

BRB No. 98-1237 BLA

CHARLES DUNFEE, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
	)	
CEDAR COAL COMPANY & AMERICAN	)	
ELECTRIC POWER SERVICE COMPANY	)	
	)	
Employers-Respondents	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	DATE ISSUED: _____
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Otis R. Mann, Jr. (Clifford, Mann & Swisher, P.L.L.C.), Charleston, West Virginia, for claimant.

David L. Yaussy (Robinson & McElwee LLP), Charleston, West Virginia, for Cedar Coal Company.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order (95-BLA-1750) of Administrative Law Judge Gerald M. Tierney 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*

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<sup>1</sup>Claimant is Charles Dunfee, Sr., the miner, who filed his claim for benefits on July 18, 1994. Director's Exhibit 1.

*seq.* (the Act). The administrative law judge credited the miner with forty years of coal mine employment. Decision and Order at 2. Applying the regulations at 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). Decision and Order at 3-6. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in failing to find the existence of pneumoconiosis at Section 718.202(a)(1). Claimant's Brief at 2-3. Claimant also contends that the administrative law judge erred in failing to accord greater weight to the opinions rendered by the examining physicians pursuant to Section 718.202(a)(4). Claimant's Brief at 3-4. Cedar Coal Company 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.<sup>2</sup>

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to Section 718.202(a)(1), claimant fails to state with specificity any error made by the administrative law judge, but merely recites the x-ray evidence contained in the record. Claimant's Brief at 2-3. Thus, since claimant has failed to provide a basis upon which the Board may review the administrative law judge's weighing of the x-ray evidence, we affirm his Section 718.202(a)(1) finding.<sup>3</sup> See *Sarf v. Director, OWCP*, 10 BLR 1-119

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<sup>2</sup>We affirm the administrative law judge's length of coal mine employment finding as it is unchallenged on appeal. See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>3</sup>We note that the administrative law judge's Section 718.202(a)(1) finding, that claimant

(1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); *see also Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986).

There is no biopsy or autopsy evidence in the record. *See* 20 C.F.R. §718.202(a)(2). The presumptions found at Sections 718.304, 718.305, and 718.306 are inapplicable to this living miner's claim filed after January 1, 1982, *see Kubachka v. Windsor Power House Coal Corp.*, 11 BLR 1-171 (1988), in which there is no evidence of complicated pneumoconiosis, *see generally Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Therefore, we deem harmless error, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), the administrative law judge's failure to render findings pursuant to these sections.

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failed to establish the existence of pneumoconiosis by the x-ray evidence, is supported by substantial evidence. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984).

Pursuant to Section 718.202(a)(4), Dr. Patel, the miner's treating physician, and Drs. Ranavaya and Rasmussen, both examining physicians, found the existence of pneumoconiosis whereas Dr. Zaldivar, an examining and reviewing physician, and Dr. Altmeyer, a reviewing physician, did not. In considering the medical opinion evidence, the administrative law judge accorded greater weight to the opinions of Drs. Zaldivar and Altmeyer over the opinions of Drs. Patel and Ranavaya based on the formers' superior qualifications.<sup>4</sup> Decision and Order at 5. While the administrative law judge stated that Dr. Rasmussen was not Board-certified in pulmonary disease, he noted that he "had extensive experience in the area of pneumoconiosis." *Id.* However, the administrative law judge found the opinions of Drs. Zaldivar and Altmeyer entitled to greater weight because both of these physicians "provided in-depth rationale[s] for their conclusions" and a review of the medical evidence on claimant developed over a period of time. Decision and Order at 5-6.

Contrary to claimant's assertion, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Zaldivar and Altmeyer based on their superior qualifications, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), and permissibly found these two opinions to be better reasoned and documented than the opinion of Dr. Rasmussen, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Therefore, we affirm the administrative law judge's Section 718.202(a)(4) finding. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988).

Inasmuch as we affirm the administrative law judge's Section 718.202(a) finding, that claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement under Part 718, *see Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we also affirm his denial of benefits.

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<sup>4</sup>Drs. Zaldivar and Altmeyer are both Board-certified in internal medicine and pulmonary disease and are B-readers; Dr. Rasmussen is Board-certified in internal medicine; Dr. Patel is a Board-certified radiologist; and Dr. Ranavaya is a B-reader.

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge