BRB No. 99-1068 BLA

BENNY LEE ADKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RYAN COAL COMPANY	)	
	)	
and	)	DATE ISSUED:
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Benny Lee Adkins, Shelbiana, Kentucky, *pro se*.

Deron L. Johnson (Boehl, Stopher & Graves), Prestonsburg, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order - Denial of Benefits (98-BLA-1160) of Administrative Law Judge Robert L. Hillyard 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 properly

considered the instant claim, filed on May 29, 1997, pursuant to the permanent regulations at 20 C.F.R. Part 718. After crediting claimant with twelve years of coal mine employment based upon the stipulation of the parties, the administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge further found the evidence insufficient to establish total disability under 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue 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 findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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 Part 718 in a living miner's claim, a claimant must establish the existence of 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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In considering the x-ray evidence of record in this case pursuant to Section 718.202(a)(1), the administrative law judge stated that the record contains fifteen interpretations of x-rays dated between February 11, 1993 and March 25, 1998. Decision and Order at 9. The record actually contains sixteen interpretations, but the administrative law judge's omission in not considering this sixteenth interpretation constitutes harmless error inasmuch as it did not prejudice claimant, given that the reading is a negative reading from Dr. Sargent of a film dated September 30, 1997. *See Larioni v. Director, OWCP*, 6 BLR 1-710 (1983); Director's Exhibit 36. The administrative law judge correctly stated that there are only three positive interpretations of record, which were submitted by Drs. Musgrave, Wells and Clarke.[1] After correctly noting that Drs. Musgrave, Wells and Clarke

[1] Films dated May 10, 1993, February 11, 1993, and March 19, 1993 were classified as positive for pneumoconiosis, 2/1, by Drs. Musgrave, Wells and Dr. Clarke, respectively. Director's Exhibit 29.

do not possess special radiological qualifications as B readers or Board-certified radiologists, the administrative law judge properly found that the positive readings of these three physicians were insufficient to establish the existence of pneumoconiosis in view of both the quantity and quality of the negative x-ray evidence of record, as prescribed by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises. *See 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); Decision and Order at 10. Aside from not accounting for Dr. Sargent's negative reading of the September 30, 1997 x-ray, as discussed *supra*, the administrative law judge properly found that four negative interpretations were submitted by dually-qualified B reader/Board-certified radiologists, and that another four negative interpretations were submitted by B readers.[2] We, therefore, affirm the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), as it is in accordance with law and supported by substantial evidence. *See Staton, supra; Woodward, supra; Edmiston, supra*.

Additionally, the administrative law judge properly found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2), since there is no autopsy or biopsy evidence in the record. Decision and Order at 10. The administrative law judge also properly found that claimant cannot establish the existence of pneumoconiosis under Section 718.202(a)(3), as none of the presumptions thereunder applies.[3] *Id.* We, therefore, affirm the administrative law judge's finding that the existence

[2]As discussed *supra*, the record actually contains an additional negative interpretation not considered by the administrative law judge. This interpretation, *i.e.*, Dr. Sargent's interpretation of a film dated September 30, 1997, comprises a fifth negative interpretation from a dually-qualified B reader/Board-certified radiologist. Director's Exhibit 36.

[3] The record does not contain evidence of complicated pneumoconiosis and, consequently, claimant does not qualify for the presumption at 20 C.F.R. §718.304. The instant claim was filed after January 1, 1982 and, therefore, the presumption at 20 C.F.R. §718.305 is

of pneumoconiosis was not established at 20 C.F.R. §718.202(a)(2) or (a)(3).

In finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4), the administrative law judge correctly stated that of the eight physicians of record, five – Drs. Jarboe, Fritzhand, Broudy, Dineen and Lane – opined that claimant does not suffer from pneumoconiosis. Decision and Order at 10; Director's Exhibits 10, 30, 32. The administrative law judge properly credited these opinions over the contrary opinions submitted by Drs. Wells, Musgrave and Clarke, having determined that the former were well-reasoned and supported by the objective evidence of record. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); Decision and Order at 10-12; Director's Exhibits 10, 29, 30, 32. The administrative law judge properly discounted Dr. Wells's opinion, finding it poorly explained because Dr. Wells did not specify any objective evidence in support of his opinion that claimant has pneumoconiosis other than the x-ray which Dr. Wells read as positive. *See Clark, supra; Tackett, supra*; Decision and Order at 11; Director's Exhibit 29. Similarly, the administrative law judge properly discounted the opinions of Drs. Musgrave and Clarke as unsupported by the objective evidence of record. *See Clark, supra; Tackett, supra;* Decision and Order at 11; Director's Exhibit 29. The administrative law judge noted that the objective studies administered by Drs. Musgrave and Clarke failed to produce qualifying results. Decision and Order at 11; Director's Exhibit 29. The administrative law judge also noted that Dr. Clarke did not address the effects of claimant's smoking history of approximately one-half pack of cigarettes per day for over twenty years. Decision and Order at 3, 11; Director's Exhibit 29. Because the administrative law judge properly credited the opinions of Drs. Jarboe, Fritzhand, Broudy, Dineen and Lane over the opinions of Drs. Wells, Musgrave and Clarke, we affirm the administrative law judge's finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Inasmuch as claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a requisite element of entitlement under Part 718, the administrative law judge properly denied benefits. *Trent, supra*; *Gee, supra*; *Perry, supra*.

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inapplicable. Additionally, as this is not a survivor's claim, the presumption at 20 C.F.R. §718.306 does not apply.

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge