BRB No. 99-1288 BLA

FRANKLIN D. RIFE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
EMPLOYER'S SERVICE CORPORATION	)	
	)	
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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Franklin D. Rife, Hurley, Virginia, *pro se*.

Natalie D. Brown (Jackson & Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order (98-

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[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, 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).

BLA-0990) of Administrative Law Judge Daniel J. Roketenetz 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*. (the Act). The administrative law judge credited claimant with thirty-two years of coal mine employment, and based on the filing date of June 9, 1997, adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1)-(4), 718.203 (b), and insufficient to demonstrate the presence of a totally disabling respiratory impairment due to pneumoconiosis at 20 C.F.R. §718.204(c), (b). Accordingly, benefits were denied. On appeal, claimant generally challenges the findings of the administrative law judge on the existence of pneumoconiosis and the presence of a totally disabling respiratory impairment. 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 participate in this appeal.[2]

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).

[2] We affirm the findings of the administrative law judge that employer is the properly designated responsible operator, as unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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*).[3]

After consideration of the administrative law judge's Decision and Order 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 is no reversible error. Initially, the administrative law judge acted within his discretion when he credited claimant with thirty-two years of coal mine employment based on the Social Security Earnings Statement and employer's verification of employment. *See Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); Director's Exhibits 4-6. We, therefore, affirm the finding of the administrative law judge on the length of coal mine employment.

[3] Since the miner's last coal mine employment took place in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

With respect to the merits, claimant bears the burden of establishing each and every element of entitlement. *Perry*, *supra*; *Trent*, *supra*. At 20 C.F.R. §718.202(a)(1), the administrative law judge concluded that the record contained numerous x-rays taken between 1978 and 1998[4] of which only one was read positive. The administrative law judge permissibly accorded determinative weight to the x-ray interpretations of the physicians who are both Board-certified Radiologists and B-readers. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Thus, the administrative law judge properly found that the preponderance of the x-ray evidence interpreted by the dually qualified readers was negative for the existence of pneumoconiosis, and that claimant failed to meet his burden of proof 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). The administrative law judge also correctly determined that since the record contained no biopsy or autopsy evidence, claimant could 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 did 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 properly found that the medical opinions of Drs. Forehand, Hippensteel, Morgan, and Dahhan did not diagnose either pneumoconiosis or any respiratory impairment related to coal mine employment. *See* 20 C.F.R. §§718.202(a)(4), 718.201; *Perry*, *supra*. 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) as it is supported by substantial evidence and is in accordance with law.

At 20 C.F.R. §718.204(c), claimant must prove the presence of a totally disabling respiratory or pulmonary impairment. *Beatty v. Danri Corp.*, 16 BLR 1-11 (1991), *aff'd* 49 F.3d 993, 199 BLR 2-136 (3d Cir. 1995); *Trent*, *supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). In the instant case, the administrative law judge properly concluded that the results of the two pulmonary function studies[5] and the two blood gas studies[6] of record

[4] The record contains four x-rays which were interpreted twelve times. *See* Director's Exhibits 14, 14, 26, 27, 29, 32, 34-36; Employer's Exhibits 1, 2.

[5] Drs. Randolph and Hippensteel administered pulmonary function tests during the course of their medical evaluation of claimant which yielded values above the disability values for claimant's age and height. *See* 20 C.F.R. §781.204(c)(1), Appendix B; Director's Exhibits 11, 34.

[6] The record reflects that blood gas studies were performed by Dr. Randolph on July

were nonqualifying under the regulatory criteria[7] for establishing the presence of a totally disabling respiratory impairment, and that claimant, therefore, failed to demonstrate the presence of a totally disabling respiratory impairment at Sections 718.204(c)(1) and (c)(2). *See* 20 C.F.R. §718.204(c)(1), Appendix B; 20 C.F.R. §718.204(c)(2), Appendix C; *Beatty*, *supra*; *Trent*, *supra*. The administrative law judge properly found that the record did not contain any evidence of cor pulmonale with right-sided congestive heart failure, and that claimant did not, therefore, meet his burden of proof at 20 C.F.R. §718.204(c)(3). Finally, the administrative law judge properly concluded that Drs. Randolph, Morgan, Hippensteel, and Dahhan determined that claimant could perform his usual coal mine employment from a respiratory standpoint as these physicians concluded that claimant did not have a totally disabling respiratory impairment based on the normal results of the objective tests, and that claimant therefore failed to establish a disabling respiratory impairment at Section 718.204(c)(4). *See* 20 C.F.R. §718.204(c)(4); *Beatty*, *supra*; *Trent*, *supra*. *See Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994). We, therefore, affirm the findings of the administrative law judge at 20 C.F.R. §718.204(c) and the denial of benefits as it is supported by substantial evidence.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

30, 1997 and by Dr. Hippensteel on March 11, 1998. *See* Director's Exhibits 11, 34.

[7] A "qualifying" pulmonary function study or arterial blood gas study yields values which are equal to or less than the applicable table values set forth in Appendices B and C of Part 718. *See* 20 C.F.R. §718,204(c)(1) and (c)(2). A "non-qualifying" test yields values which exceed the requisite table values.

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge