

BRB No. 02-0705 BLA

JOSEPH W. THOMASON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ABBOTT, INCORPORATED)	DATE ISSUED:
)	
and)	
)	
KENTUCKY EMPLOYERS MUTUAL)	
INSURANCE)	
)	
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 - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Joseph W. Thomason, St. Charles, Kentucky, *pro se*.

Lois A. Kitts (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

Per Curiam:

Claimant appeals the Decision and Order - Denial of Benefits (00-BLA-0945) of Administrative Law Judge Robert L. Hillyard 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 Claimant filed his claim for benefits on March 3, 1999. After

¹The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective

crediting claimant with five years of coal mine employment, the administrative law judge considered the claim under the applicable regulations at 20 C.F.R. Part 718. The administrative law judge found claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, he denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer has filed a response brief in support of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he does not presently intend to participate in this appeal.

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

Initially, we affirm the administrative law judge's finding that claimant established five years of coal mine employment. The administrative law judge reasonably credited claimant with five years of coal mine employment based upon claimant's Social Security records, work history sheet, and claimant's testimony that his work with Abbott, Inc. was his only coal mine employment. *See Mullins v. Director, OWCP*, 6 BLR 1-508 (1983); *Gibson v. Ryan's Creek Coal Co.*, 4 BLR 1-591 (1982); Decision and Order at 5; Director's Exhibits 2, 5; Hearing Tr. at 26-34.

on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

With regard to the merits of the claim, in considering the x-ray evidence pursuant to Section 718.202(a)(1), the administrative law judge found that the overwhelming majority of the x-ray interpretations was negative for pneumoconiosis and that, therefore, claimant failed to establish the presence of the disease under Section 718.202(a)(1). Decision and Order at 13-14. Substantial evidence supports the administrative law judge's finding. The record contains twenty-three x-ray readings of six x-ray films taken between August 1997 and July 1999.² The administrative law judge properly found that only four of the interpretations were positive for pneumoconiosis, and that these four readings were outweighed by the numerous negative readings of physicians highly qualified as B readers and/or Board-certified radiologists. See *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); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); Decision and Order at 13-14. Specifically, the administrative law judge properly found the two positive readings of the October 21, 1998 x-ray, which were submitted by Drs. Goldwin and Barrett, who are B reader/Board-certified radiologists, Director's Exhibits 24, 26, were outweighed by the five negative readings of the same film, all of which were submitted by equally qualified B reader/Board-certified radiologists.³ Decision and Order at 13; Director's Exhibits 25, 26, 31, 32. The administrative law judge further correctly stated that the July 26, 1999 film, interpreted as positive by Dr. Whitehead, a B reader/Board-certified radiologist, Director's Exhibit 22, was reread as negative by several physicians possessing the qualifications of Board-certified radiologist and/or B reader.⁴ Decision and Order at 13; Director's Exhibits

²In summarizing the x-ray evidence, the administrative law judge correctly listed twenty-three x-ray readings of the six films of record. Decision and Order at 6-8. In discussing the x-ray evidence, the administrative law judge stated that the record contained twenty-two x-ray readings. Decision and Order at 13-14. This discrepancy is explained by the administrative law judge's statement that the film dated July 26, 1999 was reread as negative by five physicians, *Id.* at 13, when, in actuality, this film was reread as negative by six physicians. The administrative law judge's failure to discuss the sixth negative rereading of the July 26, 1999 film was harmless, however, as it did not prejudice claimant. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

³The October 21, 1998 x-ray was read as negative by Drs. Sargent, Wheeler, Scott, Spitz and Wiot. Director's Exhibits 25, 26, 31, 32.

⁴As discussed in footnote 2, *supra*, the July 26, 1999 x-ray was reread as negative by six physicians. Four of these physicians, Drs. Wiot, Spitz, Wheeler, Scott, are B reader/Board-certified radiologists. Director's Exhibits 23, 25. In addition, the x-ray was read as negative by Drs. Fino and Rosenberg, both of whom are B readers. Director's Exhibit 33; Employer's Exhibit 1.

23, 25; Employer's Exhibit 1. In addition, the administrative law judge properly found that the positive reading of the April 20, 1999 x-ray, submitted by Dr. Traughber, who is neither a B reader nor a Board-certified radiologist, was outweighed by the negative reading of Dr. Sargent on the basis of Dr. Sargent's superior radiological qualifications.⁵ Decision and Order at 13; Director's Exhibit 7. Finally, the administrative law judge properly found that the remaining films, *i.e.*, a second film dated April 20, 1999, and films dated May 17, 1999 and August 29, 1997, were read uniformly negative for pneumoconiosis. Decision and Order at 13-14; Director's Exhibits 7-9, 20, 35. We, therefore, affirm the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *See Staton, supra; Woodward, supra; Edmiston, supra.*

Additionally, the administrative law judge properly found that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2), as there is no autopsy or biopsy evidence in the record. Decision and Order at 14. He also properly found that claimant was precluded from establishing the existence of pneumoconiosis under Section 718.202(a)(3), as none of the presumptions thereunder applies.⁶ *Id.* We, therefore, affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2), (a)(3).

We next address the administrative law judge's finding that the medical opinion evidence of record was insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4). The record contains medical opinions from Drs. Traughber, Collins and Houser indicating that claimant suffers from pneumoconiosis. Director's Exhibits 19, 21, 24. The record contains the contrary opinions of Drs. Broudy, Fino, Branscomb, Chandler and Rosenberg.⁷ Director's Exhibits 8, 33, 34; Employer's Exhibits 1, 2, 4-6.

⁵The administrative law judge incorrectly found that the April 20, 1999 film read by Dr. Traughber as positive was reread as negative by two physicians. Decision and Order at 13. In fact, only Dr. Sargent reread the film, interpreting it as negative. Director's Exhibit 7. The administrative law judge's error was harmless, however, since the administrative law judge properly credited Dr. Sargent's superior qualifications. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); Decision and Order at 13; Director's Exhibit 7.

⁶The record does not contain any evidence supportive of invocation of the presumption under 20 C.F.R. §718.304. Furthermore, as claimant's claim for benefits was filed after January 1, 1982, the presumption at 20 C.F.R. §718.305 does not apply. Finally, as this is not a survivor's claim, the presumption at 20 C.F.R. §718.306 is inapplicable.

⁷In addition, the record includes reports from Drs. Taylor and Giannini, and examination records of a nurse practitioner, Lezlie Russell. The administrative law judge correctly stated the reports of these two physicians and the nurse practitioner do not indicate

that claimant suffered from pneumoconiosis or any condition attributable to coal dust exposure. Decision and Order at 14-15; Director's Exhibit 9; Claimant's Exhibits 1, 2. The administrative law judge thus properly found these reports insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See* 20 C.F.R. §§718.201 and 718.202(a)(4). Decision and Order at 14-15.

Dr. Traughber examined claimant on April 20, 1999, and diagnosed pneumoconiosis upon interpreting the x-ray taken in the examination as positive for the disease. The administrative law judge properly accorded little weight to Dr. Traughber's opinion, however, in light of Dr. Traughber's "contradictory statements in a follow-up letter" dated July 13, 1999, wherein Dr. Traughber stated that "it is not likely that [claimant] has pneumoconiosis," Director's Exhibit 19. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*; Decision and Order at 15; Director's Exhibits 7, 19. Dr. Collins examined claimant on October 21, 1998, and diagnosed pneumoconiosis and asthma. Director's Exhibit 24. The administrative law judge permissibly rejected Dr. Collins's opinion under Section 718.202(a)(4), given the doctor's reliance upon an inflated coal mine employment history of twenty, rather than five, years. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); Decision and Order at 15; Director's Exhibit 24.

Dr. Houser examined claimant on July 26, 1999, and diagnosed claimant with pneumoconiosis based upon the x-ray taken in conjunction with his examination. Director's Exhibit 21. The July 26, 1999 x-ray was read as positive by Dr. Whitehead, a B reader and Board-certified radiologist. Director's Exhibit 22. The administrative law judge properly discounted Dr. Houser's opinion because the doctor's diagnosis "appears to be based" upon a positive chest x-ray, which was interpreted as negative by five other physicians of record.⁸ *See Winters v. Director, OWCP*, 6 BLR 1-877 (1984); Decision and Order at 15; Director's Exhibits 23, 25, 33; Employer's Exhibit 1.

⁸As discussed in footnote 2, *supra*, six, not five, physicians actually reread the July 26, 1999 x-ray as negative.

In considering the opinions of record indicating that claimant does not have pneumoconiosis, the administrative law judge properly credited the opinions of Drs. Chandler and Rosenberg because these physicians discussed in detail the bases for their conclusions. *See Clark, supra*; Decision and Order at 15; Employer's Exhibits 1, 2, 4, 5. The administrative law judge also properly credited the opinions of Drs. Rosenberg and Fino based upon their credentials as pulmonary specialists.⁹ *See Woodward, supra*; Decision and Order at 15; Director's Exhibit 33; Employer's Exhibit 4. In addition, the administrative law judge found that Drs. Branscomb and Broudy opined that claimant does not have pneumoconiosis, but neither credited nor discounted their opinions. Decision and Order at 14-15; Director's Exhibits 8, 34; Employer's Exhibit 6. To the extent that the administrative law judge erred by not explaining what weight he accorded the opinions of Drs. Branscomb and Broudy, the error was harmless since it did not prejudice claimant, and since the administrative law judge otherwise properly credited the opinions of Drs. Chandler, Rosenberg and Fino in finding that claimant failed to establish the existence of pneumoconiosis. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); Decision and Order 14-15. We affirm, therefore, the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4).

Because the administrative law judge properly found the evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), a requisite element of entitlement under Part 718, he properly denied benefits. *Trent, supra*; *Gee, supra*; *Perry, supra*.

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

⁹Dr. Rosenberg is Board-certified in internal medicine, pulmonary disease medicine, and occupational medicine. Employer's Exhibit 4. Dr. Fino is Board-certified in internal medicine and pulmonary disease medicine. Director's Exhibit 33.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge