

BRB No. 02-0315 BLA

TOLBERT BURKE)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS’)	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Thomas F. Phalen, Jr.,
Administrative Law Judge, United States Department of Labor.

Tolbert Burke, Neon, Kentucky, *pro se*.

Timothy S. Williams (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 the Director, Office of Workers’ Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order - Denying Benefits (01-BLA-0744) of Administrative Law Judge Thomas F. Phalen, Jr. rendered 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).¹ The administrative law judge credited claimant with twenty years of qualifying coal mine employment, but found that the evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §§718.202(a)(1)-(4). Accordingly, benefits were denied.

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, 725 and 726. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

On appeal, claimant contends that he is entitled to benefits. The Director, Office of Workers' Compensation Programs (the Director), contends that while the administrative law judge's finding that the x-ray evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(1) is affirmable, his finding at Section 718.202(a)(4) must be vacated and the case remanded for consideration of the medical opinion evidence because the administrative law judge did not sufficiently discuss the medical opinion evidence.

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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 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 conclusions of law are rational, supported by substantial evidence, and in accordance with 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 in a living miner's claim pursuant to 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. *See* 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Considering the x-ray evidence at Section 718.202(a)(1), the administrative law judge rationally accorded greater weight to the negative readings of the March 29, 1999 x-ray by Dr. Sargent, a Board-certified B-reader, and Dr. Wicker, a B-reader, than to the positive readings of the January 29, 1991 x-ray by Dr. Baker, a B-reader, and Dr. Anderson, who does not appear to have any radiological credentials, because collectively, the former have superior radiological credentials. Director's Exhibits 12, 13, 29, 31; *see Staton v. Norfolk & Western Ry 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). Further, inasmuch as there were no biopsy reports in this living miner's claim, the administrative law judge correctly found that claimant could not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2). Likewise, the administrative law judge properly found that claimant could not establish the existence of pneumoconiosis by the use of presumptions covering complicated pneumoconiosis, claims filed prior to January 1, 1982, or claims of certain deceased miners at 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306. 20 C.F.R. §718.202(a)(3).

With respect to the administrative law judge's findings at Section 718.202(a)(4), however, we agree with the Director that the administrative law judge failed to provide any

rationale for his finding. The administrative law judge considered the two medical opinions of record, stating that the opinion of Dr. Baker, that claimant had pneumoconiosis, was reasoned and documented and entitled to weight while Dr. Wicker's opinion, that claimant did not have pneumoconiosis, despite his reliance on the negative x-ray interpretation and the lack of valid test results, was also entitled to weight. Decision and Order at 8; Director's Exhibits 12, 27.

Under the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), the administrative law judge is required, in his role as fact-finder, to weigh all of the relevant medical evidence of record and render findings, including his underlying rationale, with respect to the evidence. *See Hall v. Director, OWCP*, 12 BLR 1-80, 1-81 (1988). Regarding the medical opinions of record, if the physicians' respective conclusions are conflicting, the administrative law judge must resolve the conflict and set forth an explanation for his determination. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989). In order to accomplish this task, the administrative law judge should consider factors that tend to either bolster, or render suspect, the credibility of the medical reports of record. *See Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985).

In the present case, the administrative law judge did not perform these duties in a manner that satisfies the APA inasmuch as the administrative law judge noted factors which may have diminished the reliability of the opinion of Dr. Wicker, but then treated it as equally probative as Dr. Baker's opinion. Likewise, the administrative law judge must consider and explain any factors that affect the credibility of Dr. Baker's opinion. Director's Exhibit 27. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Lafferty, supra*; *Hutchens, supra*; *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-533 n.9, 21 BLR 2-324, 2-335 n.9 (4th Cir. 1998); *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1277-78, 18 BLR 2-42, 2-48 (7th Cir. 1993). Because the administrative law judge did not adequately explain his relative weighing of the medical opinions pertinent to the issue of the existence of pneumoconiosis, his finding under Section 718.202(a)(4) is vacated and the case is remanded to the administrative law judge for reconsideration of the opinions of Drs. Baker and Wicker.

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is affirmed in part, vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge