

BRB No. 97-1110 BLA

ROOSEVELT MORROW)
)
 Claimant-Petitioner)
)
 v.)
)
 FRASURE BRANCH COAL COMPANY)
)
 and)
)
 OLD REPUBLIC INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest)
)

DATE ISSUED:

DECISION AND ORDER

Appeal of the Decision and Order - Denying Benefits of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Roosevelt Morrow, Harold, Kentucky, *pro se*.

Laura Metcoff Klaus and W. William Prochot (Arter & Hadden), Washington, D.C, for employer.

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

PER CURIAM:

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

¹Claimant's appeal was filed by Susie Davis, a lay representative with the Kentucky Black Lung Association. By Order dated May 14, 1997, the Board advised claimant that his appeal would be reviewed under the provisions provided at 20 C.F.R. §§802.211(e), 802.220. See generally *Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995).

Benefits (96-BLA-0863) of Administrative Law Judge Clement J. Kichuk 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 case is before the Board for the third time.² The administrative law judge credited claimant with 5.7 years of coal mine

²A summary of the procedural history of the case is as follows: Claimant filed his claim for benefits on January 5, 1976. Claimant's Exhibit 1. Administrative Law Judge Peter McC. Giesey credited claimant with 5.7 years of coal mine employment based on Social Security records. He denied claimant's claim for benefits on July 20, 1987, because claimant failed to establish the existence of pneumoconiosis or total respiratory disability. Director's Exhibit 63. Claimant appealed, and the Board affirmed the administrative law judge's denial of benefits. Director's Exhibit 72. Within one year of that denial, claimant filed a petition for modification. Director's Exhibit 73. Administrative Law Judge Charles W. Campbell reaffirmed a length of coal mine employment of 5.7 years inasmuch as the issue was not contested by the parties. He denied modification on September 14, 1992 pursuant to 20 C.F.R. Part 718 on the grounds that claimant did not establish the existence of pneumoconiosis. Director's Exhibit 122. Claimant appealed and the Board affirmed the

employment.³ He considered the entirety of the medical evidentiary record including the evidence submitted on modification and found that claimant failed to establish the existence of pneumoconiosis, total respiratory disability or total disability due to pneumoconiosis pursuant to 20 C.F.R. Part 718 and thus failed to establish either a change in conditions pursuant to 20 C.F.R. §725.310 or entitlement on the merits. Accordingly, he denied benefits.

On appeal, claimant generally contends that he is entitled to benefits. Employer, in response, urges affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has elected not to participate on appeal.

In an appeal by a claimant filed without the assistance of counsel, the Board will

administrative law judge's denial of benefits on May 27, 1994. Director's Exhibit 132. On July 6, 1994, claimant requested that the Board remand the case to the district director. Director's Exhibit 133. The Board treated claimant's request as a petition for modification and forwarded the request to the district director. Director's Exhibits 134, 135. The district director granted time for claimant to submit new evidence to support his request for modification. Because claimant failed to submit new evidence, the district director forwarded the case to the Office of Administrative Law Judges for a new hearing. Director's Exhibits 137, 138. A hearing was held before Administrative Law Judge Joel F. Gardiner on November 21, 1996. The case was reassigned to Administrative Law Judge Clement J. Kichuk (the administrative law judge) on December 20, 1996. Administrative Law Judge's Exhibit A.

³We affirm the administrative law judge's finding of 5.7 years of coal mine employment inasmuch as it is consistent with the Social Security Administration records. See *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984); Director's Exhibits 4, 63, 138.

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). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

After consideration of the administrative law judge's Decision and Order - Denying Benefits and the relevant evidence of record, we conclude that the administrative law judge's Decision and Order contains no reversible error, and therefore it is affirmed.

In making his findings at Section 718.202(a)(1), the administrative law judge properly considered *de novo* the entirety of the x-ray evidentiary record of fifty interpretations of twenty-two x-rays from December 11, 1975 through December 21, 1996, properly considered the qualifications of the readers, and reasonably found that the preponderance of the x-ray evidence was negative. See *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); Decision and Order at 10. The administrative law judge's failure to consider the positive interpretation of the January 24, 1994 x-ray by Dr. Rubenstein, Claimant's Exhibit 1, is harmless error, see *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), inasmuch as a single positive interpretation would not alter the outcome of the administrative law judge's weighing of either the January 24, 1994 x-ray or his weighing of the totality of the x-ray evidence. We therefore affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1).⁴

The administrative law judge properly found that Section 718.202(a)(2) is not available in this case where there is no biopsy or autopsy evidence in the record. Decision and Order at 10-11. Similarly, the presumptions provided at Section 718.202(a)(3) are not available in

⁴Our affirmance of the administrative law judge's finding that the existence of pneumoconiosis is not established at Section 718.202(a)(1) precludes invocation of the presumption at Section 410.490(b)(1)(i) for this "short-term" miner. *Phipps v. Director, OWCP*, 17 BLR 1-39 (6th Cir. 1992)(*en banc*); *Knuckles v. Director, OWCP*, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1985); *Hamric v. Director, OWCP*, 6 BLR 1-1091 (1984); see generally *Belcher v. Director, OWCP*, 895 F.2d 244, 13 BLR 2-273 (6th Cir. 1990).

the case of this living miner who has established only 5.75 years of coal mine employment and no evidence of complicated pneumoconiosis. 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306.

Inasmuch as the administrative law judge, within his discretion, determines if an opinion is well-reasoned and documented and determines the credibility of the medical witnesses, see *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*), he could properly rely on the opinions of pulmonary disease specialists, Drs. O'Neill, Myers, Dahhan, Broudy, Lane and Vuskovich, who opined that claimant did not have pneumoconiosis. See *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). We thus affirm the administrative law judge's findings that the existence of pneumoconiosis is not established at Section 718.202(a)(4). 20 C.F.R. §718.201;718.202(a)(4). We further affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a), a requisite element of entitlement, as it is rational, in accordance with law and based on substantial evidence.⁵ See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1(1986)(*en banc*). Thus, we affirm the administrative law judge's finding that the evidence is insufficient to establish entitlement.

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

⁵Because we affirm the administrative law judge's findings on the merits, based on the entirety of the evidence, we need not address his Section 725.310 modification findings.