

BRB No. 99-0741 BLA

PAUL BRINEGAR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: _____
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

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

Paul Brinegar, Irvine, Kentucky, *pro se*.

Edward Waldman (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (98-BLA-0878) of Administrative Law Judge Rudolf L. Jansen denying benefits in 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 credited claimant with fifteen years of coal mine employment 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(c)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's Decision and Order.<sup>1</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. See *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).

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

The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Of the ten x-ray interpretations of record, seven readings are negative for pneumoconiosis, Director's Exhibits 14, 16, 28-31, and three readings are positive,<sup>2</sup> Director's Exhibits 15, 26, 27. The administrative law judge properly accorded greater weight to the negative x-ray readings which were provided by physicians who are dually qualified as B-readers and Board-certified radiologists.<sup>3</sup> See *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Moreover, since seven of the ten x-ray interpretations of record are negative for pneumoconiosis, we hold that substantial evidence supports 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)(1). See *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); see also *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Further, 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)(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.

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<sup>2</sup>Dr. Myers read the February 10, 1992 x-ray as positive for pneumoconiosis on February 10, 1992, Director's Exhibit 26, and Dr. Baker read the January 8, 1992 x-ray as positive for pneumoconiosis on February 24, 1994, Director's Exhibits 15, 27. Although the administrative law judge indicated that Dr. Anderson read the January 8, 1992 x-ray as positive for pneumoconiosis on two separate occasions, Decision and Order at 4-5, an examination of the record indicates that Dr. Anderson only read this x-ray on January 8, 1992, Director's Exhibit 27. However, inasmuch as the administrative law judge's mischaracterization of the x-ray evidence did not adversely affect claimant at 20 C.F.R. §718.202(a)(1), the administrative law judge's error in this regard is harmless. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

<sup>3</sup>The administrative law judge found that "the opinions of Drs. Sargent and Barrett are entitled to the most weight since these physicians are dually qualified as "B" readers and [B]oard-certified radiologists." Decision and Order at 8. The administrative law judge also found that "[n]one of the readings by these dually qualified physicians were positive for pneumoconiosis." *Id.*

§§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 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. Anderson, Myers and Westerfield. Whereas Drs. Anderson and Myers opined that claimant suffers from pneumoconiosis, Director's Exhibits 26, 27, 32, Dr. Westerfield opined that claimant does not suffer from pneumoconiosis, Director's Exhibit 12. The administrative law judge permissibly discredited the opinions of Drs. Anderson and Myers because their diagnoses of pneumoconiosis were based in part on a positive interpretation of an x-ray that was subsequently reread as negative by physicians with superior qualifications.<sup>4</sup> See *Winters v. Director, OWCP*, 6 BLR 1-877, 881 n.4 (1984). In addition, the administrative law judge permissibly discredited the opinion of Dr. Myers because he found it to be based on an inaccurate coal mine employment history.<sup>5</sup> See *Addison v. Director, OWCP*, 11 BLR 1-68 (1988). However, an examination of the record indicates that the administrative law judge did not consider the medical report of Dr. Joshi, which consists of Dr. Joshi's answers to questions asked by the Department of Labor with regard to claimant's pulmonary condition. Director's Exhibit 32. Dr. Joshi opined that claimant suffers from a "restrictive airways disease which is aggravated by smoking, [and] chronic inhalational dust exposure." *Id.*; see *Shoup v. Director, OWCP*, 11 BLR 1-110 (1987). Nonetheless,

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<sup>4</sup>Whereas Dr. Anderson, who is not a B-reader or a Board-certified radiologist, read the January 8, 1992 x-ray as positive for pneumoconiosis, Director's Exhibit 27, Drs. Barrett and Sargent, who are B-readers and Board-certified radiologists, reread the same x-ray as negative, Director's Exhibits 28, 29. Similarly, whereas Dr. Myers read the February 10, 1992 x-ray as positive for pneumoconiosis, Director's Exhibit 26, Drs. Barrett and Sargent read the same x-ray as negative. While Dr. Myers is a B-reader, he is not a Board-certified radiologist. *Id.*

<sup>5</sup>The administrative law judge stated that "Dr. Myers overstated Claimant's coal mining history by ten years in his assessment." Decision and Order at 8. As previously noted, the administrative law judge credited claimant with fifteen years of coal mine employment. *Id.* at 4. Dr. Myers based his opinion on a coal mine employment history of twenty-six years. Director's Exhibit 26.

as the Director asserts, inasmuch as Dr. Joshi did not provide any documentation<sup>6</sup> for his opinion, 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); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984), the administrative law judge's error in this regard is harmless, see *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Therefore, inasmuch as 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>7</sup> See *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.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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<sup>6</sup>The pertinent regulation provides that a physician's finding that a miner suffers from pneumoconiosis "shall be based on objective medical evidence such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories." 20 C.F.R. §718.202(a)(4). Inasmuch as the record does not indicate that Dr. Joshi's January 16, 1998 medical report is based on any of these items, the doctor's report is not adequately documented. See *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); 20 C.F.R. §718.202(a)(4); Director's Exhibit 32.

<sup>7</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 finding at 20 C.F.R. §718.204(c). See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

ROY P. SMITH  
Administrative Appeals Judge

MALCOLM D. NELSON, Acting  
Administrative Appeals Judge