

BRB No. 01-0858 BLA

ROBERT D. ALRED, SR.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Russell D. Alred, Harlan, Kentucky, for claimant.

Jennifer Toth (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (01-BLA-0072) of Administrative Law Judge Daniel F. Solomon 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 This case is before the Board for a second time.² In this duplicate claim, the

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, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² In a Decision and Order issued January 12, 1999, the Board vacated the denial of

administrative law judge accepted the parties' stipulation of five years of coal mine employment and that total disability was established, but found the evidence of record failed to establish the existence of pneumoconiosis, that pneumoconiosis arose out of coal mine employment, or that pneumoconiosis was totally disabling. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in finding that the evidence failed to establish the existence of pneumoconiosis and disability causation. Claimant also contends that the administrative law judge should have found that the Director, Office of Workers' Compensation Programs (the Director), engaged in a pattern of conduct that unnecessarily delayed the proper evaluation of the claim, and that benefits should, therefore, be awarded. The Director responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence, and further contends, citing *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999), that absent prejudice, the delayed adjudication of a black lung claim does not violate a party's due process rights and does not, therefore, compel an award of benefits.

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 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. See 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

benefits by Administrative Law Judge John C. Holmes in this duplicate claim for benefits filed July 1, 1996, and remanded the case, pursuant to the request of the Director, Office of Workers' Compensation Programs, for a complete, credible pulmonary evaluation. See *Alred v. Director, OWCP*, BRB No. 98-570 (Jan. 12, 1999)(unpub.).

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 administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. In finding that the x-ray evidence did not establish the existence of pneumoconiosis, the administrative law judge properly placed greater weight on the weight of the negative x-ray interpretations and the superior qualification of some of the readers who read the x-rays as negative.³ 20 C.F.R. §718.202(a)(1); *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); *Worhach v. Director, OWCP*, 18 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*), see *Perry, supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Decision and Order at 9. Accordingly, the administrative law judge properly found, contrary to claimant's argument, that the x-ray evidence failed to establish the existence of pneumoconiosis.

Turning to the medical opinions of record, the administrative law judge properly accorded little weight to Dr. Baker's opinion as he found it "nebulous" and equivocal as to the existence of pneumoconiosis. Director's Exhibit 43. See *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Similarly, contrary to claimant's argument, the administrative law judge rationally accorded little weight to Dr. Rao's finding of pneumoconiosis because it was not reasoned, internally inconsistent, and equivocal. Decision and Order at 12; Director's Exhibits 21, 58; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Griffith, supra*; *Clark, supra*; *Justice, supra*. Accordingly, we affirm the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis. As the administrative law judge rationally found the medical opinion evidence insufficient to establish the existence of pneumoconiosis, we affirm the administrative law judge's finding that the evidence of record failed to establish the existence of pneumoconiosis, a necessary element of entitlement, and we need not address claimant's argument on disability causation. See *Trent, supra*; *Gee, supra*; *Perry, supra*.

³ The administrative law judge stated that Dr. Wiot was a Professor of Radiology and a past president of both The American College of Radiology and the American Board of Radiology and also that Dr. Sargent, a "B" reader, had written extensively on black lung. Decision and Order at 9; Director's Exhibits 62, 65.

Finally, contrary to claimant's argument, the administrative law judge properly found that the Director did not engage in a pattern of conduct which unnecessarily delayed the proper evaluation of the claim or coerced Dr. Rao into changing his opinion. As the Director contends, absent a showing of prejudice, the delayed adjudication of a black lung claim does not violate a party's due process rights. *See Borda, supra; Grigg v. Director, OWCP*, 28 F.3d 416, 420 n.7, 18 BLR 2-299, 2-308 n.7 (4th Cir. 1994). Rather, the delay in this case was necessitated by the need to provide claimant with evidence which would substantiate his claim. *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990)(*en banc*); *see Cline v. Director, OWCP*, 917 F.2d 9, 14 BLR 2-102 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984). Moreover, contrary to claimant's allegation, there is no evidence that the Director "coerced" Dr. Rao to change his opinion. *See* Decision and Order at 17-18. Further, claimant bears the burden of affirmatively establishing his claim. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994) *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Accordingly, the Decision and Order of the administrative law judge 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