

BRB No. 01-0129 BLA

HARVEY B. MAYNOR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
ELK RUN COAL COMPANY	)	
	)	
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 Robert J. Lesnick,  
Administrative Law Judge, United States Department of Labor.

Harvey B. Maynor, Clear Creek, West Virginia, *pro se*.

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

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denying Benefits (99-BLA-0129) of Administrative Law Judge Robert J. Lesnick 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). The administrative law

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<sup>1</sup>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 20 C.F.R. Parts 718, 725, 726 (2001). All

judge determined that claimant established twenty-five years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718 (2000). The administrative law judge found that the x-ray readings and medical opinions of record failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4) (2000). Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge's findings are erroneous. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has indicated that he will not participate in this appeal.

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

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, 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 (2000); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

At Section 718.202(a)(1) (2000), the administrative law judge found that the x-ray evidence was divided amongst equally qualified readers, but that the preponderance of the evidence by dually qualified physicians who were Board-certified radiologists and B-readers did not establish the existence of pneumoconiosis. Decision and Order at 3 - 4. The administrative law judge particularly noted that Dr. Wiot, who testified to his extensive experience in detecting pneumoconiosis, including the development of the B-reader examination and as an instructor of B-reader courses, did not detect the existence of pneumoconiosis. Decision and Order at 4; Employer's Exhibits 6, 14. In concluding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) (2000), the administrative law judge acted within his discretion in relying on the numerical superiority of the negative interpretations by better qualified physicians. *See Worhach v. Director, OWCP*, 17 BLR 1- 105 (1993); *Edmiston v. F & R*

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citations to the regulations, unless otherwise noted, refer to the amended regulations.

*Coal Co.*, 14 BLR 1-65 (1990). We therefore affirm the administrative law judge's finding that claimant failed to meet his burden pursuant to Section 718.202(a)(1) (2000).

At Section 718.202(a)(4) (2000), the administrative law judge found that Drs. Rasmussen and Zaldivar examined claimant, while Drs. Castle, Jarboe, Morgan and Spagnolo provided their opinions based on a review of medical records. Of the six medical opinions, the administrative law judge found that only Dr. Rasmussen opined that claimant suffers from pneumoconiosis. The administrative law judge found that Dr. Rasmussen's diagnosis of pneumoconiosis, based upon chest x-ray evidence, was not supported by the preponderance of the x-ray evidence. Decision and Order at 5. The administrative law judge further determined that Dr. Rasmussen's opinion regarding a possible link between diffuse interstitial fibrosis and coal mine dust exposure is equivocal and contrary to the opinions of Drs. Zaldivar, Castle, Jarboe and Morgan. *Id.* Finally, the administrative law judge found that Dr. Rasmussen's diagnosis of chronic bronchitis due to coal dust exposure and smoking was sufficient to establish pneumoconiosis, but was unsupported by any of the other physicians of record. *Id.*

The administrative law judge then found that Drs. Zaldivar, Castle, Jarboe, and Morgan agreed that claimant suffers from pulmonary fibrosis unrelated to coal dust exposure, and Dr. Spagnolo agreed that claimant's pulmonary problems were unrelated to coal dust exposure. The administrative law judge additionally found that Drs. Zaldivar, Castle, Jarboe, and Spagnolo are Board-certified in pulmonary medicine, Dr. Morgan's curriculum vitae demonstrates his experience in pneumoconiosis, but Dr. Rasmussen's credentials are not contained in the record. Decision and Order at 6. In determining that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4) (2000), the administrative law judge properly considered the relative qualifications of the physicians and rationally accorded greater weight to the opinions of the physicians with superior credentials. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Therefore, we affirm the administrative law judge's determination that

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<sup>2</sup>Dr. Rasmussen diagnosed coalworkers' pneumoconiosis based on claimant's history of coal mine employment and chest x-ray evidence, chronic bronchitis due to coal mine dust exposure and smoking, and diffuse interstitial fibrosis possibly due to coal mine dust exposure, other dusts or idiopathic pulmonary fibrosis. Director's Exhibit 11.

<sup>3</sup>Dr. Spagnolo diagnosed cigarette-related chronic bronchitis, obesity and pulmonary vascular disease. Employer's Exhibit 10.

claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000).

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (2000). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000). Inasmuch as claimant has failed to establish a requisite element of entitlement, we affirm the denial of benefits. *Trent, supra*; *Perry, supra*.

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<sup>4</sup>We note that the administrative law judge did not make findings pursuant to Section 718.202(a)(2) and (3) (2000). This error does not require remand, however, as the record does not contain evidence which would establish the existence of pneumoconiosis at either subsection. *See* 20 C.F.R. §718.202(a)(2), (3) (2000). There is no biopsy evidence of record. 20 C.F.R. §718.202(a)(2) (2000). There is no evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304 (2000); the claim was not filed prior to January 1, 1982, *see* 20 C.F.R. §718.305(e) (2000); and the instant case involves a living miner's claim, *see* 20 C.F.R. §718.306(a) (2000).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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NANCY S. DOLDER  
Administrative Appeals Judge