

BRB No. 97-1251 BLA

CARLOS DYKES)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
GARDEN CREEK POCAHONTAS 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 Joan Huddy Rosenzweig, Administrative Law Judge, United States Department of Labor.

Carlos Dykes, Charleston, West Virginia, *pro se*.

Douglas A. Smoot (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant,¹ without the assistance of counsel,² appeals the Decision and Order (95-BLA-1421) of Administrative Law Judge Joan Huddy Rosenzweig 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

¹ Claimant is Carlos Dykes, the miner, who filed his claim for benefits on July 29, 1994. Director's Exhibit 1.

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

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 thirty years of coal mine employment pursuant to the parties' stipulation, Hearing Transcript at 4, 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, 4-11. The administrative law judge also found that claimant established total respiratory disability pursuant to Section 718.204(c) and failed to establish that his disability was due to pneumoconiosis pursuant to Section 718.204(b). Decision and Order 11-12. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds, urging affirmance, 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 into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

³ We affirm the administrative law judge's findings regarding length of coal mine employment and pursuant to Sections 718.203(b) and 718.204(c) as they are 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).

We affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) inasmuch as all the x-ray interpretations⁴ in the record are negative.⁵ Decision and Order at 4; see *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); *Doss v. Itmann Coal Co.*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995); see also *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Pursuant to Section 718.202(a)(4), Dr. Forehand found pneumoconiosis whereas Drs. Morgan, Jarboe, Dahhan, and Fino did not. Director's Exhibits 14, 15; Employer's Exhibits 2-5. Considering the opinions rendered by the two examining physicians, Drs. Forehand and Dahhan, the administrative law judge permissibly found Dr. Dahhan's opinion to be "more probative" than Dr. Forehand's opinion based, in part, on Dr. Dahhan's superior qualifications.⁶ Decision and Order at 10; see *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge also stated that she found Dr. Dahhan's opinion to be more reliable inasmuch as it is "more complete and better documented," noting that this physician thoroughly explains why he does not find pneumoconiosis or any pulmonary disability due to coal dust exposure. Decision and Order at 10; see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Moreover, the administrative law judge noted that Dr. Forehand is presently claimant's treating physician, but rationally, see *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985), chose not to accord deferential treatment to his opinion on this basis, see *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th

⁴ We deem harmless error, see *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), the administrative law judge's failure to consider the x-rays dated August 24, 1983, January 28, 1994, March 2, 1994, and September 15, 1994, Employer's Exhibit 3, inasmuch as these x-ray interpretations do not qualify as properly classified readings of pneumoconiosis for the purposes of 20 C.F.R. §718.202(a)(1), see 20 C.F.R. §§718.102(b), 718.202(a)(1); *Handy v. Director, OWCP*, 16 BLR 1-73 (1990).

⁵ There is no biopsy or autopsy evidence in the record. 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 these subsections.

⁶ Dr. Dahhan is board-certified in internal medicine and pulmonary disease whereas Dr. Forehand is board-certified in pediatrics and allergy and immunology.

Cir. 1993); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *see also Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986). Decision and Order at 9-10. The administrative law judge stated that Dr. Forehand started to treat claimant after he initially examined him for the United States Department of Labor, but that the record does not contain any reports generated by him in this capacity.⁷ Decision and Order at 9-10.

Based on the foregoing, the administrative law judge properly found that claimant has failed to carry his burden pursuant to Section 718.202(a)(4), *see Maddaleni v. Director, OWCP*, 961 F.2d 1524, 16 BLR 2-68 (10th Cir. 1992); *Kuchwara, supra*; therefore, we affirm her finding pursuant to this subsection. Inasmuch as we affirm the administrative law judge's Section 718.202(a) finding, that claimant has failed to establish the existence of pneumoconiosis, *see discussion, supra*, a requisite element of entitlement under Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we also affirm her denial of benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH

⁷ The administrative law judge also found that Drs. Fino, Morgan, and Jarboe, the non-examining physicians, possess more impressive qualifications than Dr. Forehand. Decision and Order at 9. However, the administrative law judge permissibly assigned "little probative value" to the opinions of Drs. Morgan and Jarboe because "they do not adequately explain the absence of any relationship between [c]laimant's respiratory impairment and his coal mine employment." Decision and Order at 10; *see Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Duke v. Director, OWCP*, 6 BLR 1-673, 1-675 (1983).

Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge