

BRB No. 97-0644 BLA

CURVIN D. HARRIS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
C & R COAL, INCORPORATED)	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 - Denying Benefits of John C. Holmes,
Administrative Law Judge, United States Department of Labor.

Curvin D. Harris, Raven, Virginia, *pro se*.

Curtis McKenzie (Arter & Hadden), Washington, D.C., for employer.

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

Claimant appeals, without the benefit of counsel,¹ the Decision and Order - Denying Benefits (96-BLA-1524) of Administrative Law Judge John C. Holmes 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). This claim, filed on June 15, 1995, was properly adjudicated pursuant to the permanent regulations under 20 C.F.R. Part 718.²

¹Tim 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).

²The relevant procedural history of this case is as follows: Claimant filed his claim for Black Lung benefits with the Department of Labor on June 15, 1995. Director's Exhibit 1. The claim was initially denied by the district director on September 29, 1995, Director's Exhibit 18, and again after an informal conference, on April 19, 1996. Director's Exhibit 44. On May 17, 1996, claimant requested a hearing before the Office of Administrative Law

The administrative law judge found that the evidence of record failed to establish the existence of either pneumoconiosis under 20 C.F.R. §718.202(a) or a totally disabling respiratory impairment under 20 C.F.R. §718.204(c), and accordingly, he denied the claim. Employer responds to claimant's appeal, arguing that the administrative law judge's decision is supported by substantial evidence and should be affirmed. The Director, Office of Workers' Compensation Programs, has not filed a brief 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. *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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Judges (OALJ). Director's Exhibit 47. The case was transferred to OALJ for a hearing on July 24, 1996. Director's Exhibit 49. Administrative Law Judge John C. Holmes conducted a hearing on the claim in Abingdon, Virginia on November 6, 1996. Decision and Order at 1; Hearing Transcript at 1. Judge Holmes issued his decision on January 7, 1997. Decision and Order at 1.

Upon consideration of the administrative law judge's Decision and Order, and the record before us, we conclude that substantial evidence supports the administrative law judge's denial of benefits, as he properly found that the weight of the submitted evidence failed to establish the existence of pneumoconiosis. In weighing the x-ray evidence under Section 718.202(a)(1), the administrative law judge properly relied on the overwhelming weight of the negative x-ray interpretations rendered by physicians who were B-readers. See *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Trent, supra*; see also *Director, OWCP v. Greenwich Collieries [Ondecko]*, 117 S.Ct. 2251, 18 BLR 2A-1 (1994); Decision and Order at 4.³ Consequently, the administrative law judge's weighing of the x-ray evidence, and his finding that the existence of pneumoconiosis was not established under Section 718.202(a)(1), are affirmed.

Next, we note that although the administrative law judge failed to address subsection 718.202(a)(2) or (a)(3), they are inapplicable in this case as the record is devoid of autopsy or biopsy evidence, and the presumptions contained in subsection (a)(3) are unavailable to claimant. See 20 C.F.R. §§718.202(a)(2), (a)(3); 718.304, 718.305, 718.306.

Finally, under Section 718.202(a)(4), we hold that substantial evidence supports the

³We note that the administrative law judge listed 38 x-ray readings, but noted 37 in his count (28 negative, 9 positive). See Decision and Order at 2-3. The administrative law judge erred by listing Dr. Templeton's September 19, 1988 reading, and Dr. Castle's January 16, 1996 readings twice, and by counting one more reading than is listed. Additionally, as employer notes, the administrative law judge erred in failing to consider several other readings in the record: the interpretation of the October 28, 1994 x-ray by Drs. Cooper, Fairman and Jolles, Employer's Exhibit 2; the interpretations of the November 7, 1989 x-ray by Drs. Cooper and Jolles, Director's Exhibit 40; and the interpretation of the September 19, 1988 x-ray by Dr. Hippensteel, *Id.* We hold these errors to be harmless inasmuch as, if properly counted, the overwhelming weight of the interpretations by B-readers remains negative. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis. The administrative law judge properly found that the only medical opinions in the record, the opinions of Drs. Castle and Forehand, did not diagnose pneumoconiosis, and therefore were not supportive of claimant's burden under Section 718.202(a)(4). See *Ondecko, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Director's Exhibits 12, 14, 43; Decision and Order at 3. Accordingly, we affirm the administrative law judge's findings, and hold that substantial evidence supports his determination that the evidence of record fails to establish the existence of pneumoconiosis under Section 718.202(a), an essential element of entitlement. We, therefore, affirm the administrative law judge's denial of benefits under Part 718. See *Trent, supra*; *Perry, supra*.⁴

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

⁴As we affirm the administrative law judge's finding at 20 C.F.R. §718.202(a), we need not address his findings under 20 C.F.R. §718.204(c).