

BRB No. 96-1384 BLA

HAROLD JUSTUS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED:
DOTSON & JUSTUS COAL COMPANY,)	
INCORPORATED)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	DECISION and ORDER
Party-in-Interest)	

Appeal of the Decision and Order on Remand of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Harold Justus, Hurley, Virginia, *pro se*.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen), Washington, D.C., for employer.

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

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order on Remand (93-BLA-1607) of Administrative Law Judge Richard K. Malamphy denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine

¹ Claimant is Harold Justus, the miner, who filed his initial application for benefits on January 1, 1983. Director's Exhibit 1. 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, but Mr. White is not representing claimant on appeal. See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case is before the Board for the second time. Administrative Law Judge Joel A. Harmatz initially denied benefits in a Decision and Order issued on November 23, 1987. Director's Exhibit 58. Judge Harmatz found that the evidence established the existence of pneumoconiosis arising out of claimant's coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b), but concluded that the evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(c).

Claimant timely requested modification pursuant to 20 C.F.R. §725.310, which was denied by Administrative Law Judge Giles J. McCarthy in a Decision and Order issued on December 31, 1991. Director's Exhibit 105. Judge McCarthy found the newly-submitted x-rays supportive of the prior administrative law judge's finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(1), but concluded that the newly-submitted objective study evidence and medical opinions failed to establish total respiratory disability pursuant to Section 718.204(c).

Pursuant to claimant's second request for modification, Director's Exhibit 106, Administrative Law Judge Julius A. Johnson found that the new evidence established total disability under Section 718.204(c) and that therefore, a change in conditions under Section 725.310 was established, but denied benefits because he concluded that claimant failed to establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b).

Pursuant to claimant's appeal and employer's cross-appeal, the Board affirmed Judge Johnson's finding that a change in conditions was established pursuant to Section 725.310, but remanded the case for him to consider all of the relevant evidence regarding the existence of pneumoconiosis. *Justus v. Dotson & Justus Coal Co.*, BRB Nos. 94-3818 BLA/A (Jul. 13, 1995)(unpub.). The Board also instructed the administrative law judge to consider all relevant evidence at Sections 718.203(b) and 718.204, if reached. *Id.* On remand, Judge Malamphy weighed the evidence under Section 718.202(a), found that it failed to establish the existence of pneumoconiosis, and accordingly, denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal. 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 Co.*, 12 BLR 1-176 (1989). 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 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).

To be entitled to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out

of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Pursuant to Section 718.202(a)(1), the administrative law judge permissibly accorded greater weight to the x-ray interpretations by B-readers in finding that the x-ray evidence failed to establish the existence of pneumoconiosis. Decision and Order on Remand at 5; see *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). The record contains ninety-three readings of twenty-five x-rays. There are twenty-one positive readings, and seventy-two negative readings. Of the seventy-two negative readings, sixty are by physicians who are B-readers, Board-certified radiologists, or both. Substantial evidence supports the administrative law judge's finding that, of the eighteen films read by B-readers, three were read as positive, while the rest were read negative.² See *Adkins, supra*; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990). Therefore, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(2) and (3), the administrative law judge correctly found that the record contains no biopsy evidence and the presumptions at Sections 718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. Decision and Order on Remand at 5; see 20 C.F.R. §§718.304, 718.305, 718.306. We therefore affirm these findings.

² Although the administrative law judge overlooked Dr. Schmidt's 1/0 reading of the November 2, 1982 x-ray, Director's Exhibit 20, the error is harmless, see *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), because the administrative law judge permissibly determined to "give greater weight to the interpretations of B-readers," Decision and Order on Remand at 5, and the record does not contain any radiological credentials for Dr. Schmidt. The administrative law judge also overlooked eight negative readings by credentialed readers, which could only have supported his finding. Employer's Exhibits 7, 26, 32, 33.

Pursuant to Section 718.202(a)(4), the administrative law judge discussed all of the medical opinions and the readings of the September 7, 1993 CT scan in light of the physicians' qualifications. Decision and Order on Remand at 5-12. In finding that the existence of pneumoconiosis was not established, the administrative law judge permissibly “defer[red] to the physicians with the superior credentials.” Decision and Order on Remand at 12. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Substantial evidence supports the administrative law judge's finding. Drs. Dahhan, Endres-Bercher, J.D. Sargent, Hippensteel, and Fino all concluded that the medical evidence, including the CT scan reading, indicated that claimant does not have pneumoconiosis, but rather, emphysema due to smoking, while only two similarly-credentialed physicians, Drs. Rasmussen and Robinette, diagnosed pneumoconiosis.³ Compare Director's Exhibits 28, 41, 45, 46, 50, 51, 122; Employer's Exhibits 9, 26, with Director's Exhibits 36, 82, 106, 112; Claimant's Exhibit 2. Inasmuch as the administrative law judge considered all of the relevant evidence and permissibly relied on the consensus of opinion by qualified physicians, see *Clark, supra*, we affirm his finding pursuant to Section 718.202(a)(4).

Because claimant has failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a necessary element of entitlement under Part 718, the denial of benefits is affirmed. See *Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge

³ The record indicates that Drs. Endres-Bercher and Rasmussen are Board-certified in internal medicine, and that Drs. Dahhan, Sargent, Hippensteel, Fino, and Robinette are Board-certified in both internal and pulmonary medicine.