

BRB No. 04-0536 BLA

RANDALL BARTLEY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
TROJAN MINING AND PROCESSING)	DATE ISSUED: 12/20/2004
)	
and)	
)	
TRAVELERS INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Randall Bartley, Ashcamp, Kentucky, *pro se*.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,¹ appeals the Decision and Order (2003-BLA-00125) of Administrative Law Judge Pamela Lakes Wood 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.* (the Act). The administrative law judge found at least twenty-three years of coal mine employment pursuant to the parties' stipulation and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.² Decision and Order at 3, 5; Hearing Transcript at 7. The administrative law judge, after considering all the evidence of record, concluded that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Decision and Order at 6-9. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds asserting that substantial evidence supports the administrative law judge's denial. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

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. *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). 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to

¹ Susie Davis, President of the Kentucky Black Lung Coalminers & Widows Association in Pikeville, Kentucky, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order). The Board acknowledged the instant appeal on April 8, 2004, stating that the case would be reviewed under the general standard of review.

² Claimant filed his claim for benefits on March 13, 2000, which was finally denied by the district director on December 12, 2002. Director's Exhibits 1, 7, 31. Claimant subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 32.

20 C.F.R. Part 718, 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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish 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*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.³ The administrative law judge permissibly determined that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). She rationally found that the x-ray evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), as all of the x-ray readings, including those by board-certified radiologists and B-readers, were negative.⁴ Director's Exhibits 4, 5, 22, 23, 28; Decision and Order at 6; *Staton v. Norfolk & Western Railroad 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); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

The administrative law judge also correctly found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2)-(3), since the record does not contain any biopsy or autopsy results demonstrating the presence of pneumoconiosis and the presumptions set forth at 20 C.F.R. §§718.304, 718.305, 718.306 are not applicable to this claim.⁵ See 20 C.F.R. §718.202(a)(2)-(3); Decision and Order at 6; *Langerud v. Director,*

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

⁴ The administrative law judge also properly found that the May 1, 2002 CT scans were interpreted as negative for the existence of coal workers' pneumoconiosis by Drs. Wheeler and Scott. Decision and Order at 2; Director's Exhibit 22.

⁵ The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 because this claim was filed 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 or filed prior to June 30, 1982; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

OWCP, 9 BLR 1-101 (1986).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge properly reviewed the medical opinion evidence of record and rationally considered the quality of the evidence in determining whether the opinions of record were supported by their underlying documentation and were adequately explained. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Worhach*, 17 BLR at 1-108; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 6-8. She acted within her discretion, as fact-finder, in concluding that the opinion of Dr. Smiddy, claimant's treating physician, did not meet claimant's burden of proof, because the physician's opinion was poorly documented and reasoned, and because his diagnosis of pneumoconiosis was based upon a positive x-ray interpretation which was not in the record. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Trumbo*, 17 BLR at 1-89; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark*, 12 BLR at 1-149; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *see also Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Decision and Order at 8; Director's Exhibits 28, 29.

Moreover, the administrative law judge rationally found that the preponderance of the medical opinion evidence did not establish the existence of pneumoconiosis, as at best, it was in equipoise. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 508, 22 BLR 2-623, 2-638 (6th Cir. 2003); Decision and Order at 8. In so finding, the administrative law judge permissibly relied on the opinions of Drs. Rosenberg, Vuskovich and Broudy, who opined that the miner did not have pneumoconiosis or any condition caused by the inhalation of coal dust, over the medical opinion of Dr. Younes, who opined that the miner suffered from emphysema, chronic bronchitis and chronic obstructive pulmonary disease due in part to occupational dust exposure,⁶ because these physicians provided detailed, reasoned analyses, and in light of their superior credentials.⁷ *Stephens*, 298 F.3d at 522, 22 BLR 2-512;

⁶The administrative law judge also noted that Dr. Smiddy diagnosed chronic obstructive pulmonary disease and bronchitis but did not relate these conditions to claimant's coal dust exposure and were therefore insufficient to meet claimant's burden of proof. *See* 30 U.S.C. §902(b); *Dockins v. McWane Coal Co.*, 9 BLR 1-57 (1986); Decision and Order at 8; Director's Exhibits 28, 29.

⁷The record indicates that Dr. Rosenberg is board-certified in Internal Medicine, Pulmonary Disease and Occupational Medicine. Employer's Exhibit 5. Dr. Vuskovich is

Worhach, 17 BLR at 1-108; *Trumbo*, 17 BLR at 1-89; *Clark*, 12 BLR at 1-155; Decision and Order at 8; Director's Exhibits 4, 5, 23, 28, 29; Employer's Exhibits 2, 3, 5-10. The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Consequently, we affirm the administrative law judge's credibility determinations with respect to the medical opinion evidence pursuant to Section 718.202(a)(4), as they are supported by substantial evidence and in accordance with law.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Because the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) is supported by substantial evidence and is in accordance with law, we affirm the denial of benefits. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

board-certified in Occupational Medicine. Employer's Exhibit 3. Dr. Broudy is board-certified in Internal Medicine with a subspecialty in Pulmonary Disease. Employer's Exhibits 1, 9. The credentials of Drs. Smiddy and Younes are not in the record. Claimant's Exhibit 3; Employer's Exhibits 4, 5, 28, 29.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge