.F.R. §§718.305 and 718.306 are not applicable in this case, in light of the fact that the present claim was filed by a living miner after January 1, 1982. Director's Exhibit 1; 20 C.F.R. §§718.202(a)(3), 718.305(e), 718.306.

The irrebuttable presumption of total disability due to pneumoconiosis, set forth in 20 C.F.R. §718.304 and referenced in Section 718.202(a)(3), is also not available to claimant in this case. Although the administrative law judge did not render findings specifically under Section 718.304, he resolved the issue of whether the evidence of record was sufficient to establish the presence of complicated pneumoconiosis under Section 718.202(a)(1). Pursuant to Section 718.202(a)(1), the administrative law judge rationally determined that the readings in which dually qualified B readers/Board-certified radiologists, Drs. McMahon, Francke, and Fisher, found a size "A" large opacity, were insufficient to establish the presence of complicated pneumoconiosis, as Drs. Wiot, Mazzei, and Sargent, who are also dually qualified as B readers and Board-certified radiologists, proffered negative readings of the same x-rays. Decision and Order at 6-7; Director's Exhibits 18-20, 30, 32; Employer's Exhibits A, C, F; *see Trent*, *supra*. The administrative law judge also permissibly relied upon the fact that these same physicians, in addition to Dr. Fino, who is a B reader, interpreted the remaining x-rays of record as negative for pneumoconiosis. Decision and Order at 6-7; Director's Exhibits 30; Employer's Exhibits A, C, F, H, I; *see Trent*, *supra*; *Vance*, *supra*. Finally, although readings of a CT scan of claimant's chest were proffered by Drs. Murphy, Fino, and Wiot, these do not include diagnoses of complicated pneumoconiosis. Claimant's Exhibit 2; Employer's Exhibits G, H; *see Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(en banc). Thus, the administrative law judge rationally determined that the evidence of record does not support a finding of complicated pneumoconiosis, thereby rendering the irrebuttable presumption set forth in Section 718.304 unavailable to claimant in this case.

Director's Exhibit 31; Claimant's Exhibit 1; *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Regarding Section 718.202(a)(4), the administrative law judge weighed the opinion of Dr. Fino, who determined that claimant does not have pneumoconiosis, against the contrary opinions of Drs. Cho, Kroh, Levine, and Murcek.[3] Decision and Order at 5-8; Director's Exhibits 15, 30, 31, 33; Claimant's Exhibits 3, 4; Employer's Exhibits G, E. The administrative law judge acted within his discretion in finding that Dr. Fino's opinion is entitled to more weight than the contrary opinions of record, based upon Dr. Fino's superior qualifications as a Board-certified pulmonologist. Decision and Order at 7; Director's Exhibit 30; Employer's Exhibit E at 3; *see McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). The administrative law judge also permissibly relied upon the fact that Dr. Fino both examined claimant and reviewed claimant's medical records and provided a more thorough explanation of his conclusions than did Drs. Cho, Levine, and Kroh. Decision and Order at 7-8; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge rationally concluded that Dr. Murcek's opinion was entitled to little weight, despite his status as one of claimant's treating physicians, on the ground that Dr. Murcek did not specifically identify the objective evidence that supported his statement that claimant has pneumoconiosis in addition to allergic reactive airway disease. Decision and Order at 8; Claimant's Exhibit 3; *see Clark*, *supra*; *Wetzel*, *supra*. Inasmuch as the administrative law judge's finding that the medical

[3]The administrative law judge rationally determined that the medical report prepared by Dr. Lega does not contain a diagnosis of pneumoconiosis, as Dr. Lega did not state that claimant has pneumoconiosis nor did he identify coal dust exposure as the source of claimant's respiratory problems. Decision and Order at 7; Director's Exhibit 31; *see Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). The administrative law judge's similar finding with respect to Dr. Michos's opinion is also rational, as Dr. Michos stated explicitly that he could not offer an opinion as to the etiology of claimant's totally disabling respiratory impairment. Decision and Order at 7; Director's Exhibit 35; *see Perry, supra*.

opinions of record do not establish the existence of pneumoconiosis under Section 718.202(a)(4) is rational and is supported by substantial evidence, it is affirmed.

In light of our affirmance of the administrative law judge's determination that claimant did not prove that he is suffering from pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement, we must also affirm the denial of benefits under Part 718. *See Trent*, *supra*; *Gee*, *supra*; *Perry*, *supra*. Finally, because claimant did not establish the existence of pneumoconiosis under any of the subsections of Section 718.202(a), we need not remand this case for consideration under *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).[4]

[4]This case arises under the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's last year of coal mine employment occurred in Pennsylvania. Director's Exhibits 2, 6, 7; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). In *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), the Third Circuit held that the evidence relevant to 20 C.F.R. §718.202(a)(1)-(4) must be weighed together to determine whether a claimant has established the existence of pneumoconiosis.

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge