

BRB No. 98-0252 BLA

MILTON HURLEY)
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 Claimant-Petitioner)
)
 v.)
)
 PREMIUM ENERGY, INC.) DATE ISSUED:
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 and)
)
 WEST VIRGINIA CWP FUND)
)
 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 of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Milton Hurley, Grundy, Virginia *pro se*.

K. Keian Weld (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel,¹ appeals the Decision and Order (97-BLA-726) of Administrative Law Judge Jeffrey Tureck denying benefits on a claim filed

¹ Tim White, a benefits counselor with the Stone Mountain Health Services of Vansant, Virginia, filed an appeal on behalf of claimant but is not representing him on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

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 found, and the parties stipulated to, over thirty years of coal mine employment. Considering entitlement pursuant to 20 C.F.R. Part 718, the administrative law judge concluded that the evidence of record was insufficient to establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied. On appeal, claimant generally contends that he is entitled to benefits. Employer responds urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond to 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. *McFall v. Jewell Ridge Coal Corp.*, 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 the conclusions of law are rational, supported by substantial evidence, and in accordance with the law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits 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. 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 administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. The record contains three interpretations of an x-ray taken on June 24, 1996. Director's Exhibits 17-19. The administrative law judge, in the instant case, found that the only positive interpretation of this x-ray indicated the most minimal presence of pneumoconiosis at category 1/0 opacities in only one of the six lung zones. He found that although the positive interpretation was rendered by a B-reader, Dr. Francke, it carried no weight in view of the fact that the other two x-ray interpretations, both of which were negative, were rendered also by B-readers, Drs. Forehand and Sargent. Decision and Order at 2. Inasmuch as the administrative law judge weighed the x-ray evidence not merely in terms of the quantity of negative interpretations but the qualifications of the interpreting physicians as well, *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal*

Co., 12 BLR 1-149 (1989)(*en banc*); *see also Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990), and the weight of the evidence is clearly negative for the presence of pneumoconiosis, we affirm the administrative law judge's finding that the x-ray evidence fails to establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).²

Next, the administrative law judge properly found that claimant failed to establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), noting that neither of the two physicians of record opined that claimant suffers from pneumoconiosis. Decision and Order at 3. Dr. Forehand, who examined claimant, found claimant suffering from “a mild respiratory impairment” associated with cigarette smoking. Director's Exhibit 14. Dr. Zaldivar, who reviewed the medical evidence of record, opined that there was no evidence that claimant suffers from pneumoconiosis. Employer's Exhibit 1. The administrative law judge rationally found that neither of these reports diagnosed the presence of pneumoconiosis and that claimant therefore failed to meet the requirements of Section 718.202(a)(4). Thus, we affirm the administrative law judge's finding that the medical reports of record fail to establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) as it is supported by substantial evidence. *Trent, supra*.

Inasmuch as claimant has failed to establish the presence of pneumoconiosis, an essential element of entitlement under Part 718, we affirm the denial of benefits. *See Trent, supra; Perry, supra*.

² The administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2), (3) as there is no biopsy evidence of record, this is a living miner's claim filed after January 1, 1982, and there is no evidence of complicated pneumoconiosis in the record. *See* 20 C.F.R. §§718.304, 718.305, 718.306; Decision and Order at 2-3; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge