

BRB No. 98-0134 BLA

GROVER C. POTTER)	
)	
Claimant-Petitioner))
)	
v.)	
)	
PATRICK COAL COMPANY)	DATE ISSUED:
)	
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 Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Grover C. Potter, Grundy, Virginia, *pro se*.¹

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

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

PER CURIAM:

¹Tim White, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision. See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant, without the assistance of counsel, appeals the Decision and Order (96-BLA-1782) of Administrative Law Judge Paul A. Mapes 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 adjudicated this claim² pursuant to the regulations

²Claimant filed his initial claim on March 23, 1984. Director's Exhibit 36. This claim was denied by the Department of Labor (DOL) on September 20, 1984 and March 23, 1986. *Id.* Claimant filed a request for a hearing on June 24, 1986. *Id.* However, on August 4, 1987, the DOL notified claimant that the conference scheduled for August 26, 1987 had been cancelled at claimant's attorney's request, and that claimant must request a hearing or a conference within thirty days. Administrative Law Judge's Exhibit 1. The administrative law judge stated that "[a]pparently, the claimant failed to make any response to this letter, and, as a result, the OWCP decided to treat the claim as if [it] had been abandoned on September 4, 1987." Decision and Order at 2. The administrative law judge also stated that "the OWCP apparently failed to send any notice of this determination to any of the parties and also apparently failed to prepare any documentation contemporaneously memorializing such determination." *Id.* Consequently, the administrative law judge found that "although the claimant apparently did in fact abandon his initial claim, the OWCP failed to fully comply with the notification procedures set forth in 20 C.F.R. §725.409(b) and that, as a result, the OWCP's determination that the claim had been finally denied due to abandonment may be invalid." *Id.* at 3 n.4.

contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Alternatively, the administrative law judge found all of the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found all of the evidence insufficient to establish that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. Further, the administrative law judge found all of the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Lastly, the administrative law judge found all of the evidence insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). 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 administrative law judge's Decision and Order. 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 rational, supported by substantial evidence, and 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).

In light of the questions noted by the administrative law judge surrounding the denial of the first claim, we will review the administrative law judge's alternative findings in which he considers all of the evidence of record. In finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), the administrative law judge considered all of the x-ray evidence of record. Of the forty x-ray interpretations of record, thirty-three readings are negative for pneumoconiosis, Director's Exhibits 11, 12, 21, 22, 24, 25, 34, 36, and two readings are positive, Director's Exhibits 13, 36. In addition, the administrative law judge correctly observed that "[w]hile Dr. Spitz read [five] x-rays as positive for changes consistent with pneumoconiosis, he added that there was 'no evidence of coal workers' pneumoconiosis.'"³ Decision and Order at 6; Director's Exhibit 23.

³Although Dr. Spitz provided a 1/0 classification of the x-rays dated November 13, 1984, February 21, 1991, August 9, 1992, December 2, 1993 and May 22, 1995, Dr. Spitz's recorded impression of these x-rays is that there is no evidence of coal workers' pneumoconiosis. Director's Exhibit 23.

The administrative law judge properly discounted the x-ray readings provided by Dr. Spitz because “Dr. Spitz did not explain why he concluded that the opacities were not coal workers’ pneumoconiosis.” *Id.*; see generally *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); see also *Valazak v. Bethlehem Mines Corp.*, 6 BLR 1-282 (1983). Further, the administrative law judge properly accorded greater weight to the negative x-ray readings provided by physicians who are B-readers and/or Board-certified radiologists.⁴ See *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Moreover, since thirty-three of the forty x-ray interpretations of record are negative for pneumoconiosis, substantial evidence supports the administrative law judge’s finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). See *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994); see also *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff’g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Further, we affirm the administrative law judge’s finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) since the record does not contain any biopsy or autopsy evidence. Additionally, we affirm the administrative law judge’s finding that the evidence is insufficient to

⁴The administrative law judge stated that two of the x-ray readings “which were positive for pneumoconiosis were provided by Dr. Modi and by a Dr. Sutherland.” Decision and Order at 11. The administrative law judge observed that “[t]here is no evidence that Dr. Modi or Dr. Sutherland are either B-readers or radiologists.” *Id.* In contrast, the administrative law judge observed that of the “negative x-ray interpretations [that] were provided by 14 different physicians [in the initial claim], at least 11 of [the physicians] are either B-readers or [B]oard-certified radiologists or both.” *Id.* Moreover, all of the physicians who provided negative x-ray readings in the second claim are B-readers and/or Board-certified radiologists.

establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) since none of the presumptions set forth therein is applicable to the instant claim. See 20 C.F.R. §§718.304, 718.305, 718.306. The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Similarly, claimant is not entitled to the presumption at 20 C.F.R. §718.305 because he filed his claim on March 23, 1984. See 20 C.F.R. §718.305(e); Director's Exhibit 36. Lastly, this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

Next, in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge considered all of the relevant medical opinions of record. Whereas Drs. Berry and Modi opined that claimant suffers from pneumoconiosis,⁵ Director's Exhibits 27, 36, Drs. Endres-Bercher and Sargent opined that claimant does not suffer from pneumoconiosis, Director's Exhibits 24, 36. Dr. Forehand opined that claimant suffers from an atherosclerotic cardiovascular disease.⁶ Director's Exhibit 9. The administrative law judge properly accorded determinative weight to the opinions of Drs. Endres-Bercher and Sargent over the contrary opinions of Drs. Berry and Modi because of their superior qualifications.⁷ See *Martinez v. Clayton Coal Co.*, 10 BLR

⁵Dr. Berry opined that claimant suffers from chronic obstructive pulmonary disease related to coal dust exposure. Director's Exhibit 36. Dr. Modi, in a report dated April 12, 1985, opined that claimant suffers from interstitial pulmonary fibrosis secondary to working for thirty-eight years in coal dust. Director's Exhibit 36. In a subsequent report, Dr. Modi opined that claimant suffers from coal workers' pneumoconiosis. Director's Exhibit 27.

⁶The administrative law judge correctly stated that "the initial claim also contains the first page of a January 17, 1987 report prepared for the employer by Dr. A. Dahhan." Decision and Order at 10 n. 8; Director's Exhibit 36. The administrative law judge also correctly stated that "[t]he portion of the report containing Dr. Dahhan's conclusions is missing." *Id.* at 11 n.8. Further, the administrative law judge found that "since the report is clearly incomplete, it has not been accorded any evidentiary value." *Id.* Employer does not challenge the administrative law judge's characterization of Dr. Dahhan's report.

⁷The administrative law judge stated that Dr. Sargent "is [B]oard-certified in internal, pulmonary, and critical care medicine." Decision and Order at 6. Further, the administrative law judge stated that Dr. Endres-Bercher "is [B]oard-certified in internal medicine." *Id.* at 11. The record does not contain the credentials of Drs. Berry and Modi.

1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). In addition, the administrative law judge permissibly discredited the opinion of Dr. Modi because Dr. Modi's "conviction for tax evasion and fraudulent actions in connection with the treatment of Black Lung Act beneficiaries indicates that he has lied in the past and is not necessarily trustworthy." Decision and Order at 8. The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable. See *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Thus, substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Since claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement, the administrative law judge properly denied benefits on the merits under 20 C.F.R. Part 718.⁸ See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

⁸In view of our disposition of this case on the merits at 20 C.F.R. §718.202(a), we need not address the administrative law judge's findings at 20 C.F.R. §§718.203, 718.204(c), 718.204(b) and 725.309. See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge