

BRB No. 01-0854 BLA

DALLAS G. BERRY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS’ COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)	DATE ISSUED:
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order On Remand Denying Benefits Based On A Request For Modification of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Dallas G. Berry, Vansant, Virginia, *pro se*.

Timothy S. Williams (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 Director, Office of Workers’ Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,¹ the Decision and Order On Remand Denying Benefits Based On A Request For Modification (99-BLA-0003) of Administrative Law Judge Richard K. Malamphy rendered 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 Pursuant to the Board’s Decision and Order remanding the

¹ Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge’s decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

² The Department of Labor has amended the regulations implementing the Federal

case for further consideration of the evidence pursuant to 20 C.F.R. §718.202(a)(1) and 20 C.F.R. §725.310 (2000), *Berry v. Director, OWCP*, BRB No. 00-0620 BLA (Jan. 16, 2001),³ the administrative law judge found the x-ray evidence of record insufficient to establish the existence of pneumoconiosis and further found that as claimant failed to establish a change in condition or a mistake in a determination of fact, he was not entitled to modification of the previous decision denying benefits. Accordingly, benefits were denied.

On appeal, claimant generally challenges the findings of the administrative law judge. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of benefits. The Director contends that the administrative law judge properly found that the x-ray evidence failed to establish the existence of pneumoconiosis and that, even if the existence of pneumoconiosis were established, the evidence of record fails to establish that pneumoconiosis arose out of coal mine employment in this case where claimant has established fewer than ten years of coal mine employment.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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.

³ The Board affirmed the administrative law judge's finding that the existence of pneumoconiosis and complicated pneumoconiosis were not established pursuant to 20 C.F.R. §§718.202(a)(2)-(4) and 718.304.

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*).

In finding that the evidence of record failed to establish the existence of pneumoconiosis at Section 718.202(a)(1), the administrative law judge concluded that the x-rays taken through 1994 (1974-1994) were consistently interpreted as negative, that two out of the three B-readers who read the September 1, 1995 x-ray interpreted it as positive, and that the B-reader who read the 1998 x-ray interpreted it as negative. Accordingly, acknowledging that pneumoconiosis is a progressive and irreversible disease, the administrative law judge stated that he would give greater weight to the readings of the more recent x-rays. Decision and Order at 3.

The administrative law judge, however, erred in according greater weight to the negative reading of the 1998 x-ray over positive readings of the 1995 x-ray solely due to its “recency.” *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Likewise, having acknowledged that pneumoconiosis is a progressive and irreversible the administrative law judge did not explain how he concluded that the x-rays taken through 1995 (1974-1995) which culminated in two positive readings of the September 1, 1995 x-ray did not establish the existence of pneumoconiosis. *See Adkins, supra*. Moreover, while the administrative law judge noted that the 1995 x-ray was read by three “B-readers”, he did not acknowledge that these B-readers were also board-certified, a qualification which the B-reader who read the 1998 x-ray as negative did not share. Director’s Exhibit 59. This is a factor the administrative law judge must consider in weighing conflicting x-ray evidence. 20 C.F.R. §718.202(a)(1); *Adkins, supra*. Accordingly, the administrative law judge’s finding that the x-ray evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(1) and his denial of claimant’s request for modification on this basis is not supported by the evidence of record or in accordance with law. As the Director contends, however, any error by the administrative law judge in his evaluation of the evidence regarding the existence of pneumoconiosis is harmless inasmuch as the evidence of record is insufficient to establish that even if pneumoconiosis existed it arose out of coal mine employment, in this case where the miner had fewer than ten years of coal mine employment. Although the miner’s death certificate listed coal workers’ pneumoconiosis as a cause of death, Drs. Kelly, Vasudevan, Spagnolo and Hyde did not diagnose the existence of coal workers’ pneumoconiosis, Dr. Vasudevan found that the miner had no respiratory impairment arising out of coal mine employment, and Dr. Spagnolo found no abnormal lung condition. In addition, the evidence shows that the miner had less than ten years of coal mine employment and that he had other hazardous exposure. Director’s Exhibits 56, 55, 49, 42,

29, 31, 15; Claimant's Exhibit 1. *Wisniewski v. Director, OWCP*, 929 F.2d 952, 959, 15 BLR 2-57, 71 (3d Cir. 1991); *Addison v. Director, OWCP*, 11 BLR 1-68, 70 (1988); *Baumgartner v. Director, OWCP*, 9 BLR 1-65, 66 (1986); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

Accordingly, the administrative law judge's order on remand denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge