

BRB No. 01-0437 BLA

HENRY L. GREEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RED ASH SALES 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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

Robert Weinberger (State of West Virginia Employment Programs Litigation Unit), Charleston, West Virginia, for carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-0532) of Administrative Law Judge Thomas M. Burke 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).<sup>1</sup> The administrative law judge credited claimant with fourteen years and

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<sup>1</sup>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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted,

eleven months 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) (2000). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges 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) (2000). Claimant also contends that the evidence is sufficient to establish that claimant suffers from a totally disabling respiratory impairment due to pneumoconiosis. 20 C.F.R. §718.204. The carrier responds to claimant's appeal, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to respond to claimant's appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law 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 into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) (2000). Specifically, claimant asserts that the administrative law judge should have weighed together the various types of evidence relevant to the issue of the existence of pneumoconiosis in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). In *Compton*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that an administrative law judge must weigh all types of relevant evidence together at 20 C.F.R. §718.202(a) (2000) to determine whether claimant has established the existence of pneumoconiosis.

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refer to the amended regulations.

Citing 20 C.F.R. §718.202(a) (2000), the administrative law judge stated that “[t]he existence of pneumoconiosis may be established by any one or more of the following methods: (1) chest x-rays; (2) autopsy or biopsy; (3) by operation of presumption; or (4) by a physician exercising sound medical judgment based on objective medical evidence.” Decision and Order at 9. The administrative law judge found the x-ray evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) (2000). Of the nine x-ray interpretations of record, six readings are negative for pneumoconiosis, Director’s Exhibits 12, 13, 25; Employer’s Exhibits 2-4, and three readings are positive, Claimant’s Exhibits 1-3. 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>2</sup> See *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Moreover, since six of the nine x-ray readings of record are negative for pneumoconiosis, we affirm the administrative law judge’s finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis. See 20 C.F.R. §718.202(a)(1); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994).

Next, we affirm the administrative law judge’s finding that the evidence is insufficient to establish the existence of pneumoconiosis by biopsy or autopsy evidence as there is no such evidence in the record. See 20 C.F.R. §718.202(a)(2). In addition, we affirm the administrative law judge’s finding that the evidence is insufficient to establish the existence of pneumoconiosis since there is no evidence of complicated pneumoconiosis in this living miner’s claim which was filed after January 1, 1982. See 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306.

Further, in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4)(2000), the administrative law judge considered the reports of Drs. Brown, Fino, Kohli, Raduns and Rao. The administrative law judge stated that “[n]one of the medical opinions diagnosed claimant as having coal worker’s (sic) pneumoconiosis.” Decision and Order at 13. Dr. Fino opined that claimant does not suffer

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<sup>2</sup>The administrative law judge stated that “[s]ince the majority of the x-ray readings are negative, and more importantly, four (4) of which were done by dually qualified readers, the claimant has failed to establish the existence of pneumoconiosis by a preponderance of the evidence.” Decision and Order at 10.

from coal workers' pneumoconiosis. Employer's Exhibit 1. Dr. Rao diagnosed probable asthma and mild chronic obstructive pulmonary disease related to cigarette smoking. Director's Exhibit 10. Dr. Brown diagnosed chronic cough and shortness of breath with a history of working in coal mines. Director's Exhibit 25. However, as the administrative law judge correctly stated, "Dr. Brown did not link the claimant's coal mine employment as a cause of his medical condition." Decision and Order at 11. In a report dated August 22, 1997, Dr. Kohli diagnosed acute asthmatic bronchitis as well as possible obstructive sleep apnea. Director's Exhibit 25.

In a subsequent report dated September 5, 1997, Dr. Kohli diagnosed mild obstructive sleep apnea and significant obstructive lung disease associated with some restrictive lung disease. *Id.* Dr. Kohli further opined that he did not know the exact cause of claimant's illness. *Id.* The administrative law judge stated that "based on the medical opinions in the record, in conjunction with a review of the x-ray evidence as discussed above, the claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4)." Decision and Order at 13. Since none of the physicians of record opined that claimant suffers from pneumoconiosis or any chronic obstructive lung disease arising out of coal mine employment, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis by medical report.<sup>3</sup> *See* 20 C.F.R. §718.202(a)(4); *Shoup v. Director, OWCP*, 11 BLR 1-110 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Furthermore, since the administrative law judge properly found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4), we reject claimant's assertion that the administrative law judge should have weighed the relevant

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<sup>3</sup>In a CT scan report, Dr. Raduns opined that there were no acute infiltrates or significant peribronchial thickening to confirm bronchitis. Director's Exhibit 25. The administrative law judge considered Dr. Raduns's opinion along with the medical opinions of record under 20 C.F.R. §718.204(c)(4) (2000). Since there is no medical opinion evidence that could support a finding that suffers from pneumoconiosis, we hold that any error by the administrative law judge in this regard is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

evidence together in accordance with *Compton*. See *Compton, supra*; see also *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Moreover, since it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis. See 20 C.F.R. §718.202(a); *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).

Since claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement, the administrative law judge properly denied benefits under 20 C.F.R. Part 718.<sup>4</sup> See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry, supra*.

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

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<sup>4</sup>In view of our disposition of the case at 20 C.F.R. §718.202(a), we decline to address claimant's contentions with regard to 20 C.F.R. §718.204 (2000). See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

BETTY JEAN HALL  
Administrative Appeals Judge