BRB No. 99-1222 BLA

ROGER TUTTLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Roger Tuttle, Harrisburg, Illinois, *pro se*.

Barry H. Joyner (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order - Denying Benefits (95-BLA-2177) of Administrative Law Judge John C. Holmes 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). Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant was not a coal miner as defined under the Act and that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total respiratory disability pursuant to 20 C.F.R.

[1] Claimant is Roger Tuttle, who filed an application for benefits on April 23, 1986. Director's Exhibit 1.

§718.204(c).[2] Accordingly, the administrative law judge denied benefits.[3]

On appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, the Director, Office of Workers' Compensation Programs, (the Director) urges affirmance of the denial.

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

After consideration of the Decision and Order and the evidence of record, we conclude that the administrative law judge's denial of benefits is supported by substantial evidence, contains no reversible error, and therefore, it is affirmed. Relevant to Section 718.202(a)(1), the administrative law judge correctly found that the x-ray evidence consists of five x-ray interpretations of record, two are positive and three are negative for the

[2] The administrative law judge noted that claimant alleged one and one-half years of coal mine employment. Decision and Order at p. 2 [unpaginated]; Director's Exhibit 1. It appears that the administrative law judge did not render a length of coal mine employment finding since he also found that claimant was not a coal miner as defined under the Act.

[3] With respect to claimant's *pro se* status at the formal hearing before the administrative law judge, a review of the record and hearing transcript reveals that claimant was afforded a full and fair hearing in accordance with 20 C.F.R. §725.362(b) inasmuch as the administrative law judge fully complied with the procedural safeguards delineated in *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984).

existence of pneumoconiosis. Director's Exhibits 15-18. The administrative law judge, within a proper exercise of his discretion, found the positive reading of a film dated December 15, 1992 by Dr. Manalang, a Board-eligible radiologist, entitled to less weight because this x-ray film was found to be unreadable by Dr. Cole, a Board-certified radiologist and B-reader. *See Gober v. Reading Anthracite Co.*, 12 BLR 1-67, 1-70 (1988); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at p.4 [unpaginated]; Director's Exhibits 15, 17. Likewise, the administrative law judge properly found that Dr. Rosecan's x-ray reading "compatible with pneumoconiosis" was not sufficient to establish the existence of pneumoconiosis inasmuch as Dr. Rosecan failed to provide a proper ILO-U/C classification or a basis for this opinion. *See* 20 C.F.R. §718.102(b); Decision and Order at p. 4 [unpaginated]. Inasmuch as it is within the discretion of the administrative law judge to find that the preponderance of the x-ray interpretations is negative for the existence of pneumoconiosis, *see 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); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986), and therefore, more credible and probative than the positive x-ray readings of record, we affirm the administrative law judge's finding that the x-ray evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Although the administrative law judge did not specifically render findings under Section 718.202(a)(2) and (a)(3), we deem this omission harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), since a review of the evidence of record reveals that claimant cannot establish the existence of pneumoconiosis pursuant to these subsections. There is no biopsy evidence of record, and therefore, the existence of pneumoconiosis cannot be established under Section 718.202(a)(2). Similarly, the record reveals that none of the presumptions set forth in Section 718.202(a)(3) are applicable to this case as there is no evidence of record establishing the existence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304, the instant claim was filed after January 1, 1982, *see* 20 C.F.R. §718.305, and this is a living miner's claim, *see* 20 C.F.R. §718.306. *See* 20 C.F.R. §§718.202(a)(2), (a)(3), 718.304-718.306. Hence, the record is devoid of evidence sufficient to establish the existence of pneumoconiosis under Sections 718.202(a)(2) and (a)(3).

Turning to the administrative law judge's consideration of the medical opinion evidence pursuant to Section 718.202(a)(4), a review of the record reveals that there is one physician's opinion of record. Dr. Sanjabi diagnosed chronic bronchitis due to cigarette smoking and coronary artery disease. Director's Exhibit 14. Although the administrative law judge did not render a specific Section 718.202(a)(4) determination, he correctly determined that claimant failed to satisfy his burden to affirmatively establish the existence of pneumoconiosis or a pulmonary condition related to coal dust exposure. *See* 20 C.F.R. §718.201; *Handy v. Director, OWCP*, 16 BLR 1-73, 1-76 (1990); Decision and Order at p.4

[unpaginated]. Inasmuch as the evidence of record does not contain a physician's medical opinion diagnosing the existence of coal workers' pneumoconiosis or a pulmonary disease arising out of coal dust exposure, we affirm the administrative law judge's determination that claimant failed to satisfy his burden of establishing the existence of pneumoconiosis.

Since claimant failed to satisfy his burden of affirmatively establishing the existence of pneumoconiosis pursuant to Section 718.202(a), a requisite element of entitlement under Part 718, we affirm the administrative law judge's finding that claimant is not entitled to benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).[4]

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[4] Claimant's failure to affirmatively establish the existence of pneumoconiosis, a requisite element of entitlement, obviates the necessity to address the administrative law judge's determinations regarding whether claimant was a miner as defined under the Act or pursuant to Section 718.204(c). *See Trent*, *supra*; *Perry*, *supra*.