BRB No. 05-0974 BLA

CALVIN HUNTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DRUMMOND COMPANY, INCORPORATED	)	DATE ISSUED: 06/28/2006
	)	
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 Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Patrick K. Nakamura (Nakamura, Quinn & Walls LLP), Birmingham, Alabama, for claimant.

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

McGRANERY, Administrative Appeals Judge:

Claimant appeals the Decision and Order Denying Benefits (05-BLA-5249) of Administrative Law Judge Jeffrey Tureck 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 subsequent claim on June 18, 2003.[1] Director's

[1] Claimant first filed a claim for benefits on May 6, 1998, which was denied by the district director on July 14, 1998. Director's Exhibit 1. Claimant also filed a claim on February 22, 1999, but later requested that the claim be withdrawn. Because the February 22, 1999 claim was withdrawn at claimant's request, it is considered never to have been filed. *See* 20 C.F.R. §725.306; Director's Exhibit 2. The instant claim filed on June 18, 2003 constitutes a subsequent claim under 20 C.F.R. §725.309. The regulation at Section 725.309(d) provides that a subsequent claim, such as the instant claim, shall be

Exhibit 4. The district director issued a Proposed Decision and Order denying benefits on October 13, 2004. Director's Exhibit 21. Claimant subsequently filed a request for modification on June 30, 2004, which was denied by the district director on October 13, 2004. Director's Exhibits 21, 25. At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing held on April 19, 2005. In his Decision and Order, the administrative law judge presumed that claimant was totally disabled, and thus, he found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §718.309. However, reviewing the claim on the merits, the administrative law judge found that the evidence was insufficient to establish that claimant suffers from coal workers' pneumoconiosis. Accordingly, the administrative law judge denied benefits.

Claimant appeals, arguing that the administrative law judge erred in weighing the x-ray and medical opinion evidence relevant to whether he established the existence of pneumoconiosis. Employer has not responded to claimant's appeal. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[2] 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).

After reviewing claimant's Memorandum in Support of his Petition for Review, the administrative law judge's Decision and Order, and the issues presented on appeal, we vacate the administrative law judge's denial of benefits. In weighing the x-ray evidence at Section 718.202(a)(1), the administrative law noted that the record contained

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denied unless the claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(d). Claimant's prior claim was denied because the district director found that the evidence failed to establish any of the requisite elements of entitlement. Director's Exhibit 1. Because the administrative law judge presumed that claimant was totally disabled, and had established a change in an applicable condition of entitlement under Section 725.309, the administrative law judge proceeded to review the claim on the merits.

[2] Because claimant's last coal mine employment occurred in Alabama, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

thirteen readings for pneumoconiosis of five x-rays dated August 3, 2004, September 30, 2003, April 24, 2003, August 28, 2003 and May 28, 1998, of which there were seven positive readings, six by B-readers, and six negative readings, five by B-readers. Director's Exhibits 1, 13, 20, 23; Claimant's Exhibits 1-3; Employer's Exhibits 2, 3; Decision and Order at 4-5. The administrative law judge found that "[f]rom the claimant's perspective, the best that can be said is that the x-ray readings occurring since the denial of the initial claim [of the films dated August 3, 2004, April 24, 2003 and August 28, 2003] cancel each other out" since three B-readers and one physician, whose credentials were not of record, read these x-rays as positive for pneumoconiosis, while three B-readers, and one physician whose credentials were not of record, read these x-rays as negative for pneumoconiosis. Decision and Order at 5. However, the administrative law judge further found that "when the two negative readings of the May 28, 1998 x-ray are also considered, both the majority of the x-ray readings and a majority of the B-readers find no pneumoconiosis." *Id*.

Claimant asserts that the administrative law judge erred at Section 718.202(a)(1) because he "counted heads" of the physicians rendering positive versus negative readings without giving due consideration to the fact that each x-ray is distinct; hence, claimant argues the administrative law judge should have weighed together the readings of each x-ray and made a determination as to whether each x-ray was positive or negative for pneumoconiosis. Claimant also asserts that the administrative law judge should have recognized that the May 28, 1998 x-ray, which preceded the other three x-rays by more than five years, is less probative of the existence of pneumoconiosis because pneumoconiosis is a progressive disease.[3] Claimant's Memorandum at 5-7. Claimant maintains that, contrary to the administrative law judge's finding, the weight of the positive x-ray readings, of the more recent x-rays dated September 30, 2003 and August 3, 2004, establish that he has pneumoconiosis. Claimant's Memorandum at 5. Claimant also argues that the administrative law judge erred in assessing the qualifications of Dr. Goldstein, and in failing to justify his decision *not* to assign controlling weight to the majority of positive readings for pneumoconiosis, which were provided by physicians

[3] Claimant notes that the September 30, 2003 was read as positive by three physicians (Drs. Cappiello, Ballard and Ahmed), and negative by two physicians (Drs. Wheeler and Scott), and that the August 3, 2004 x-ray was read as positive by two physicians (Drs. Cappiello and Ahmed), and negative by two physicians (Drs. Goldstein and Wheeler). Claimant's Memorandum at 4. Claimant asserts "[i]f one counted the x-ray interpretations [of these two most recent x-rays], the weight of the evidence would have been in favor of a finding of pneumoconiosis (5 readings to 4 readings)," Claimant's Memorandum at 5.

who were dually qualified Board-certified radiologists and B-readers.[4] Claimant's Memorandum at 7.

Claimant's assertions of error have merit. Section 718.202(a)(1) provides specific instructions on how an administrative law judge must weigh conflicting x-ray readings as they pertain to a single chest x-ray presented in the record:

> A chest X-ray conducted and classified in accordance with §718.102 may form the basis for a finding of the existence of pneumoconiosis. Except as otherwise provided in this section, where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays.

20 C.F.R. §718.202(a)(1).

In this case, the administrative law judge erred by performing a simple head count of the physicians who rendered a positive versus a negative reading, and by not properly resolving the conflicts in the x-ray reports as they pertained to each of claimant's x-rays. *Id*. We agree with claimant that since physicians may interpret x-rays differently based on the age and quality of the film, it was improper for the administrative law judge not to consider both the quality and quantity of conflicting x-ray evidence by comparing the readings of each individual x-ray prior to reaching a determination as to whether the x-ray evidence establishes the existence of pneumoconiosis. By focusing his analysis solely on the overall number of negative or positive readings, the administrative law

[4] We note that the five to four ratio cited by claimant also pertains to a comparison of the readings by Board-certified radiologists and B-readers (dually qualified physicians). We glean from claimant's memorandum and a review of the record, that it is his position that he has established the existence of pneumoconiosis at Section 718.202(a)(1) because of a total of thirteen readings, there are five positive readings by dually qualified physicians compared to four negative readings by dually qualified physicians. Claimant's Memorandum at 5. Of the six positive readings of record, we note that five were made by dually qualified physicians and one was made by a physician whose qualifications are unknown. Of the negative readings, four were made by dually qualified physicians, two negative readings were made by B-readers, and one negative reading was made by a physician, whose qualifications are unknown. Claimant contends that Dr. Goldstein's negative reading of the August 3, 2004 x-ray has less probative value compared to the positive readings of that film by dually qualified physicians because Dr. Goldstein is only a B-reader. *Id*. Claimant also maintains that, despite the fact that Dr. Hasson is a B-reader, his negative reading of the May 28, 1998 x-ray is of little probative value, based on the age of that film and the progressive nature of pneumoconiosis. Claimant's Memorandum at 6-7.

judge's analysis incorrectly presumes that "each doctor would necessarily read each x-ray the same way and get the same result," or that the doctor's interpretation of one x-ray uniformly applies to all other x-rays of record. Claimant's Memorandum at 5.

We also agree that the administrative law judge did not give proper consideration to the chronology of the x-ray evidence. Although the administrative law judge initially noted that the B-readings of the x-rays occurring since the denial of the initial claim were in equipoise, he went on to credit the two negative readings of the earliest x-ray dated May 28, 1998 as shifting the weight of the evidence against a finding of pneumoconiosis. Decision and Order at 5. Because pneumoconiosis is recognized as a latent and progressive disease, the courts have recognized that earlier, negative x-ray evidence for pneumoconiosis does not detract from the probative value of later, positive x-ray evidence. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see generally Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987) *reh'g denied*, 484 U.S. 1047 (1988); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976). To the extent that the administrative law judge found the earlier negative x-ray readings of the May 28, 1998 x-ray to be inconsistent with the later positive x-ray evidence for pneumoconiosis, and therefore weighed the earlier negative readings against the later positive readings for pneumoconiosis, his finding at Section 718.202(a)(1) must be vacated, and the case remanded for further consideration. *See Woodward*, 991 F.2d at 314, 17 BLR at 2-77; *Adkins*, 958 F.2d at 49, 16 BLR at 2-61.

Lastly, with respect to Section 718.202(a)(1), the administrative law judge erred in the manner in which he assessed the physicians' radiological qualifications and ultimately weighed the conflicting x-ray readings for pneumoconiosis. In footnote 7 of his Decision and Order, the administrative law judge states that he rejects "the mantra" that is often given for assigning greater probative weight to readings by physicians who are dually qualified as Board-certified radiologists and B-readers, as opposed to physicians who are qualified B-readers but are not also radiologists. Comparing Dr. Goldstein's qualifications as a pulmonary specialist and B-reader to the remaining dually qualified physicians of record, the administrative law judge observed:

> Over the 26 years I have been hearing black lung cases, I have heard numerous pulmonary specialists testify that they receive the same training in interpreting chest x-ray[s] as do radiologists. Moreover, since they constantly read chest x-rays in treating their patients, pulmonary specialists may develop greater expertise in interpreting these x-rays as compared to radiologists, who generally do not specialize in only one area of the body. Therefore, I do not give greater weight to the positive B-readings, all of which are by B-reader/radiologists, over the negative B-readings, one of which (that of Dr. Goldstein) is by a B-reader/pulmonary specialist.

Decision and Order at 5, n. 7.

Claimant asserts that, while the administrative law judge was not required to assign greatest weight to the positive reading of a dually qualified doctor compared to the negative reading by Dr. Goldstein, who is only a B-reader, he should at least base his credibility determinations on record evidence. We agree. Section 725.477 provides that "[a] decision and order shall be based upon the record made before the administrative law judge." 20 C.F.R. §725.477. The administrative law judge erred when he assessed the qualifications of the doctors in this case based on "testimony received from doctors in other cases." [5] Claimant's Memorandum at 7. The administrative law judge improperly credited Dr. Goldstein's x-ray reading based on the administrative law judge's perception of the doctor's experience as a pulmonary specialist, derived from evidence in other cases. On remand, the administrative law judge should resolve the conflict in the x-ray evidence based on the *radiological* qualifications of the physicians as presented in the record before him in this case. *See* 20 C.F.R. §718.202(a)(1). Thus, for all of the above-stated reasons, we vacate the administrative judge's finding that claimant failed to establish the existence of pneumoconiosis based on the x-ray evidence.

We now turn to the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). It is claimant's contention on appeal that the administrative law judge erred in weighing the medical opinion evidence at Section 718.202(a)(4) because he relied on the Merck Manual to discredit the physicians who attributed claimant's respiratory impairment to coal dust exposure without addressing claimant's alleged asbestos exposure. We agree

[5] We agree with claimant that the administrative law judge erroneously took what amounts to judicial notice of medical opinion testimony provided in other hearings. The Federal Rules of Evidence provide that a judicially noted fact must be one that is not subject to reasonable dispute in that it is either generally known within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *See* Fed. R. Evid. 201(b). An administrative law judge may therefore take administrative judicial notice of facts only if it is done in the proper manner. In so doing, the administrative law judge must provide the parties with "the opportunity to contradict the noticed facts" with evidence to the contrary. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990). As claimant was not present during the prior administrative hearings to cross-examine the physicians' testimony cited by the administrative law judge in support of his ruling, we fail to see how claimant was provided the opportunity to contradict the noticed facts in this case. Consequently, on remand, the administrative law judge should not cite to testimony that is not of record.

that the administrative law judge's analysis of the medical opinions cannot withstand scrutiny.

Initially, we note that the administrative law judge misconstrued claimant's testimony and, as a result, erred in discrediting doctors who testified on his behalf. The administrative law judge discredited Drs. Hawkins and Waldrum for not having an accurate picture of claimant's dust exposure because neither physician referred to claimant as wearing a "respirator" in the mines. Decision and Order at 6, 7. The administrative law judge speculated that "although claimant was a coal miner for 20 years, it is likely that his coal dust exposure was much less than it would have been had he not used a respirator." Decision and Order at 6. The administrative law judge, however, did not discuss claimant's testimony that the "mask" he wore in the mines "helped some[,]" but it did not prevent him from breathing dust. Hearing Transcript at 23. Absent evidence in the record regarding the effectiveness of the mask in reducing coal dust exposure, the administrative law judge erred in discrediting the doctor's testimony for failure to discuss it.

Furthermore, in weighing the conflicting medical opinion evidence at Section 718.202(a)(4), the administrative law judge based his credibility determinations on improper suppositions and not the record evidence. In discussing claimant's medical records, the administrative law judge related a notation in Dr. Sexton's April 24, 2003 report, stating that claimant reported "direct asbestos exposure including handling asbestos materials…." Decision and Order at 3, citing Director's Exhibit 23. The administrative law judge acknowledged, however, that the extent of claimant's asbestos exposure was unknown because "the April 24, 2003 report is the only place in this record where asbestos exposure is mentioned[,]" Decision and Order at 3, and "neither party explored this issue during claimant's testimony[.]" Decision and Order at 7.

Despite the lack of evidentiary support from which to assess claimant's asbestos exposure, the administrative law judge nonetheless proceeded to discount the opinions of Drs. Hawkins and Waldrum because they were "unaware" of claimant's exposure to asbestos or failed to "acknowledge" that exposure. Decision and Order at 6, 7. The administrative took judicial notice of the Merck Manual to support his own theory that Dr. Ballard's x-ray notation of interstitial changes in the mid and lower lung zones bilaterally, with small and irregular opacities (s/t, profusion 1/0) was "more consistent with asbestosis" and not coal dust exposure as reported by the physicians. Decision and Order at 7; *see* Claimant's Memorandum at 8. The administrative law judge then improperly speculated that "[h]ad either Dr. Ballard or Dr. Hawkins been aware of claimant's history of asbestos exposure, Dr. Ballard's x-ray findings may have led them to diagnose asbestosis instead of coal workers' pneumoconiosis." Decision and Order at 7.

The administrative law judge abused his discretion in weighing the medical opinion evidence. By speculating that claimant may suffer from asbestosis, the administrative law judge has improperly substituted his opinion for those of the medical experts regarding the etiology of claimant's respiratory condition and the contribution of claimant's coal dust exposure to his impairment. *See Kertesz v. Crescent Hills Coal Co*., 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986). Although the weighing of the evidence is for the administrative law judge, the interpretation of medical data is for the medical experts.[6] *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984). Because it is impossible to discern the extent to which the invalid considerations discussed *supra*, tainted the administrative law judge's weighing of the medical opinion evidence, we vacate his finding that claimant failed to establish the existence of pneumoconiosis based on the medical opinion evidence at 20 C.F.R. §718.202(a)(4).

In light of the administrative law judge's errors at Section 718.202(a)(1) and (4), we vacate his denial of benefits. On remand, the administrative law judge must reweigh the x-ray and medical opinion evidence, bearing in mind the directives contained herein, to determine whether claimant has established the existence of pneumoconiosis. In weighing the conflicting x-ray evidence, the administrative law judge must consider the relative radiological qualifications of the readers, and render an analysis consistent with *Woodward* and *Adkins. See Woodward*, 991 F.2d at 314, 17 BLR at 2-77; *Adkins*, 958 F.2d at 49; 16 BLR at 2-61; *see also Worhach v. Director*, OWCP, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988) (*en banc*). The administrative law judge must also provide a proper and detailed rationale for the weight accorded the conflicting medical opinions at 20 C.F.R. §718.202(a)(4). If the administrative law judge finds that the evidence is sufficient to establish that claimant has coal workers' pneumoconiosis, the administrative law judge must further consider the remaining elements of entitlement, and decide whether claimant is entitled to benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

[6] The administrative law judge improperly substituted his opinion for that of a medical expert when he rejected Dr. Hawkins's diagnosis of coal workers' pneumoconiosis, based in part on claimant's symptom of dyspnea, noting that "dyspnea can be caused by both bronchitis and coronary disease, two other conditions which Dr. Hawkins diagnosed as well as asbestosis, a condition which Dr. Hawkins did not diagnose." Decision and Order at 6.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

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BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, dissenting:

I respectfully dissent from the decision of my colleagues to vacate the administrative law judge's denial of benefits and to remand this case. In my opinion, the administrative law judge's ultimate finding that claimant failed to establish the existence of pneumoconiosis is supported by substantial evidence, and thus, should be affirmed.

Since he presumes that claimant established a change in conditions sufficient to modify the denial of the subsequent claim, the administrative law judge turns his attention to whether, based upon a review of the entire record, claimant establishes his entitlement to benefits. Addressing the existence of pneumoconiosis pursuant to Section 718.202(a)(1), the administrative law judge observes that of the thirteen x-ray readings taken between May, 1998, and August, 2004, six are positive, while seven are negative for pneumoconiosis. Moreover, while recognizing that some of the x-rays were read by doctors who were both B-readers and board-certified radiologists, the administrative law judge determines that these "dually qualified" doctors are not entitled to more weight than the B-readers. *See generally Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Nevertheless, because Drs. Wheeler and Scott, who both read x-rays as negative for pneumoconiosis, are also Associate Professors of Radiology, and because of Dr. Wheeler's expertise in pulmonary radiology in general and pneumoconiosis in particular, the administrative law judge finds that Drs. Wheeler and Scott have better qualifications than the other B-readers of record. Consequently, the administrative law judge concludes

that the overall x-ray evidence is negative for pneumoconiosis. Because the administrative law judge considers both the quantity and the quality of the x-ray evidence, and because his ultimate conclusion is supported by substantial evidence in the record, I would affirm the finding that the x-ray evidence is negative for pneumoconiosis. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993), *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Hopton v. United States Steel Corp.*, 7 BLR 1-12 (1984).

I also would hold that the administrative law judge provided sufficient reasons for not crediting the opinions of Drs. Hawkins and Waldrum. Dr. Waldrum does not diagnose the existence of pneumoconiosis in his report dated April 24, 2003, yet in a subsequent report dated May 22, 2003, he diagnoses "probable pneumoconiosis," and then in reports dated August 28, 2003, and March 4, 2004, he specifically diagnoses the existence of pneumoconiosis. *See* Director's Exhibit 23. The administrative law judge provides four reasons for according little probative weight to Dr. Waldrum. Two of these reasons are that Dr. Waldrum: (1) fails to explain his diagnosis of pneumoconiosis given the inconsistent x-ray and CT-scan interpretations, and (2) fails to explain what led him to change his diagnosis. Both of these reasons are accurate, and each provides a sufficient basis for according little probative weight to Dr. Waldrum's diagnosis of pneumoconiosis. Therefore, since he has provided two proper reasons for according little weigh to Dr. Waldrum's diagnosis of pneumoconiosis, any problem with the other reasons advanced by the administrative law judge are, at best, harmless error. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n. 4 (1983). [7]

Dr. Hawkins indicates that his diagnosis of coal workers' pneumoconiosis is based upon x-ray, dyspnea and work exposure to coal dust. However, a mere restatement of a positive x-ray is not a reasoned medical opinion within the meaning of Section 718.202(a)(4). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000), *Worhach*, 17 BLR 1-105 (1993); s*ee also Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985) (the lack of an explanation where a diagnosis of no pneumoconiosis was based upon a negative x-ray and coal mine employment history rendered the opinion a mere rereading of an x-ray and not a reasoned medical opinion). Moreover, as suggested by the administrative law judge, Dr. Hawkins does not explain why the presence of dyspnea led him to conclude that claimant has pneumoconiosis. *Clark*, 12 BLR 1-149 (1989). Therefore, Dr. Hawkins has not provided a well-reasoned opinion diagnosing the existence of pneumoconiosis.

[7] In determining that Dr. Waldrum's opinion is entitled to little probative weight, the administrative law judge also found that Dr. Waldrum never mentions asbestos, and that he probably overestimated claimant's exposure to coal dust since he does not mention that claimant used a respirator in the mines.

Accordingly, I believe that substantial evidence supports the administrative law judge's conclusion that there is no medical evidence sufficiently probative to support a finding that claimant has pneumoconiosis, and thus, I would affirm his finding that claimant failed to prove that he has pneumoconiosis under Section 718.202(a)(4).

Consequently, inasmuch as claimant failed to establish the existence of pneumoconiosis, I would affirm the administrative law judge's denial of benefits.

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ROY P. SMITH
Administrative Appeals Judge