

BRB No. 02-0717 BLA

BILLY LUTHER LESTER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
J.J. 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 Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Billy Luther Lester, Grundy, Virginia, *pro se*.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (01-BLA-0260) of Administrative Law Judge Stuart A. Levin 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.*¹ Based on the filing date of November 19, 1999, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge credited claimant with twenty years of coal mine employment and found employer to be the responsible operator. Turning to the merits, the administrative law judge found the evidence of record sufficient to establish a totally disabling respiratory

¹ 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, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

impairment, but insufficient to establish the existence of pneumoconiosis or that pneumoconiosis was totally disabling. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of pneumoconiosis and that pneumoconiosis was totally disabling.² Employer has not responded to this appeal. The Director, Office of Workers' Compensation Programs (the Director), is not participating 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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 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 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *W.G. Moore and Sons v. Director, OWCP*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

² Claimant concedes that the existence of pneumoconiosis cannot be established by x-ray evidence because a majority of the x-rays are negative for the existence of pneumoconiosis.

At the outset, claimant specifically stated his agreement with the administrative law judge's finding that the x-ray evidence cannot establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Inasmuch as claimant is unrepresented by counsel, however, and the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), that the evidence relevant to the existence of pneumoconiosis, *e.g.*, x-rays and medical opinions, must be weighed together in determining whether the existence of pneumoconiosis is established, we will address the administrative law judge's finding at Section 718.202(a)(1). In finding that the x-ray evidence did not establish the existence of pneumoconiosis, the administrative law judge placed greater weight on the majority of negative interpretations by the physicians possessing the dual qualifications of Board-certified radiologist and B reader. This was rational. 20 C.F.R. §718.202(a)(1); *see Adkins v. Director, OWCP*, 958 F.3d 949, 16 BLR 2-61 (4th Cir. 1992); *see also Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211, 1-213 (1985). Decision and Order at 14. Accordingly, the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(1) is affirmed.³

Claimant argues that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of pneumoconiosis. Considering the medical opinion evidence of record, the administrative law judge accorded greater weight of the medical opinions, provided by highly qualified pulmonary specialists, which related claimant's chronic obstructive pulmonary disease and chronic bronchitis to smoking alone, than to the opinion of Dr. Baker, and the opinion of Dr. Husain, claimant's treating physician, even though he found both of these opinions to be documented and well-reasoned. The administrative law judge, therefore, found that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a)(4).

A review of the record shows that there is medical evidence developed by claimant's treating physician, Dr. Husain, which was developed after January 1, 2001, *i.e.*, the hospital report covering claimant's hospital admission from June 25 to June 27, 2001. *See* 20 C.F.R. §718.101(b). Claimant's Exhibit 2. In light of this evidence, therefore, we vacate the

³ In addition, the administrative law judge correctly found that the existence of pneumoconiosis could not be established pursuant to 20 C.F.R. §718.202(a)(2) and (3). Decision and Order at 13.

administrative law judge's finding that the medical opinion evidence does not establish the existence of pneumoconiosis and remand the case for the administrative law judge to determine whether Dr. Husain is a treating physician under the standard set forth at 20 C.F.R. §718.104(d)(1)-(4) and the weight to be accorded his opinion under 20 C.F.R. §718.104(d)(5). Further, in reconsidering the medical opinion evidence, the administrative law judge must consider Dr. Husain's opinion that claimant has a chronic obstructive pulmonary disease due to coal mine employment and smoking and his opinion that claimant has coal workers' pneumoconiosis, along with the other medical opinion evidence on these issues. *See Compton, supra*; *see also Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Nance v. Benefits Review Board*, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988); *Tedesco v. Director, OWCP*, 14 BLR 1-103 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73 (1986); *Perry, supra*; *Winters v. Director, OWCP*, 6 BLR 1-877 (1984). Further, if, on remand, the administrative law judge determines that the existence of pneumoconiosis is established by medical opinion evidence, the administrative law judge must then, weigh the x-ray evidence and medical opinion evidence together before determining whether claimant has established the existence of pneumoconiosis. *Compton, supra*. In addition, in light of our remand for the administrative law judge to reconsider the evidence relevant to the existence of pneumoconiosis at Section 718.202(a), the administrative law judge must also consider whether the evidence establishes that claimant's pneumoconiosis arose out of coal mine employment and whether claimant is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.203(b), 718.204(b); (c).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed in part, vacated in part, and the case is remanded for consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH

Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge