

BRB No. 06-0319 BLA

G.C. CHILDRESS )  
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 Claimant-Petitioner )  
 )  
 v. )  
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 EASTERN COAL CORPORATION ) DATE ISSUED: 10/27/2006  
 )  
 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 Denying Benefits of Janice K. Bullard,  
Administrative Law Judge, United States Department of Labor.

G.C. Childress, McAndrews, Kentucky, *pro se*.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for  
employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,<sup>1</sup> the Decision and Order Denying Benefits (03-BLA-6116) of Administrative Law Judge Janice K. Bullard 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). Claimant filed his application for benefits on July 30, 2001, which was denied by the district director in a Proposed Decision and Order dated March 4, 2003. Director's Exhibits 2, 9. Claimant

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<sup>1</sup> Kelly Fidell, of the Kentucky Black Lung Coalminers & Widows Association of Pikeville, Kentucky, filed an appeal on behalf of claimant. *See* Letter dated December 28, 2005; Board's Order dated January 13, 2007; *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

requested a hearing, which was held on May 12, 2005. In her Decision and Order dated December 7, 2005, the administrative law judge found that, while claimant had at least seventeen years of coal mine employment, he failed to establish that he suffered from coal workers' pneumoconiosis or that he was totally disabled due to pneumoconiosis. Accordingly, the administrative law judge denied benefits.

Employer responds to claimant's appeal, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

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. *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 conclusions of law are rational, supported by substantial evidence, and in accordance with law.<sup>2</sup> 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).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

After consideration of the administrative law judge's Decision and Order and the issues presented by this appeal, we affirm the administrative law judge's denial of benefits as it is supported by substantial evidence. Specifically, we affirm the administrative law judge's finding that claimant failed to establish either the existence of pneumoconiosis at 20 C.F.R. §718.202(a) or that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).

In addressing whether claimant established the existence of pneumoconiosis at Section 718.202(a)(1), the administrative law judge properly found that that the record contained three x-rays dated October 17, 2001, November 19, 2001, and June 17, 2004, of which there was one quality reading, one positive reading, and three negative readings for pneumoconiosis. Director's Exhibits 14, 16; Employer's Exhibit 1; Decision and

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<sup>2</sup> Because the miner's last coal mine employment occurred in Kentucky, this claim arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

Order at 5. The administrative law judge properly found that all of the negative readings were by physicians who were either board-certified radiologists or B-readers, and that the “only positive reading was rendered by Dr. Hussain, who is neither a B-reader nor a board-certified radiologist.” Decision and Order at 5. By according the greatest weight to the readings by the more qualified physicians, the administrative law judge properly found that the weight of the x-ray evidence was negative for pneumoconiosis. See *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 5. Thus, we affirm, as supported by substantial evidence, the administrative law judge’s finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Since there was no biopsy evidence for pneumoconiosis submitted with respect to this claim for benefits, the administrative law judge properly found that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 5. Similarly, since the record contains no evidence that claimant has complicated pneumoconiosis, see 20 C.F.R. §718.304, and claimant is not eligible for the presumptions at 20 C.F.R. §§718.305 and 718.306, the administrative law judge properly found that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3).<sup>3</sup> Decision and Order at 5-6.

Under Section 718.202(a)(4), the administrative law judge considered three opinions by Drs. Hussain, Rosenberg and Repsher relevant to whether claimant has clinical or legal pneumoconiosis. Director’s Exhibit 14, Employer’s Exhibits 1, 3. The administrative law judge permissibly assigned less weight to Dr. Hussain’s October 17, 2001 report, diagnosing coal workers’ pneumoconiosis, because the doctor’s opinion was “not entirely consistent with records of his treatment of [c]laimant[.]” Decision and Order at 8, and because the doctor failed to address what role, if any, claimant’s smoking history played with respect to his symptoms, Decision and Order at 9.<sup>4</sup> See *Maypray v.*

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<sup>3</sup> The presumption provided at 20 C.F.R. §718.305 is inapplicable because claimant filed the instant claim after January 1, 1982. 20 C.F.R. §718.305(e). The presumption provided at 20 C.F.R. §718.306 is also applicable because the instant claim is not a survivor’s claim. 20 C.F.R. §718.306.

<sup>4</sup> The administrative law judge noted that while Dr. Hussain diagnosed coal workers’ pneumoconiosis during his treatment of claimant in 2001, his more recent treatment records from 2002 failed to mention the disease and listed a diagnosis of acute exacerbation of chronic obstructive pulmonary disease with hypertension. Decision and Order at 8.

*Island Creek Coal Co.*, 7 BLR 1-683 (1985). The administrative law judge also permissibly rejected Dr. Hussain's diagnosis of pneumoconiosis because it was based in part on the doctor's positive reading of the October 17, 2001 x-ray, which had also been read as negative for pneumoconiosis by a more qualified Board-certified radiologist and B-reader. See *Arnoni v. Director, OWCP*, 6 BLR 1-427 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Director's Exhibit 14; Decision and Order at 9. The administrative law judge further noted that Dr. Hussain failed to explain how a finding of hypoxemia on arterial blood gas testing supported his diagnosis of pneumoconiosis. *Id.* In contrast, the administrative law judge had discretion to credit the opinions of the Drs. Rosenberg and Repsher, that claimant did not have pneumoconiosis, since he found their opinions to be better reasoned and documented. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Because claimant was unable to establish the existence of pneumoconiosis, a requisite element of entitlement, benefits are precluded. See *Trent*, 11 BLR at 1-26; *Perry*, 9 BLR at 1-1. Based on our affirmance of the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a), we decline to address the administrative law judge's finding with respect to the issue of total disability.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge