

BRB No. 03-0503 BLA

JIMMY THOMPSON)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED:
03/11/2004)	
)	
CANNELTON INDUSTRIES,)	
INCORPORATED)	
)	
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 - Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Jimmy Thompson, Logan, West Virginia, *pro se*.

Mary Rich Maloy (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,¹ appeals the Decision and Order - Denying Benefits (01-BLA-1002) of Administrative Law Judge Richard

¹Claimant was not represented by counsel at a hearing in this case which was held before Administrative Law Judge Robert J. Lesnick on June 11, 2002. Claimant waived a subsequently scheduled hearing for December 12, 2002,

A. Morgan 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).² Claimant filed his claim for benefits on October 23, 2000. In a Decision and Order dated April 9, 2003, the administrative law judge credited claimant with at least thirty-five years of coal mine employment, and considered the claim pursuant to the applicable regulations at 20 C.F.R. Part 718. The administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that claimant failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, he denied benefits. On appeal, claimant generally contends that the administrative law judge improperly denied benefits. Employer responds in support of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating 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

requesting that his case be decided on the record. At the June 12, 2002 hearing, Judge Lesnick informed claimant of his right to counsel and of the benefits in having counsel present. Hearing Tr. at 4. Advising claimant that he was "very concerned" that claimant did not have counsel, Judge Lesnick allowed claimant a continuance to obtain counsel, and to submit additional medical evidence. *Id.* at 5. A subsequent hearing was scheduled before Administrative Law Judge Richard A. Morgan (the administrative law judge) for December 12, 2002. In the Notice of Hearing, dated September 5, 2002, claimant was advised again of his right to have an attorney represent him, and was encouraged to obtain counsel. In a letter to the administrative law judge dated December 5, 2002, claimant indicated that he did not want to attend a hearing, and requested a decision on the record. Employer's counsel informed the administrative law judge that she had no objection to the case being decided on the record. By Order dated December 9, 2002, the administrative law judge granted claimant's request for a decision on the record. We hold that there was a valid waiver of claimant's right to a hearing. 20 C.F.R. §725.461.

²The 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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

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*).

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). Substantial evidence supports the administrative law judge's finding. The record contains thirty readings of six x-ray films taken on March 4, 1999, April 6, 2000, December 5, 2000, June 4, 2001, September 11, 2001, and June 24, 2002. Director's Exhibits 14-16; Employer's Exhibits 1-6, 11-20, 22. The administrative law judge properly found that only one of these readings is positive for pneumoconiosis – Dr. Ranavaya's 1/0 interpretation of the December 5, 2000 film, which was taken in the course of Dr. Ranavaya's pulmonary evaluation of claimant. Decision and Order at 4, 10; Director's Exhibit 16. The administrative law judge properly found Dr. Ranavaya's positive x-ray reading outweighed by the numerous negative readings of the December 5, 2000 film, all of which were submitted by B readers and/or Board-certified radiologists,³ and by the unanimously negative interpretations of the remaining x-rays of record. *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); Decision and Order at 4, 10; Director's Exhibits 14-16; Employer's Exhibits 1-6, 11-20, 22. We affirm, therefore, the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1).

³The December 5, 2000 x-ray, read as positive by Dr. Ranavaya, who is neither a B reader nor Board-certified radiologist, was reread as negative by two B readers – Drs. Gaziano and Zaldivar – and six dually-qualified B reader/Board-certified radiologists – Drs. Navani, Wheeler, Scott, Spitz, Perme and Wiot. Director's Exhibits 14, 15; Employer's Exhibits 1, 2, 4, 17, 20.

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 10. 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.⁴ *Id.* We, therefore, affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2), (a)(3).

In weighing the medical opinion evidence under Section 718.202(a)(4), the administrative law judge correctly stated that the opinions of Drs. Ranavaya and the West Virginia Occupational Pneumoconiosis Board would, if credited, support a finding of pneumoconiosis, Director's Exhibit 12; Claimant's Exhibit D, while the opinions of Drs. Zaldivar, Fino, Rosenberg and Castle, Employer's Exhibits 7-10, 21, indicated that claimant does not suffer from the disease. Decision and Order at 10-11. The administrative law judge properly discounted Dr. Ranavaya's opinion because Dr. Ranavaya based his diagnosis of pneumoconiosis, in part, on his positive interpretation of the x-ray taken on December 5, 2000, a film which was reread as negative by physicians with superior radiological qualifications, as discussed above. *See Winters v. Director, OWCP*, 6 BLR 1-877 (1984); Decision and Order at 11; Director's Exhibits 14-16; Employer's Exhibits 1, 2, 4, 17, 20. The administrative law judge properly discounted the West Virginia Occupational Pneumoconiosis Board's diagnosis of pneumoconiosis because the Board's report did not mention claimant's extensive, thirty-five year cigarette smoking history and analyze its possible role as the cause of claimant's pulmonary problems.⁵ *See Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); Decision and Order at 11; Claimant's Exhibit D. Furthermore, the administrative law judge properly credited, as better reasoned and documented than the opinions of Drs. Ranavaya and the West Virginia Occupational Pneumoconiosis Board, the contrary opinions of Drs. Zaldivar, Fino, Rosenberg and Castle.⁶ *Clark v. Karst-Robbins Coal Co.*,

⁴The 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.

⁵Claimant's history of having smoked one to one and one-half packages of cigarettes per day for approximately thirty-five years is documented in the reports of Drs. Ranavaya, Zaldivar, Castle, Rosenberg and Fino. Director's Exhibit 12; Employer's Exhibits 7-10, 21.

12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); Decision and Order at 11; Employer's Exhibits 8, 9, 10, 21. Additionally, the administrative law judge properly credited the opinions of Drs. Zaldivar, Fino, Rosenberg and Castle on the ground that these physicians are Board-certified pulmonary specialists, whereas the credentials of Drs. Ranavaya

⁶In summarizing the medical opinions of record, the administrative law judge correctly stated that Dr. Zaldivar examined claimant on September 11, 2001, and evaluated the medical evidence of record, in conjunction with claimant's thirty-five year coal mine employment history and thirty-six year cigarette smoking history. Decision and Order at 6-7; Employer's Exhibits 7, 21. The administrative law judge correctly stated that Drs. Fino, Rosenberg and Castle reviewed and analyzed the medical evidence of record, including claimant's coal mine employment and smoking histories, in rendering their opinions. Decision and Order at 7-19; Employer's Exhibits 8-10. The administrative law judge also accurately identified the reasons which Drs. Zaldivar, Fino, Rosenberg and Castle gave for their opinions that claimant does not suffer from pneumoconiosis. Decision and Order 6-9. All four physicians concluded that there is insufficient radiographic and physiological evidence of the disease, but sufficient evidence indicating that claimant has emphysema, a tobacco induced chronic obstructive pulmonary disease. Employer's Exhibits 7-10, 21.

Dr. Ranavaya examined claimant on December 5, 2000, and considered claimant's coal mine employment and smoking histories. Decision and Order at 5; Director's Exhibit 12. Dr. Ranavaya diagnosed pneumoconiosis based upon claimant's coal mine employment history and x-ray. Director's Exhibit 12. Dr. Ranavaya also completed a report dated December 12, 2000 for the West Virginia Occupational Pneumoconiosis Board, providing the Board with the information contained in his December 5, 2000 examination report. Claimant's Exhibit D. As discussed above, the administrative law judge discounted Dr. Ranavaya's opinion because Dr. Ranavaya based his diagnosis of pneumoconiosis, in part, on his positive interpretation of the x-ray taken on December 5, 2000, a film which was reread as negative by physicians with superior radiological qualifications. The West Virginia Occupational Pneumoconiosis Board issued its findings in a report dated March 27, 2001. *Id.* As the administrative law judge noted, the three-physician panel, consisting of Drs. Walker, Kinder and Hayes, indicated that it reviewed Dr. Ranavaya's medical reports, and reports from the Greenbrier clinic, including a medical history, physical findings, and an abnormal ventilatory study administered on March 27, 2001. *Id.* The Board also indicated that it considered an unspecified negative chest x-ray. The administrative law judge correctly stated that the Board did not address claimant's smoking history in its report. Decision and Order at 11; Claimant's Exhibit D.

and the West Virginia Occupational Pneumoconiosis Board are not in evidence. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 11; Employer's Exhibits 8, 9, 10, 21. Accordingly, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). We further affirm the administrative law judge's consideration of all of the relevant like and unlike evidence under Section 718.202(a)(1)-(4), and his consequent finding that claimant failed to establish the existence of pneumoconiosis thereunder in view of the overwhelmingly negative x-ray interpretations of record and the better reasoned and documented opinions of those physicians possessing superior qualifications who found that claimant does not suffer from the disease. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); Decision and Order at 11.

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 - 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

