

BRB No. 01-0577 BLA

MARGIE MARIE MILLS)
(Widow of FRED MILLS))
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED:
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Margie Marie Mills, Heidrick, Kentucky, *pro se*.

Jeffrey S. Goldberg (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant¹, without the assistance of counsel, appeals the Decision and Order-Denying Benefits (2000-BLA-00223) of Administrative Law Judge Donald W. Mosser on claims 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).² This case

¹ Claimant is the surviving spouse of the deceased miner who died on September 11, 1991. Director's Exhibit 7.

² The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became

is before the Board on appeal following the administrative law judge's denial of benefits on requests for modification in both claims.³ The administrative law judge determined that claimant failed to establish the presence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) (2000) and noted that, therefore, the presumption found at 20 C.F.R. §410.490(b)(1)(i) would not be invoked.⁴ Decision and Order at 8. Thus, the administrative law judge found that there was no mistake in the finding that the x-ray evidence failed to establish the presence of pneumoconiosis. The administrative law judge further found, having reviewed all the prior administrative law judge and Board decisions in this case, that there was no mistake in the conclusions that the miner did not establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4). He additionally found no error in the administrative law judge's finding of no more than eight and one-half years of coal mine employment. Finally, the administrative law judge found no mistake in the determination that claimant failed to establish pneumoconiosis arising out of coal mine employment at 20 C.F.R. §410.490(b) and 20 C.F.R. §718.203. The administrative law judge therefore denied the request for modification of the miner's claim. The administrative law judge also found that the evidence of record failed to establish entitlement in the survivor's claim pursuant to 20 C.F.R. §718.205(c). Claimant appeals, generally arguing that the administrative law judge erred in denying benefits. The Director, Office of Workers' Compensation Programs, has filed a response brief urging affirmance of the denial of benefits.

effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³ The Board's Decision and Order in BRB No. 96-1513 BLA contains the complete prior procedural history of this case. *Mills v. Director, OWCP*, BRB No. 96-1513 BLA (Apr. 17, 1997).

⁴ The administrative law judge noted that, given the original date of the filing of the claim, the evidence would have to be evaluated pursuant to 20 C.F.R. §410 as well as 20 C.F.R. §718. Decision and Order at 5.

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. *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 the conclusions of law are rational, supported by substantial evidence, and in accordance with the law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). To be entitled to benefits under Part 718 in a living miner's claim, the evidence must establish total respiratory disability due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 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. In a survivor's claim filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis arising out of coal mine employment, or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis and that the pneumoconiosis arose out of coal mine employment. 20 C.F.R. §§718.205(c), 718.202, 718.203; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87; *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988).

In evaluating all of the x-ray evidence of record, the administrative law judge noted that he would “defer to the readings of the best-qualified readers, which are overwhelmingly negative for pneumoconiosis.” Decision and Order at 7. The administrative law judge correctly assessed that there were seventeen readings rendered by B-readers and B-reader/Board certified radiologists. Among these readings the record reflects eight negative interpretations, six positive interpretations and three readings of unreadable or underexposed films. Claimant's Exhibits 1, 2, 3; Director's Exhibits 31, 33, 34, 44, 45, 46, 48, 50, 51, 52, 80, 87, 89. Inasmuch as the preponderance of the x-ray evidence by the most highly qualified readers is negative for the existence of pneumoconiosis, we affirm the administrative law judge's finding that the x-ray evidence failed to establish the presence of pneumoconiosis at Section 718.202(a)(1), and that the presumption found at Section 410.490(b)(1)(i) is not invoked. See *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

The administrative law judge, after reviewing all of the evidence of record, properly found that no mistake had been made in the assessment of the evidence at

20 C.F.R. §718.202(a)(2)-(4)(2000).⁵ See 20 C.F.R. §718.202(a)(2)-(4); *Consolidation Coal Co., v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

In light of the foregoing we affirm the administrative law judge's denial of benefits on modification in the miner's claim. See *Trent v. Director OWCP*, 11 BLR 1-26 (1987); *Perry v. Director OWCP*, 9 BLR 1-1 (1986)(*en banc*). Moreover, inasmuch as we affirm the finding that pneumoconiosis is not established at 20 C.F.R. §718.202(a)(1)-(4), a finding of entitlement in the survivor's claim is also precluded. See *Trumbo, supra*.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁵ In its February 27, 1995 Decision and Order, the Board specifically affirmed the administrative law judge's finding that the evidence failed to establish the presence of pneumoconiosis under Section 718.202(a)(4)(2000). *Mills v. Director, OWCP*, BRB No. 94-0381 BLA (Feb. 27, 1995)(unpublished). Further, in that same decision, the Board noted that claimant had not contested the administrative law judge's finding that pneumoconiosis was not established pursuant to Section 718.202(a)(2) and (a)(3)(2000), and the Board therefore affirmed these findings as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).