BRB No. 99-0706 BLA

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| SAMMIE D. ROSE | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | DATE ISSUED: _____ |
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| TRIPLE M & K COAL COMPANY | ) | |
| | ) | |
| and | ) | |
| | ) | |
| AMERICAN BUSINESS AND MERCANTILE INSURANCE MUTUAL, INC. | ) | |
| | ) | |
| | ) | |
| 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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Sammie D. Rose, Elkhorn City, Kentucky, *pro se*.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant, without assistance of counsel, appeals the Decision and Order (98-BLA-0625) of Administrative Law Judge Robert L. Hillyard 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). After crediting

claimant with fifteen years of coal mine employment, the administrative law judge found that claimant failed to establish both the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and total disability under 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, employer argues that the administrative law judge's Decision and Order denying benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See 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 conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that his pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203 and 718.204. Failure to establish any one of these elements precludes entitlement. *See Perry v. Director, OWCP,* 9 BLR 1-1 (1986) (*en banc*).

After considering the administrative law judge's Decision and Order and the relevant evidence of record, we conclude that substantial evidence supports the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge correctly found that of the thirteen interpretations of three x-rays in the record, the only positive reading is of a June 23, 1997 x-ray by Dr. Westerfield, a B reader. Decision and Order at 9; Director's Exhibits 14, 16, 17, 40-43, 50; Employer's Exhibits 3-6, 8. The administrative law judge properly found that this x-ray was subsequently reread as negative by Drs. Scott, Sargent and Wheeler, who are dually qualified B-readers and Board-certified radiologists. *See Sheckler v. Clinchfield Coal Co.,* 7 BLR 1-128 (1984). Additionally the administrative law judge found that eleven of the twelve negative interpretations of record are by physicians who are B readers and/or Board-certified radiologists. As the majority of qualified physicians interpreted the x-ray evidence as negative for the existence of pneumoconiosis, the administrative law judge properly found that the x-ray evidence does not support a

finding of pneumoconiosis under Section 718.202(a)(1). *Staton v. Norfolk & Western Ry. Co.,* 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); Decision and Order at 9. Also, since the record contains no biopsy evidence in this living miner's claim or evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304, and the presumptions of pneumoconiosis at 20 C.F.R. §§718.305 and 718.306 are inapplicable to this claim filed after January 1, 1982, the administrative law judge properly found that the evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(2) and (a)(3). Decision and Order at 10.

Further, the administrative law judge properly found that the existence of pneumoconiosis is not established pursuant to Section 718.202(a)(4), as he accorded less weight to the opinion of Dr. Westerfield, the only physician of record to diagnose pneumoconiosis.[1] Decision and Order at 10-11; Director's Exhibit 41. The administrative law judge, within a proper exercise of his discretion, gave less weight to the opinion of Dr. Westerfield because his diagnosis of "pneumoconiosis, category 1/0 mirrors" his questionable positive x-ray interpretation. *Id.* The administrative law judge properly noted that the doctor's examination of claimant was essentially normal and that a diagnosis which is merely a restatement of a positive x-ray is not a reasoned opinion and may not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order at 11; *Worhach v. Director, OWCP,* 17 BLR 1-105 (1993). Moreover, the administrative law judge properly relied on the contrary opinions of Drs. Fino, Branscomb, Broudy and Fritzhand as the objective evidence of record supports their diagnosis that claimant does not suffer from pneumoconiosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 11; Director's Exhibits 14, 40, 48; Employer's Exhibits 2, 3, 7,9. Accordingly, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a).

[1]The administrative law judge properly found that Dr. Mettu's statement that claimant has been instructed to use a breathing machine, and Dr. Gibson's diagnosis of severe obstructive sleep apnea, do not support a finding of pneumoconiosis because the doctors failed to attribute any impairment to coal dust exposure. Decision and Order at 11; Director's Exhibit 47; Claimant's Exhibit 1.

Inasmuch as claimant has failed to establish the existence of pneumoconiosis, an essential element of entitlement, the denial of benefits under 20 C.F.R. Part 718 is affirmed. *See Perry, supra.* Therefore, we need not address the administrative law judge's findings under Section 718.204(c)(1)-(4). *Endrezzi v. Bethlehem Mines Corp.*, 8 BLR 1-11 (1985).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge