

BRB No. 03-0602 BLA

JOE E. VARNEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MCCOY ELKHORN COAL CORPORATION	)	DATE ISSUED: 05/18/2004
	)	
and	)	
	)	
JAMES RIVER COAL COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Joe E. Varney, Pikeville, Kentucky, *pro se*.<sup>1</sup>

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (02-BLA-5130) of Administrative Law Judge Rudolf L. Jansen denying benefits on a claim filed

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<sup>1</sup>Susie Davis, president of the Kentucky Black Lung Association, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Davis is not representing claimant on appeal. *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

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).<sup>2</sup> The administrative law judge credited claimant with twenty-six years of coal mine employment based on the parties' stipulation, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.<sup>3</sup>

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), the administrative law judge considered the x-ray evidence. Of the six x-ray interpretations of record, four readings are negative for pneumoconiosis, Director's Exhibits 12, 13; Employer's Exhibits 1, 2, and two readings are positive for pneumoconiosis, Claimant's Exhibit 1. The administrative law judge properly accorded greater weight to the negative x-ray readings that were provided by physicians who are B readers and/or Board-certified radiologists. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). The administrative law judge accurately stated that "[t]hree of the negative interpretations were read by two B-readers and a dually qualified physician." Decision and Order at 9. The administrative law judge also stated that

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<sup>2</sup>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, 722, 725 and 726 (2002). As the instant claim was filed after the effective date of the amended regulations, all citations to the regulations refer to the amended regulations.

<sup>3</sup>Since the administrative law judge's length of coal mine employment finding, which is not adverse to claimant, is not challenged on appeal, we affirm it. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

“[n]either of the positive interpretations was read by a physician with either of those qualifications.” *Id.* Moreover, since four of the six x-ray interpretations of record are negative for pneumoconiosis, we hold that substantial evidence supports the administrative law judge’s finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994).

Further, we affirm the administrative law judge’s finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) since the record does not contain any biopsy or autopsy evidence. Additionally, we affirm the administrative law judge’s finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) since none of the presumptions set forth therein is applicable to the instant claim. *See* 20 C.F.R. §§718.304, 718.305, 718.306. The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Similarly, claimant is not entitled to the presumption at 20 C.F.R. §718.305 because he filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director’s Exhibit 1. Lastly, this claim is not a survivor’s claim; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

Finally, the administrative law judge found the medical opinion evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the opinions of Drs. Broudy, Dahhan, Rosenberg and Sundaram. The administrative law judge correctly stated that “Dr. Sundaram is the only physician of record to opine that [c]laimant has pneumoconiosis.” Decision and Order at 10. Dr. Sundaram opined that claimant suffers from pneumoconiosis, Claimant’s Exhibit 1, while Drs. Broudy, Dahhan and Rosenberg opined that claimant does not suffer from pneumoconiosis, Director’s Exhibit 12; Employer’s Exhibits 1, 5. The administrative law judge properly accorded greater weight to the opinions of Drs. Broudy, Dahhan and Rosenberg than to the contrary opinion of Dr. Sundaram because they are better supported by the underlying documentation of record.<sup>4</sup> *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Duke v. Director, OWCP*, 6 BLR 1-673 (1983). The administrative law judge also properly accorded greater weight to the opinion of Dr. Broudy than the contrary opinion of Dr. Sundaram

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<sup>4</sup>The administrative law judge stated that “Drs. Broudy, Dahhan, and Rosenberg based their findings on objective data and examination findings.” Decision and Order at 10. The administrative law judge additionally stated that “Dr. Rosenberg also had the benefit of a review of the medical evidence in his supplemental opinion.” *Id.*

because of Dr. Broudy's superior qualifications.<sup>5</sup> *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). In addition, the administrative law judge permissibly discredited Dr. Sundaram's diagnosis of coal workers' pneumoconiosis because he found that it was merely a restatement of an x-ray reading. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach*, 17 BLR at 1-110; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Since claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement, we hold that the administrative law judge properly denied benefits under 20 C.F.R. Part 718.<sup>6</sup> *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

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<sup>5</sup>The record indicates that Dr. Broudy is Board-certified in internal medicine and pulmonary disease. Director's Exhibit 12. The record does not contain the credentials of Dr. Sundaram.

<sup>6</sup>In view of our disposition of this case at 20 C.F.R. §718.202(a), we decline to address the administrative law judge's findings at 20 C.F.R. §718.204(b)(2). *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge