BRB No. 01-0178 BLA

GARY SHELTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LOFTIS COAL COMPANY,	)	DATE ISSUED:
	)	
INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
TERESA COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Gary Shelton, Belfry, Kentucky, *pro se*.

Lenore S. Ostrowsky (Arter & Hadden LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denial of Benefits (99-BLA-1170) of Administrative Law Judge Daniel J. Roketenetz 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, adjudicating this claim pursuant to 20 C.F.R. Part 718 (2000), initially dismissed Teresa Coal Company as a party to this case and designated Loftis Coal Company as the responsible operator. Next, the administrative law judge credited claimant with fifteen years of qualifying coal mine employment and found that claimant failed to establish the existence of pneumoconiosis and total respiratory disability. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating that he will not participate in this appeal.

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[1] Claimant is Gary Shelton, the miner, who filed his application for benefits on July 9, 1998. Director's Exhibit 1.

2 The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001).

3 We affirm the administrative law judge's findings regarding responsible operator and length of coal mine employment, which are not adverse to claimant, inasmuch as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 4, 5-6; *see also* Employer's Brief at 3 n.1.

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 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, a claimant must establish 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, 718.204 (2001). 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*).

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) (2000), the x-ray evidence of record consists of eighteen interpretations of seven chest x-ray films. There are a total of fourteen negative readings provided by three B-readers and six Board-certified radiologists who are also B-readers. Director's Exhibits 9, 10, 34, 35, 37-39; Employer's Exhibits 1, 5-8. The four positive readings of record were rendered by physicians with no demonstrated radiological or B-reader expertise. Director's Exhibit 36. After considering the qualitative and quantitative nature of the x-ray evidence and assessing the readings rendered by the Board-certified radiologists who are also B-readers, the administrative law judge properly found that the four positive x-ray interpretations were outweighed by the fourteen negative interpretations. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.3d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); Decision and Order at 11. Consequently, the administrative law judge accorded probative weight to the negative readings by the radiologists with demonstrated radiological expertise, and thus concluded that the existence of pneumoconiosis was not established under Section 718.202(a)(1) (2000). *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988). Because the administrative law judge properly conducted a qualitative review of the x-ray evidence by considering the radiological expertise of the readers, we affirm the administrative law judge's Section 718.202(a)(1) (2000) determination. *See* 20 C.F.R. §718.202(a)(1)(2001); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *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 6-7.

Relevant to Section 718.202(a)(2) (2000), the administrative law judge properly found that the evidence of record contains no biopsy evidence. *See* 20 C.F.R. §718.202(a)(2)

(2001); Decision and Order at 7. Additionally, under Section 718.202(a)(3) (2000), the administrative law judge correctly noted that the presumption at Section 718.304 is inapplicable because there is no evidence of complicated pneumoconiosis and, as this is a living miner's claim filed after January 1, 1982, none of the presumptions referenced in Section 718.202(a)(3) (2000) were applicable. *See* 20 C.F.R. §718.202(a)(3) (2000). Hence, we affirm the administrative law judge's findings pursuant to Sections 718.202(a)(2) and (a)(3) (2000) inasmuch as these determinations are rational and supported by the evidentiary record. *See* 20 C.F.R. §718.202(a)(2), (3) (2001), 718.304, 718.305, 718.306; Decision and Order at 7.

Turning to the administrative law judge's consideration of the medical opinion evidence pursuant to Section 718.202(a)(4) (2000), there are four physicians' opinions of record. After performing a pulmonary evaluation of claimant, Dr. Musgrave diagnosed second stage anthracosilicosis caused by coal mine employment. Director's Exhibit 36. Drs. Broudy, Younes, and Fino each opined that claimant does not suffer from coal workers' pneumoconiosis. Director's Exhibits 9, 34, 35, 38, 39; Employer's Exhibits 1, 3, 7, 8.

The administrative law judge, within a proper exercise of his discretion, determined that Dr. Musgrave's opinion was entitled to less weight because Dr. Musgrave made no mention of claimant's substantial cigarette smoking history and did not administer arterial blood gas studies (the results of blood gas studies could be indicative of a respiratory impairment). *See Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48 (1990); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-137 (1986); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); *Rickey v. Director, OWCP*, 7 BLR 1-106, 1-108 (1984); *Spradlin v. Island Creek Coal Co.*, 6 BLR 1-716, 1-719 (1984)(administrative law judge may legitimately assign less weight to medical opinion that presents incomplete picture of miner's health). The administrative law judge permissibly found that the opinions of Drs. Broudy and Younes were entitled to determinative weight inasmuch as these physicians have superior medical expertise and rendered well documented and reasoned reports based on complete pulmonary evaluations of claimant as well as considerations of claimant's work and cigarette smoking histories. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683,

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4 During the formal hearing, claimant testified that he smoked approximately one and one-half packs of cigarettes per day until undergoing open heart surgery in 1999, thereafter he reduced his smoking to one-half pack per day. Hearing Transcript at 24-25; *see* Decision and Order at 3.

5 Dr. Broudy recorded claimant's cigarette smoking history as one and one-half packs per day since the age of fifteen. Director's Exhibits 34, 38, 39; Employer's Exhibits 1, 3. Similarly, Dr. Younes recorded claimant's cigarette smoking history as one and one-half packs per day since the age of eight. Director's Exhibits 9, 35.

1-686 (1985); Decision and Order at 9. Moreover, the administrative law judge rationally found that the opinions of Drs. Broudy and Younes, that claimant does not have coal worker's pneumoconiosis, were supported by the objective laboratory evidence as well as the opinion of Dr. Fino, who reviewed the evidence of record. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 9. Inasmuch as the administrative law judge rationally found that the opinions of Drs. Broudy and Younes, as supported by that of Dr. Fino, were entitled to dispositive weight, we affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4)(2000). *See* 20 C.F.R. §718.202(a)(4) (2001).

Inasmuch as the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement in this Part 718 case, we affirm the administrative law judge's finding that claimant is not entitled to benefits. *See Trent*, *supra*; *Perry*, *supra*.

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6 Claimant's failure to affirmatively establish the existence of pneumoconiosis, a requisite element of entitlement, obviates the need to address the administrative law judge's total disability determination. *See Trent*, *supra*; *Perry*, *supra*.

Accordingly, the Decision and Order - Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge