BRB No. 97-0835 BLA

DEWEY FRANKLIN YATES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BIG FOUR COAL CORPORATION	)	
	)	
Employer-Respondent	)	
	)	
and	)	
	)	
EXCELLO COAL CORPORATION	)	DATE ISSUED:
	)	
	)	
Employer-Respondent	)	
	)	
and	)	
	)	
JEWELL COAL COMPANY	)	
	)	
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 Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Dewey Franklin Yates, Vansant, Virginia, *pro se*.[1]
Terri L. Bowman (Arter & Hadden), Washington, D.C., for Big Four Coal Company and Excello Coal Corporation.

[1]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).

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (96-BLA-1285) of Administrative Law Judge Frederick D. Neusner 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 instant case involves a duplicate claim filed on January 3, 1995.[2] After crediting claimant with "not more than eight and one-half years of coal mine employment," 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). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Big Four Coal Company and Excello Coal Corporation respond in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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 under Part 718 in a living miner's claim, a 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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore*

[2]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on September 1, 1989. Director's Exhibit 68. The district director denied the claim on November 3, 1989. *Id.* There is no evidence that claimant took any further action in regard to his 1989 claim.

Claimant filed a second claim on January 3, 1995. Director's Exhibit 1.

and Sons, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

In his consideration of whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge found that the "consensus of opinion of the doctors who read and reread the chest x-rays of the [c]laimant is that the films are negative for pneumoconiosis." Decision and Order at 4. In fact, all of the x-ray interpretations of record are negative for pneumoconiosis. *See* Director's Exhibits 13-15, 46, 49, 51-58, 61, 66-68. We, therefore, affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Since the record does not contain any biopsy or autopsy evidence, claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Furthermore, claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3). Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, inasmuch as the instant claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

In his consideration of whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge properly found the opinions of Drs. Forehand, Shoukry and Fino insufficient to support a finding of pneumoconiosis. Decision and Order at 5; Director's Exhibits 11, 52; Employer's Exhibit 1. Although the administrative law judge did not address Dr. Abernathy's opinion, this error is harmless inasmuch as Dr. Abernathy did not diagnose pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Director's Exhibit 68. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718.[3] *See Trent*, *supra*.

[3]Because claimant's 1995 claim is a duplicate claim, the administrative law judge erred in not initially determining whether the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997). However, in light of our affirmance of the administrative law judge's denial of benefits on the merits, the administrative law judge's error in not addressing whether the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R.

§725.309 constitutes harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge