

BRB No. 98-0135 BLA

CLAUDE R. RATLIFF	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: <u>5/17/99</u>
	)	
SEA "B" MINING COMPANY	)	
	)	
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 on Remand-Denying Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Claude R. Ratliff, Rowe, Virginia, *pro se*.<sup>1</sup>

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

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

PER CURIAM:

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<sup>1</sup>Tim White, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant, without assistance of counsel, appeals the Decision and Order on Remand (95-BLA-2045) of Administrative Law Judge David W. Di Nardi denying benefits on a duplicate 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). This is the second time this claim has been before the Board.<sup>2</sup> The instant duplicate claim, filed on September 26, 1994, Director's Exhibit 1, was denied by Administrative Law Judge Charles Rippey. The Board affirmed the administrative law judge's finding that the newly submitted evidence established a total respiratory disability and thus, a material change in conditions under 20 C.F.R. §725.309(d). However, the Board vacated Judge Rippey's findings on the merits because he only considered the newly submitted evidence in determining that the medical opinions are insufficient to establish that claimant's totally disabling respiratory impairment was not due in whole or in part to his coal mine employment. The Board remanded the case to the administrative law judge to consider all the evidence on the merits. *Ratliff v. Sea "B" Mining Company*, BRB No. 96-0821 BLA (July 30, 1996)(unpub.). On remand, Administrative Law Judge David W. Di Nardi (the administrative law judge), found the evidence insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b) and total disability pursuant to 20 C. F.R. §718.204. Accordingly, the administrative law judge denied benefits. Claimant appeals, generally challenging the denial of benefits. In response, employer argues that the administrative law judge's denial of benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider whether the Decision and Order below is supported by substantial evidence. See *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v.*

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<sup>2</sup>Claimant previously filed a claim for benefits on March 30, 1981. Director's Exhibit 42. This claim was denied by Administrative Law Judge V. M. McElroy on November 6, 1987 because claimant failed to establish the existence of pneumoconiosis and a totally disabling respiratory impairment. *Id.* The Board affirmed. See *Ratliff v. Jewell Ridge Coal Corp.*, BRB No. 87-3588 BLA (July 30, 1992)(unpub.). The record does not indicate that claimant took any further action with regard to the 1981 claim.

*Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent 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 (1985).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that his pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203 and 718.204. Failure to establish any one of these elements precludes entitlement. See *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

After considering the administrative law judge's Decision and Order on Remand and the evidence of record, we conclude that substantial evidence supports the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge properly found that of the seventy-six x-ray readings of record, only three readings are positive for the existence of pneumoconiosis. The administrative law judge properly found that the x-ray taken on September 5, 1985, was read as positive by a B-reader, but was subsequently read as negative for the existence of pneumoconiosis by four B-readers who are also Board-certified radiologists. Decision and Order on Remand at 17; Employer's Exhibits 17, 19-22. Similarly, the administrative law judge properly found that the x-ray taken on November 3, 1994 was read as positive by a Board-certified radiologist, but was also subsequently read as negative for the existence of pneumoconiosis by four B-readers, three of whom are also Board-certified radiologists. Decision and Order on Remand at 17; Director's Exhibits 19, 21, 33; Employer's Exhibit 1. The x-ray taken on August 29, 1993, interpreted as positive for the existence of pneumoconiosis by a physician dually qualified as a B-reader and Board-certified radiologist, was only read once for the record. However, sixteen negative interpretations of six x-rays by qualified B-readers and/or Board-certified radiologists followed. Director's Exhibits 19, 33, 34, 37; Employer's Exhibits 1, 4, 44, 47, 50, 51, 54, 57, 58. The administrative law judge, within a proper exercise of his discretion, determined, based on the radiological qualifications of each of the physicians interpreting claimant's x-rays, that the overwhelming preponderance of both the newly submitted and previously submitted x-ray evidence failed to establish the existence of pneumoconiosis. See *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). We, therefore, affirm this finding.

The administrative law judge properly found that claimant failed to establish

the existence of pneumoconiosis at Section 718.202(a)(2) because the record contains no biopsy evidence in this living miner's claim. Decision and Order on Remand at 18. Likewise, because there is no evidence of complicated pneumoconiosis, see 20 C.F.R. §718.304, and the presumptions contained in 20 C.F.R. §§718.305 and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, see 20 C.F.R. §718.305(e); Director's Exhibit 1, the administrative law judge properly found that the existence of pneumoconiosis is not established pursuant to Section 718.202(a)(3). Decision and Order on Remand at 19.

