BRB No. 02-0597

MARION HUBBARD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEA B MINING COMPANY	)	
	)	DATE
Employer-Respondent	)	ISSUED:___________
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	
		DECISION and ORDER

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart, Eskridge and Jones), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2001-BLA-0383) of Administrative Law Judge Stuart A. Levin denying benefits 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). The relevant procedural history of this case is as follows: Claimant, a living miner, filed an application for benefits on April 9, 1982. Director's Exhibit 42-1. In a Decision and Order issued on November 10, 1986, Administrative Law Judge Aaron Silverman denied benefits on the grounds that claimant failed to establish either the existence of pneumoconiosis or that he was suffering from a totally disabling respiratory or pulmonary impairment. Director's Exhibit 42-37. The Board

affirmed the denial of benefits in a Decision and Order dated August 31, 1989. *Hubbard v. Sea B Mining Co.*, BRB No. 86-3130 BLA (Aug. 31, 1989)(unpub.); Director's Exhibit 42-51. Claimant filed a second application for benefits on June 13, 1991. Director's Exhibit 42-51. This claim was denied by Administrative Law Judge Victor Chao in a Decision and Order issued on June 7, 1993. Judge Chao determined that the evidence of record did not support a finding of pneumoconiosis or total disability. Director's Exhibit 41-65.

Upon consideration of claimant's appeal, the Board vacated Judge Chao's Decision and Order and remanded the case for him to reconsider the evidence relevant to 20 C.F.R. §§718.202(a)(1), (a)(4), 718.204 and 725.309 (2000).[1] *Hubbard v. Sea B Mining Co.*, BRB No. 93-1952 BLA (Sept. 27, 1995)(unpub.); Director's Exhibit 41-79. Due to Judge Chao's unavailability, the case was reassigned to Administrative Law Judge Fletcher E. Campbell, Jr., who found, that claimant did not establish the existence of pneumoconiosis or that he was suffering from total respiratory disability. Accordingly, benefits were denied. The Board affirmed Judge Campbell's Decision and Order on May 27, 1997. *Hubbard v. Sea B Mining Co.*, BRB No. 96-1275 BLA (May 27, 1997)(unpub.); Director's Exhibit 41-84. Claimant filed a third application for benefits on July 12, 2000. Director's Exhibit 1.

In the Decision and Order that is the subject of this appeal, Administrative Law Judge Stuart A. Levin (the administrative law judge) credited claimant with twenty-nine years of coal mine employment and noted that because employer conceded that claimant had established a material change in conditions based upon newly submitted evidence establishing that claimant has a totally disabling respiratory impairment, the issue before him was whether the evidence of record, as a whole, was sufficient to establish that claimant is entitled to benefits on the merits. The administrative law judge found that claimant failed to prove that he has pneumoconiosis or that he is totally disabled due to pneumoconiosis. Accordingly, benefits were denied. Claimant argues on appeal that the administrative law judge did not properly weigh the evidence relevant to Sections 718.202(a) and 718.204(c). Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs,

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). The amendments to the regulation pertaining to duplicate claims, set forth in 20 C.F.R. §725.309, does not apply to claims, such as the present one, filed before January 19, 2001. 20 C.F.R. §725.2.

has not filed a brief in this appeal.[2]

The Board′s scope of review is defined by statute. The administrative law judge′s Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

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*).

[2] We affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to Section 718.202(a)(1), the administrative law judge determined, based upon the preponderance of negative readings proffered by physicians who are both Board-certified radiologists and B-readers, that the x-ray evidence was insufficient to support a finding of pneumoconiosis. Decision and Order at 7-8. Claimant argues that the administrative law judge erred in stating that Dr. Alexander's positive interpretations were not admitted into the record. This contention is without merit. The administrative law judge was correct in indicating that Dr. Alexander's readings were not formally made part of the record, in light of the fact that they are marked as Claimant's Exhibits 34 and 36, while claimant requested the admission of Claimant's Exhibits 26 through 33 at the hearing. Decision and Order at 7; Hearing Transcript at 7. In addition, the administrative law judge rendered a finding in which he addressed this evidence and rationally concluded that it was insufficient to alter his conclusion that the x-ray evidence, as a whole, was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) because the vast majority of readings by highly qualified physicians remained negative. Decision and Order at 7-8; s*ee Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).[3] We affirm, therefore, the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis under Section 718.202(a)(1).

Upon weighing the medical opinions of record pursuant to Section 718.202(a)(4), the administrative law judge determined that the opinions in which the physicians concluded that pneumoconiosis is not present were better reasoned and better documented than the opinions to the contrary. Based upon this finding, the administrative law judge determined that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis. Decision and Order at 16. Claimant asserts that the administrative law judge did not adequately address the evidence supportive of a finding of pneumoconiosis that appears in claimant's hospital records and in Dr. Iosif's medical opinion. Claimant also argues that the administrative erred in crediting Dr. Castle's medical opinion in light of the fact that Dr. Castle's diagnoses are contradicted by the medical reports of Drs. Rosser and Santos, which Dr. Castle did not review.

These contentions are also without merit. The administrative law judge acted within his discretion in finding that claimant's hospital records do not substantiate a finding of pneumoconiosis because the physicians who mentioned pneumoconiosis or black lung disease did not identify the bases for the diagnosis or notation. Decision and Order at 15-17; s*ee Sterling Smokeless Coal Co. v.*

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[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in the Commonwealth of Virginia. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Akers, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *see also U.S. Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Even if, as claimant indicates, the hospital records in which pneumoconiosis is mentioned also include clinical data that support a diagnosis of pneumoconiosis, the administrative law judge rationally determined that without statements from a physician explicitly rendering a diagnosis and identifying the underlying rationale, these records do not contain reasoned diagnoses of pneumoconiosis as defined in 20 C.F.R. §718.201. *See Akers*, *supra*.

With respect to the Dr. Iosif's opinion, the administrative law judge noted that the doctor examined claimant on several occasions and diagnosed, among other conditions, chronic obstructive pulmonary disease (COPD), chronic bronchitis, and chronic interstitial disease. Decision and Order at 10-12; Director's Exhibit 18; Employer's Exhibits 30, 32. The administrative law judge acted rationally in declining to treat Dr. Iosif's diagnoses as evidence of pneumoconiosis, as Dr. Iosif did not link these conditions to dust exposure in coal mine employment. 20 C.F.R. §718.201; *see Perry*, *supra*.

Regarding Dr. Castle's opinion, that claimant does not have pneumoconiosis, claimant asserts that the administrative law judge should have determined that Dr. Castle's findings were undermined by the reports of Drs. Rosser and Santos. This contention does not identify an error in the administrative law judge's Decision and Order. The administrative law judge gave great weight to Dr. Castle's opinion based upon Dr. Castle's status as a Board-certified pulmonologist, and because Dr. Castle's opinion was well-documented, well-reasoned, and supported by the opinions of other pulmonary specialists of record and "the vast majority of recent treatment records." Decision and Order at 16; Employer's Exhibits 36, 60. The administrative law judge's weighing of Dr. Castle's opinion, as it pertained to the issue of whether claimant has pneumoconiosis, was rational and within his discretion. *See Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Contrary to claimant's assertion, therefore, the administrative law judge was not required to discredit Dr. Castle's opinion on the ground that Drs. Rosser and Santos came to a different conclusion regarding the significance of claimant's cardiac disease because their opinions do not contradict Dr. Castle's determination that claimant's respiratory condition is attributable to cigarette smoking, rather than coal dust exposure.[4] *See Perry*, *supra*. In addition, the fact that Dr. Castle did not review the reports submitted by Drs. Rosser and Santos does not alter the administrative law judge's conclusion that Dr. Castle's opinion was thoroughly documented, based upon his examination of claimant and his review of the medical evidence of record. *See Carson*, *supra*; *Clark*, *supra*. Thus, we affirm the administrative law judge's finding that claimant has not established the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

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[4] With respect to Dr. Rosser's medical reports, the doctor diagnosed chronic obstructive lung disease (COPD), chronic bronchitis, and asthma and indicated that claimant had a history of exposure to coal dust, but did not state that the diagnosed pulmonary conditions were caused by claimant's coal dust exposure. Claimant's Exhibits 28, 33. Dr. Santos, who performed a cardiac catheterization on claimant in July of 2001, did not indicate whether pneumoconiosis was present, but rather determined that claimant's chest pain was probably attributable to bronchitis and exacerbation of

Because we have affirmed the administrative law judge's determination that claimant did not prove that he has pneumoconiosis under Section 718.202(a)(1)-(4), an essential element of entitlement, we must also affirm the denial of benefits. *See Perry*, *supra*. We need not, therefore, address any of claimant's arguments pertaining to the issue of total disability due to pneumoconiosis since error, if any, in the administrative law judge's finding under Section 718.204(c), is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

REGINA C. McGRANERY
Administrative Appeals Judge

claimant's COPD rather than to his heart. Claimant's Exhibit 31.