

BRB No. 97-1793 BLA

HAROLD H. BOSTIC)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CLINCHFIELD COAL COMPANY)	DATE ISSUED:
)	
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 Edward J Murty, Jr., Administrative Law Judge, United States Department of Labor.

Harold H. Bostic, Davenport, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: SMITH and BROWN, Administrative Appeals Judges and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,¹ without the assistance of counsel,² appeals the Decision and Order

¹ Claimant is Harold H. Bostic, the miner, who filed his present claim for benefits on October 25, 1996. Director's Exhibit 1. Claimant's first claim, filed on December 4, 1980, was finally denied on June 19, 1981. Director's Exhibit 20. Claimant withdrew his second claim, and his third claim, filed on January 20, 1993, was finally denied by the Board on May 31, 1995. Director's Exhibits 18, 19.

² 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

(97-BLA-0977) of Administrative Law Judge Edward J. Murty, Jr. 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, applying the regulations at 20 C.F.R. Part 718, credited the miner with over twenty-seven years of coal mine employment and found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 2-3. The administrative law judge also found the evidence insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c). Decision and Order at 2-3. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer has not responded, and the Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.³

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). 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 the Act, 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

appeal. See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

³ We affirm the administrative law judge's length of coal mine employment finding as it is not adverse to claimant and unchallenged on appeal. See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to Section 718.202(a)(1), the administrative law judge permissibly found the x-ray evidence insufficient to establish the existence of pneumoconiosis by relying on the numerous negative x-ray readings rendered by physicians who were B-readers⁴ or B-readers and board-certified radiologists. Decision and Order at 2; see *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); see also *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). Therefore, we affirm the administrative law judge's finding that claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).⁵

The administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis by the medical opinion evidence inasmuch as none of the physicians whose opinions are in the record diagnosed coal workers' pneumoconiosis or a respiratory condition arising from coal mine employment. See 20 C.F.R. §718.201; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Barber v. U.S. Steel Mining Co., Inc.*, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995); *Nance v. Benefits Review Board*, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988); *Biggs v. Consolidation Coal Co.*, 8 BLR 1-317 (1987); see also *Shaffer v. Consolidation Coal Co.*, 17 BLR 1-56 (1992); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Therefore, we affirm the administrative law judge's Section 718.202(a)(4) finding. See *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

⁴ A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Safety and Health. See 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-16 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

⁵ There is no biopsy or autopsy evidence in the record that establishes the existence of pneumoconiosis. See 20 C.F.R. §718.202(a)(2). The presumptions found at Sections 718.304, 718.305, and 718.306 are inapplicable to this living miner's claim filed after January 1, 1982, see *Kubachka v. Windsor Power House Coal Corp.*, 11 BLR 1-171 (1988), in which there is no evidence of complicated pneumoconiosis, see generally *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Therefore, we affirm the administrative law judge's findings pursuant to Section 718.202(a)(2) and (3).

Inasmuch as we affirm the administrative law judge's Section 718.202(a) finding, that claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement under Part 718, see *Trent, supra*; *Perry, supra*, we also affirm his denial of benefits.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

⁶ We deem harmless, see *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), the administrative law judge's failure to initially consider whether claimant has established a material change in conditions pursuant to Section 725.309(d), see *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), inasmuch as his denial of benefits on the merits is supported by substantial evidence, see discussion, *supra*; *Doss v. Itmann Coal Co.*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995); *Zbosnik v. Badger Coal Co.*, 759 F.2d 1187, 7 BLR 2-202 (4th Cir. 1985).

MALCOLM D. NELSON, Acting
Administrative Appeals Judge