

BRB Nos. 07-0245 BLA
and 07-0245 BLA-A

R.C.)
)
 Claimant-Petitioner)
 Cross-Respondent)
)
 v.)
)
 BADGER COAL COMPANY)
) DATE ISSUED: 11/23/2007
 Employer-Respondent)
 Cross-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

R.C., Volga, West Virginia, *pro se*.¹

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Jeffrey S. Goldberg (Jonathan L. Snare, Acting Solicitor of Labor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

¹ Claimant's daughter is assisting her father with his appeal. She filed a statement on March 8, 2007, which has been considered by the Board in rendering this decision.

PER CURIAM:

Claimant, without the assistance of legal counsel, appeals and employer cross-appeals, the Decision and Order Denying Benefits (05-BLA-5341) of Administrative Law Judge Adele Higgins Odegard, rendered on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act, as amended, 30 U.S.C. §901 *et. seq.* (the Act). Claimant filed his claim for benefits on January 21, 2003. Director's Exhibit 3. The district director issued a Proposed Decision and Order denying benefits on September 2, 2004. Director's Exhibit 44. Claimant requested a hearing, which was held on May 10, 2006.² In her Decision and Order issued October 25, 2006, the administrative law judge determined that employer was the responsible operator, and that claimant worked 8.59 years in coal mine employment. Although the administrative law judge determined that claimant was totally disabled, she found that the evidence was insufficient to establish that claimant suffered from pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits and asserts that she erred in allowing employer to submit the deposition transcript of Dr. Scattaregia.³ Employer responds to claimant's appeal, urging affirmance

² In his September 24, 2004 letter requesting a hearing, claimant challenged the district director's determination that he had only eight years of coal mine employment, and also submitted additional evidence. Director's Exhibit 46. On September 28, 2004, the district director advised claimant that the time period for submission of additional evidence expired with the issuance of the Proposed Decision and Order, but he also advised claimant that his evidence could be submitted to the Office of Administrative Law Judges (OALJ). Director's Exhibit 49. After the case was forwarded to the OALJ, employer filed a motion requesting that it be dismissed as the responsible operator. On February 7, 2006, Administrative Law Judge Robert D. Kaplan, to whom the matter was then assigned, denied employer's motion. *See* ALJ Order Denying Employer's Motion for Summary Decision Dismissing It As The Responsible Operator (Feb. 7, 2006) (unpub.). The case proceeded to hearing on May 10, 2006.

³ At the hearing, employer proffered the deposition transcript of Dr. Scattaregia, which was admitted into the record by the administrative law judge. Employer's Exhibit 5; Hearing Transcript at 28. However, in her Decision and Order, the administrative law judge acknowledged that Dr. Scattaregia's testimony was inadmissible under 20 C.F.R. §725.414(c) as the doctor did not author a medical report. Decision and Order at 14. Because the administrative law judge ultimately refused to consider Dr. Scattaregia's testimony, there has been no prejudice to claimant by the administrative law judge's initial ruling at the hearing to admit the deposition transcript into record. Moreover, because employer does not challenge the administrative law judge's evidentiary ruling

of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a brief on the merits of claimant's entitlement to benefits.

In its cross-appeal, employer challenges its designation as the responsible operator pursuant to 20 C.F.R. §725.495. Although employer agrees with the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, employer asserts that she erred in giving "negligible" weight to Dr. Wiot's negative interpretation of a September 16, 2004 CT scan. Employer also contends that the administrative law judge erred, in her general conclusion that Dr. Rajjoub's opinion was well-reasoned and deserving of consideration on the issue of whether claimant had pneumoconiosis. Employer notes, however, that if the Board affirms the administrative law judge's denial of benefits, it is not necessary for the Board to address employer's arguments on cross-appeal. The Director has filed a letter in response to employer's cross-appeal, asserting that employer was properly identified as the responsible operator. Employer has also filed a reply brief in its cross-appeal.

We first address claimant's appeal. In an appeal filed by a claimant without the assistance of legal counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence.⁴ *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he suffers from pneumoconiosis arising out of coal mine employment, and that he is totally disabled due to pneumoconiosis.⁵ 30 U.S.C. §901; 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).

After reviewing the administrative law judge's Decision and Order, the submissions of the parties, and the evidence of record, we affirm the administrative law

with respect to the exclusion of Dr. Scattaregia's testimony under Section 725.414(c), that ruling is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit since claimant's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibits 2, 7.

⁵ We affirm, as unchallenged by employer on appeal, the administrative law judge's finding that claimant established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *Skrack*, 6 BLR at 1-711.

judge's denial of benefits based on her finding that claimant failed to establish the existence of pneumoconiosis. Under Section 718.202(a)(1), the administrative law judge first considered whether claimant was able to establish the existence of pneumoconiosis based on x-ray evidence. *See* 20 C.F.R. §718.202(a)(1). The record contains seven readings of two x-rays dated May 19, 2003 and October 28, 2003. Director's Exhibits 17, 19; Claimant's Exhibits 1, 2; Employer's Exhibits 4, 5, 13. The administrative law judge correctly noted that the October 28, 2003 x-ray has one reading by Dr. Simone, a Board-certified radiologist and B reader, which was negative for pneumoconiosis. Decision and Order at 17; Employer's Exhibit 13. However, with regard to the May 19, 2003 x-ray, there was one negative reading by Dr. Bellotte, a B reader; two positive readings by Drs. Miller and Ahmed, Board-certified radiologists and B readers; and three negative readings by Drs. Wiot, Shipley, and Penne, Board-certified radiologists and B readers. Decision and Order at 17; Director's Exhibits 17, 19; Claimant's Exhibits 1, 2; Employer's Exhibits 4, 5.

In weighing the conflicting x-ray readings of the May 19, 2003 x-ray, the administrative law judge stated that she was "unable to differentiate between the interpretations of the three dually qualified physicians who read the [c]laimant's May 2003 [x]-ray as negative for pneumoconiosis and the two who interpreted that same [x]-ray as showing evidence of the disease." Decision and Order at 17. Because the administrative law judge rationally considered the positive and negative readings of the May 19, 2003 x-ray, by dually qualified physicians, to be equally probative, *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), and since the only remaining x-ray, dated October 28, 2003, has been read as negative for pneumoconiosis, we affirm her finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-65 (2004) (*en banc*).

Under Section 718.202(a)(2), the existence of pneumoconiosis may be established based on autopsy or biopsy evidence. *See* 20 C.F.R. §718.202(a)(2). The record contains a bronchoscopy, with right middle lobe bronchial biopsy, performed on April 26, 2006. Claimant's Exhibit 4. The biopsy report identifies "diffuse chronic inflammation of the airway . . . suggestive of chronic bronchitis," pulmonary parenchyma showing mild stromal fibrosis and reactive bronchial epithelial cells, with a large amount of thick white mucous in all airways. *Id.* Although the biopsy report indicates that claimant has a chronic respiratory condition, it does not specifically identify pneumoconiosis or further address the etiology of claimant's pulmonary condition. We, therefore, affirm the administrative law judge's finding that claimant was unable to establish the existence of pneumoconiosis based on the biopsy evidence under Section 718.202(a)(2). Additionally, because claimant is not eligible for any of the regulatory presumptions available to prove that he has pneumoconiosis, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20

C.F.R. §718.202(a)(3). Decision and Order at 18; *see* 20 C.F.R. §§718.304, 718.305, 718.306.

Lastly, under Section 718.202(a)(4), claimant may establish the existence of pneumoconiosis “if a physician exercising sound medical judgment, notwithstanding a negative [x]-ray” finds that he suffers from pneumoconiosis as defined at 20 C.F.R. §718.201. *See* 20 C.F.R. §718.202(a)(4). Pursuant to Section 718.202(a)(4), the administrative law judge considered four medical opinions by Dr. Bellotte, Dr. Renn, Dr. Castle and Dr. Rajjoub, claimant’s treating physician.⁶ The administrative law judge noted that Drs. Bellotte, Renn and Castle offered varying diagnoses of chronic bronchitis, chronic obstructive pulmonary disease (COPD), emphysema, and asthma, but that each physician specifically opined that claimant’s respiratory condition was unrelated to coal dust exposure. Decision and Order at 22-23.⁷

⁶ Dr. Bellotte examined claimant at the request of the Department of Labor on May 19, 2003, and diagnosed that claimant suffered from chronic obstructive pulmonary disease (COPD), asthma, emphysema, chronic bronchitis, old granulomatous disease, along with other non-respiratory conditions. Director’s Exhibits 13-17. Dr. Bellotte attributed claimant’s cardiopulmonary condition to a combination of tobacco abuse, genetics, and infection, and he specifically stated that claimant’s respiratory condition was unrelated to coal dust exposure. Director’s Exhibit 13. Dr. Renn examined claimant on November 12, 2003, and diagnosed chronic bronchitis due to cigarette smoking, asthma, and old granulomatous disease. Employer’s Exhibit 6. Dr. Renn attributed claimant’s respiratory condition to smoking and a history of asthma, unrelated to coal dust exposure. *Id.* Dr. Castle prepared a consultative report on October 26, 2005 based on his review of the medical record. Employer’s Exhibit 20. Dr. Castle opined that claimant’s x-rays showed evidence of old granulomatous disease but not coal workers’ pneumoconiosis. *Id.* He diagnosed smoking-induced airways obstruction and bronchial asthma, and further stated that these conditions were unrelated to coal dust exposure. *Id.* In a letter dated March 8, 2006, Dr. Rajjoub advised that he had been treating claimant since March 2005 for severe COPD. Claimant’s Exhibit 3. In a letter dated May 23, 2006, Dr. Rajjoub referenced claimant’s bronchoscopy report and stated that claimant “suffers from mild to moderate COPD which is a possible result from his black lung.” Claimant’s Exhibit 4. The record also includes treatment notes by Dr. Scattaregia, indicating that claimant suffers from COPD, asthmatic bronchitis and emphysema, for which he was prescribed breathing medication. Employer’s Exhibit 5. These records, however, do not address the etiology of claimant’s respiratory condition. *Id.*

⁷ The administrative law judge also noted that there was a negative CT scan reading for pneumoconiosis by Dr. Wiot, although she found that there was “no corresponding report of a CT scan test in the medical records of the [c]laimant submitted with this case” to show why the test had been ordered, and whether it had been conducted

Turning to Dr. Rajjoub's opinion, the administrative law judge stated that she considered Dr. Rajjoub to be highly qualified as a Board-certified pulmonary specialist, and that she considered his diagnosis of COPD to be reasoned and documented, based on his treatment of claimant and the results of the bronchoscopy. Decision and Order at 23. However, because she found that Dr. Rajjoub offered an equivocal diagnosis that claimant's COPD was "a possible result from his black lung," the administrative law judge permissibly concluded that Dr. Rajjoub's causation opinion was insufficient to satisfy claimant's burden to establish that coal dust exposure was a contributing factor to his respiratory condition. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); Decision and Order at 23. She also specifically observed:

Considering this physician's breadth of knowledge of pulmonary medicine, and that his specific basis of knowledge concerning the Claimant is unmatched, the fact that Dr. Rajjoub is unable to make a definitive link between coal dust exposure and the Claimant's pulmonary condition leads me to conclude that no link can be established.

Decision and Order at 23.

Thus, we conclude that the administrative law judge acted within her discretion, as trier of fact, in determining that Dr. Rajjoub's opinion failed to prove that claimant has legal pneumoconiosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*). We therefore affirm the administrative law judge's finding that claimant was unable to establish the existence of the pneumoconiosis under Section 718.202(a)(4). Furthermore, based on her analysis of all the relevant evidence, we affirm the administrative law judge's conclusion that claimant failed to establish the existence of pneumoconiosis, by a preponderance of the credible evidence, pursuant to 20 C.F.R. §718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-177 (4th Cir. 2000); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988).

Claimant bears the burden of proof and, thus, the risk of non-persuasion if his evidence is insufficient to establish an element of entitlement. *See Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Because claimant has failed to establish the

to examine claimant's lungs for evidence of a respiratory condition or some other purpose. Decision and Order at 13. Thus, she gave the CT scan reading "negligible weight." *Id.*

existence of pneumoconiosis, a requisite element of entitlement, we must affirm the administrative law judge's denial of benefits. *Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*). Based on our affirmance of the administrative law judge's denial of benefits, it is not necessary that we address employer's arguments raised on cross-appeal.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge