

BRB No. 96-0261 BLA

JUNIOR M. BUSH)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED:
WESTMORELAND 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 of Eric Feirtag, Administrative Law Judge, United States Department of Labor.

Junior M. Bush, Big Stone Gap, Virginia, *pro se*.

Ann B. Rembrandt (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order

¹ Claimant is Junior M. Bush, the miner, whose application for benefits filed on April 30, 1993 was denied on October 14, 1993 and again on April 7, 1994 after consideration of additional evidence. Director's Exhibits 18, 29. 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

(94-BLA-1762) of Administrative Law Judge Eric Feirtag 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 accepted the parties' stipulation to thirty-three years of coal mine employment, one dependent for

Shelton v. Claude V. Keen Trucking Co., 19 BLR 1-88 (1995)(Order).

purposes of benefits augmentation, and employer's status as the responsible operator. The administrative law judge found that the evidence failed to establish either the existence of pneumoconiosis or total respiratory disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(c) and, accordingly, denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to 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. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with 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 under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Pursuant to Section 718.202(a)(1), the administrative law judge considered all the x-ray evidence of record, which consisted of seven readings of three x-rays. Five readings were negative for pneumoconiosis while two were positive. Director's Exhibits 8-10, 24, 25; Claimant's Exhibit 1; Employer's Exhibit 1. The administrative law judge weighed the x-ray interpretations and permissibly concluded that the weight of the x-ray evidence, viewed in light of the readers' qualifications, was negative for the existence of pneumoconiosis. Decision and Order at 3; see *Adkins*

² We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment, dependency, and responsible operator status. See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

v. Director, OWCP, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990). We therefore affirm as supported by substantial evidence the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(3), the administrative law judge correctly found that the presumptions at Sections 718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. Decision and Order at 8; see 20 C.F.R. §§718.304, 718.305, 718.306. We therefore affirm this finding.³

Pursuant to Section 718.202(a)(4), the administrative law judge considered both medical opinions of record and concluded that neither physician diagnosed pneumoconiosis. Decision and Order at 3-4. Dr. Paranthaman examined claimant on behalf of the Department of Labor and initially diagnosed pneumoconiosis, Director's Exhibit 13, but later changed his opinion. After reviewing his examination report and two negative re-readings of the July 12, 1993 x-ray upon which he had relied, Dr. Paranthaman concluded that claimant "does not have any coal workers' pneumoconiosis" or any "demonstrable pulmonary impairment." Director's Exhibit 14. Dr. Forehand also examined and tested claimant and found "no evidence of coal workers' pneumoconiosis." Director's Exhibit 24. Substantial evidence supports the administrative law judge's finding pursuant to Section 718.202(a)(4), which we therefore affirm.

Because claimant has failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a necessary element of entitlement under Part 718, the denial of benefits is affirmed. See *Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

³ Although the administrative law judge did not address whether pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(2), any error is harmless, see *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), because the record contains no biopsy evidence. See 20 C.F.R. §718.202(a)(2).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

_____ REGINA C.
McGRANERY
Administrative Appeals Judge