

BRB No. 99-0909 BLA

L. D. ROBERTS)	
)	
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 - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

L. D. Roberts, Findlay, Ohio, *pro se*.

Jill M. Otte (Henry L. Solano, 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, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-0847) of Administrative Law Judge Robert L. Hillyard 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.*¹ The administrative law judge credited claimant with two and one quarter

¹ Claimant filed this claim on April 6, 1995. Director's Exhibit 1. Administrative Law Judge Daniel J. Roketenetz denied the claim on December 12, 1996, based on claimant's failure to establish the existence of pneumoconiosis, or that pneumoconiosis contributes to

years of coal mine employment and, based on the filing date of the claim, applied the regulations at 20 C.F.R. Part 718. The administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. 718.202(a)(1)-(4). Accordingly, benefits were denied. On appeal, claimant generally challenges the findings of the administrative law judge on the existence of pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 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 substantial evidence, and in accordance with 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 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*).

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 Decision and Order of the administrative law judge is supported by substantial evidence and that there

claimant's impairment. See 20 C.F.R. §§718.202(a)(1)-(4); 718.204(b). Director's Exhibit 25. Claimant appealed, and during the pendency of the appeal, the Director moved the Board for an Order remanding the case to the district director for development of further medical evidence. The Board granted the Director's motion and returned the case to the district director for a complete and credible pulmonary evaluation. *Roberts v. Director, OWCP*, BRB No. 97-0521 BLA (Nov. 19, 1997) (unpub.). Director's Exhibit 26.

is no reversible error. The administrative law judge rationally credited claimant with two and one quarter years of coal mine employment based on claimant's hearing testimony, employment statements, and Social Security records. *See Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Niccoli v. Director, OWCP*, 6 BLR 1-910 (1984). We, therefore, affirm the administrative law judge's length of coal mine employment finding.

In finding the evidence of record insufficient to meet claimant's burden to establish the existence of pneumoconiosis, the administrative law judge found that the four interpretations of the three x-rays of record were negative for pneumoconiosis, and properly found that claimant, therefore, failed to establish the existence of pneumoconiosis at Section 718.202(a)(1). *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 sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); Director's Exhibits 11, 12, 27, 28; Decision and Order at 5. The administrative law judge also correctly determined that since the record contained no biopsy or autopsy evidence, claimant did not establish the existence of pneumoconiosis at Section 718.202(a)(2), and that claimant, a living miner, was not entitled to the presumptions at Section 718.202(a)(3) as this claim was filed after January 1, 1982 and the record does not contain any evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305(e), 718.306.

At Section 718.202(a)(4), the administrative law judge accorded greater weight to the 1998 medical report of Dr. Merris Young, who examined claimant at the request of the Director. Director's Exhibit 27.² The administrative law judge properly found that in this report the doctor did not diagnose pneumoconiosis or any pulmonary/respiratory impairment related to coal mine employment. *See Perry, supra*. The administrative law judge properly found that this opinion outweighed Dr. Cosiano's opinion on the existence of pneumoconiosis at Section 718.202(a)(4), prepared in 1995, because the 1998 opinion

² The administrative law judge misidentified the 1998 report by Dr. Young, Director's Exhibit 28, as being an additional report by Dr. Cosiano, claimant's treating physician, who had written a report and a letter in 1995. Director's Exhibits 9, 18. As the administrative law judge's misidentification of the author of the report did not affect his qualitative analysis of the medical opinion evidence, the administrative law judge's error in this regard is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

was better reasoned and documented, and supported by the underlying documentation. Decision and Order at 6. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). We, therefore, affirm the finding of the administrative law judge that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4) and further affirm the denial of benefits as it is supported by substantial evidence and is in accordance with law.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