Finally, the administrative law judge properly found that the existence of pneumoconiosis is not established pursuant to Section 718.202(a)(4). The record contains at least twenty-four reports, letters and/or medical opinions by thirteen physicians. Drs. Thakkar, Byers, Buddington, Modi, Kabaria, and Forehand opined that claimant had pneumoconiosis. The administrative law judge properly questioned the reliability of the medical opinions of Drs. Thakkar, Byers, and Buddington as these physicians relied on questionable x-ray evidence of the existence of pneumoconiosis.<sup>3</sup> See *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); Decision and Order on Remand at 23, 30; Director's Exhibits 32, 36, 42. The administrative law judge correctly noted that Dr. Modi's 1994 opinion was insufficient to establish the existence of pneumoconiosis, as he diagnosed "breathing problems" but did not relate them to coal dust exposure. See *Perry, supra*; Decision and Order on Remand at 23; Director's Exhibit 12. The administrative law judge also acted within his discretion in finding Dr. Modi's previous reports, including the May 5, 1986 report, unreasoned because Dr. Modi relied solely on a questionable positive x-ray to diagnose the existence of pneumoconiosis and ignored the effect of claimant's smoking history in determining the cause of any respiratory problems. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Winters, supra*; Decision and Order on Remand at 23; Director's Exhibits 32, 33. The administrative law judge properly found Dr. Kabaria's opinion that claimant's respiratory problems "could be" due to pneumoconiosis was equivocal and unreasoned, see *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988), and the

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<sup>3</sup>The administrative law judge properly found that Dr. Byers' diagnosis of pneumoconiosis was based on a positive x-ray that was subsequently read as negative by four dually qualified physicians. Decision and Order on Remand at 30; Employer's Exhibits 15, 19-22. Dr. Buddington, in his report dated March 2, 1983, makes reference to a positive reading by Dr. Brandon. This reading, however, is not part of the record.

administrative law judge noted that like Drs. Modi and Thakkar, Dr. Kabaria did not discuss the effect of claimant's smoking history of at least twenty years. Decision and Order on Remand at 23, 24; Director's Exhibit 32. The administrative law judge also properly found Dr. Forehand's opinion not credible because, *inter alia*, Dr. Forehand relied on a grossly understated smoking history.<sup>4</sup> See *Trumbo, supra*; Decision and Order on Remand at 24; Director's Exhibits 14, 16. In contrast, the administrative law judge properly chose to rely on the medical opinions of Drs. Sargent, Fino and Branscomb in finding that claimant failed to establish the existence of pneumoconiosis inasmuch as their opinions were better supported by the evidence of record, including the overwhelming number of negative x-rays and an accurate smoking history of at least twenty years.<sup>5</sup> Accordingly, substantial evidence supports the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a)(4).

Inasmuch as claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), a requisite element of entitlement, an award of benefits under Part 718 is precluded. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Perry, supra*. Therefore, we need not review the administrative law judge's findings under 20 C.F.R. §§718.203(b) and 718.204. *Endrezzi v. Bethlehem Mines Corp.*, 8 BLR 1-11 (1985).

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<sup>4</sup>The administrative law judge correctly noted that Dr. Forehand determined that claimant smoked for only five years, "an insufficient interval of time to cause significant lung disease" as opposed to thirty-two years of coal dust exposure. Decision and Order on Remand at 24, 25; Director's Exhibits 14, 16. In contrast to the minimal smoking history reported by Dr. Forehand, the administrative law judge noted claimant's several reports of smoking history ranging from one third to one pack of cigarettes per day for twenty to thirty years. Decision and Order on Remand at 24; Hearing Transcript of January 14, 1987 at 33, 37; Director's Exhibits 32, 33,42; Employer's Exhibits 17, 18, 37, 61.

<sup>5</sup>Dr. Sargent examined claimant and attributed claimant's restrictive ventilatory impairment to a combination of respiratory muscle weakness and truncal obesity from his chronic steroid therapy unrelated to coal dust exposure. Employer's Exhibit 5 at 28. The administrative law judge properly found that Dr. Sargent's opinion was corroborated by Drs. Fino and Branscomb. Decision and Order on Remand at 25; Employer's Exhibits 59, 61.

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

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge