BRB Nos. 00-0971 BLA
and 00-0971 BLA-A

DONALD E. YOSS Claimant-Petitioner v. HOWARD L. BOWERS CONTRACTING COMPANY, INCORPORATED and OHIO COAL & CONSTRUCTION COMPANY and OHIO BUREAU OF WORKERS' COMPENSATION Employers/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 of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Donald E. Yoss, Powhatan, Ohio, *pro se*.

Shane M. Dawson (Arter & Hadden LLP), Columbus, Ohio, for Howard L. Bowers Contracting Company, Incorporated.

Gregory K. Johnson (Ohio Bureau of Workers' Compensation), Columbus, Ohio, for carrier.

Dorothy L. Page (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (00-BLA-0002) of Administrative Law Judge Daniel L. Leland 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).[1] The administrative law judge credited claimant with twenty-two and three-quarter years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Although the administrative law judge found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000), 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 generally challenges the administrative law judge's denial of benefits. Howard L. Bowers Contracting Company, Incorporated, and carrier respond to claimant's appeal, urging affirmance of the administrative law judge's Decision and Order.[2] The Director, Office of Workers'

[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 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, refer to the amended regulations.

[2]Howard L. Bowers Contracting Company, Incorporated (Bowers Contracting Company) filed a cross-appeal on July 14, 2000. The Board subsequently acknowledged receipt of Bowers Contracting Company's cross-appeal. *Yoss v. Howard L. Bowers Contracting Co.*, BRB Nos. 00-0971 BLA and 00-0971 BLA-A (July 21, 2000)(unpublished Order). However, Bowers Contracting Company did not file a Petition for Review and brief. *See* 20 C.F.R. §802.211. Consequently, the Board ordered Bowers Contracting Company to show cause within ten (10) days from receipt of its order why Bowers Contracting Company's cross-appeal should not be dismissed for failure to timely file a Petition for Review and brief. *Yoss v. Howard L. Bowers Contracting Co.*, BRB Nos. 00-0971 BLA and

Compensation Programs (the Director), has declined to respond to claimant's appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on April 18, 2001, to which the Director has responded.[3] In a brief dated May 8, 2001, the Director indicated that it is his position that the instant case would not be affected by application of the litigated regulations. The Director, therefore, indicated that the Board could decide the instant case. Based on the brief submitted by the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 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

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00-0971 BLA-A (Nov. 27, 2000)(unpublished Order). The Director, Office of Workers' Compensation Programs, subsequently filed a motion to dismiss Bowers Contracting Company's cross-appeal as abandoned. Inasmuch as Bowers Contracting Company has failed to respond to the Board's show cause order, Bowers Contracting Company's cross-appeal is dismissed as abandoned. *See* 20 C.F.R. §§802.211(d), 802.402(a).

[3]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's order issued on April 18, 2001 would be construed as a position that the challenged regulations will not affect the outcome of this case.

substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) (2000). Of the forty-two interpretations of record, twenty-four readings are negative for pneumoconiosis, Director's Exhibits 13, 17, 41; Employer's Exhibit 4, and eighteen readings are positive, Director's Exhibits 13, 16, 19, 18; Claimant's Exhibits 4-11, 13-20; Employer's Exhibit 4. The administrative law judge observed that "[p]ositive readings were made by Drs. Mathur, Noble, Aycoth, and Gaziano." Decision and Order at 9. Drs. Aycoth and Gaziano are B-readers, and Drs. Mathur and Noble are B-readers and Board-certified radiologists. The administrative law judge also observed that "[n]egative readings were rendered by Drs. Wheeler, Scott, and Sargent, all [B]oard certified radiologists/B readers, and Dr. Fino, a B reader." *Id*. The administrative law judge therefore stated, "[a]lthough this is a close case, I conclude that a preponderance of the x-ray evidence does not establish the existence of pneumoconiosis." *Id*. Inasmuch as it is supported by substantial evidence, 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); *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).

Next, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis since there is no biopsy or autopsy evidence of 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; Director's Exhibit 1.

Further, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) (2000). The record contains the reports of Drs. Fino, Reddy, Tipton and Tuteur.[4] Whereas Drs. Reddy and Tipton opined that claimant suffers from pneumoconiosis, Director's Exhibit 14; Claimant's Exhibit 2; Employer's Exhibit 4, Drs. Fino and Tuteur opined that claimant does not suffer from pneumoconiosis, Director's Exhibit 41; Employer's Exhibits 2, 4. The administrative law

[4]The administrative law judge observed that "[t]he CT scan of January 7, 1999 was read as negative for pneumoconiosis by Drs. Fino, Wheeler, and Scott." Decision and Order at 9.

judge properly accorded greater weight to the opinions of Drs. Fino and Tuteur than to the contrary opinions of Drs. Reddy and Tipton because he found the former opinions to be better reasoned.[5] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*);

[5]The administrative law judge stated that "Dr. Reddy cited claimant's history, examination, chest x-ray, and spirometry as a basis for his diagnosis, but he failed to indicate what aspects of the examination or spirometry led him to conclude that claimant's pulmonary disease was related to coal dust exposure." Decision and Order at 9. The administrative law judge observed that "Dr. Reddy also stated that twenty five percent of claimant's pulmonary impairment is due to occupational pneumoconiosis, but this assessment is completely unreasoned and entitled to little weight." *Id*. The administrative law judge additionally stated that "Dr. Tipton only reviewed the x-ray readings that were positive for pneumoconiosis and was unaware of the negative readings." Decision and Order at 9. Moreover, the administrative law judge stated that "[Dr. Tipton's] determination that thirty to thirty-five percent of claimant's pulmonary disability is due to coal mine dust exposure was not explained and appears to be based on pure speculation." *Id*. at 9-10. In contrast, the administrative law judge stated that "Dr. Fino and Dr. Tuteur's opinions that [claimant's] pulmonary disease is due solely to cigarette smoking are better reasoned." *Id*. at 10.

Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). The administrative law judge also properly accorded greater weight to the opinions of Drs. Fino and Tuteur because of their superior qualifications.[6] *See Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(4).

[6]The administrative law judge stated that "Dr. Reddy and Dr. Tipton are also less qualified in evaluating the causes of pulmonary diseases than Dr. Fino and Dr. Tuteur." Decision and Order at 10. The administrative law judge observed that "[a]lthough Dr. Reddy, Dr. Fino, and Dr. Tuteur are [B]oard certified in internal medicine and pulmonary diseases, unlike Dr. Reddy, Dr. Fino and Dr. Tuteur have published articles on pulmonary diseases and teach in medical schools." *Id*. The administrative law judge also observed that "Dr. Tipton has no [B]oard certifications and is [B]oard eligible only in allergy and immunology." *Id*.

Since claimant failed to establish the existence of pneumoconiosis, *see* 20 C.F.R. §718.202(a), an essential element of entitlement, we hold that the administrative law judge properly denied benefits under 20 C.F.R. Part 718,[7] *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

NANCY S. DOLDER
Administrative Appeals Judge

[7]In view of our disposition of the case at 20 C.F.R. §718.202(a), we decline to address the administrative law judge's finding at 20 C.F.R. §718.204(c) (2000). *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).