

BRB No. 96-0450 BLA

REX H. MOSES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
PEABODY COAL 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 of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Rex H. Moses, Greensburg, Kentucky, *pro se*.

Bryan A. Sims (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Claimant,<sup>1</sup> without the assistance of counsel, appeals the Decision and Order (94-BLA-1873) of Administrative Law Judge Donald W. Mosser denying benefits 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). The administrative law judge credited claimant with thirty-eight years of coal mine

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<sup>1</sup> Claimant is Rex H. Moses, the miner, whose application for benefits filed on November 4, 1993 was denied on April 15, 1994. Director's Exhibits 1, 13.

employment, found that he has one dependent for purposes of benefits augmentation, and determined that employer is the responsible operator. The administrative law judge found that the evidence failed to establish either the existence of pneumoconiosis or total respiratory disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(c) 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.<sup>2</sup>

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'Keefe 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 correctly noted that the only x-ray of record was interpreted as negative for pneumoconiosis by both physicians who read it. Decision and Order at 4; Director's Exhibits 11, 12. We therefore affirm as supported by substantial evidence 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 at 4; see 20 C.F.R. §§718.304, 718.305, 718.306. We therefore affirm these findings.

Pursuant to Section 718.202(a)(4), the administrative law judge found that the sole medical opinion of record does not contain a diagnosis of pneumoconiosis.

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<sup>2</sup> We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment, dependency, and responsible operator status. See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Decision and Order at 4-5. Dr. Westerfield examined claimant on behalf of the Department of Labor (DOL) and completed a standard DOL medical report form. The physician took claimant's medical and coal mine employment history, considered his symptoms, and recorded that he never smoked. Director's Exhibit 9. Dr. Westerfield noted that claimant's physical examination was normal, his chest x-ray was negative for pneumoconiosis, and his pulmonary function and blood gas studies were normal. Director's Exhibits 8, 9. In both the "cardiopulmonary diagnosis" and "impairment" sections of the form, Dr. Westerfield indicated "None." Director's Exhibit 9 at 4. Because Dr. Westerfield did not diagnose pneumoconiosis and the record contains no other evidence of pneumoconiosis,<sup>3</sup> we affirm as supported by substantial evidence the administrative law judge's 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*).

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<sup>3</sup> Claimant contends that the administrative law judge failed to consider the opinion of his family physician, Dr. Simmons. Claimant's Letter, November 6, 1996. Review of the record reveals no report from this physician. The record indicates that claimant was sent the Department of Labor's "Guide to Submitting Additional Evidence" along with the April 15, 1994 denial letter. Director's Exhibit 13 at 4-6.

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

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

\_\_\_\_\_ JAMES F.  
BROWN  
Administrative Appeals Judge

\_\_\_\_\_ NANCY S.  
DOLDER  
Administrative Appeals Judge