BRB No. 98-0138 BLA

CASBY G. BOWMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BOWMAN COAL COMPANY, INCORPORATED	)	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 Denying Benefits of Joan Huddy Rosenzweig, Administrative Law Judge, United States Department of Labor.

Casby G. Bowman, Florahome, Florida, *pro se*.

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

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order Denying Benefits (95-BLA-2138) of Administrative Law Judge Joan Huddy Rosenzweig 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). Two claims have been filed in this case. The first claim was filed by claimant in August, 1990 and was denied by

[1] As stated in the Board's Order, issued October 20, 1997, Tim White, a benefits counselor with Stone Mountain Health Services in Vansant, Virginia, on behalf of claimant, requested an appeal of the administrative law judge's Decision and Order Denying Benefits, but Mr. White is not representing claimant on appeal. *Bowman v. Bowman Coal Co., Inc.*, BRB No. 98-0138 BLA (Oct. 20, 1997)(unpub. Order); *see Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

the district director in February, 1991. Director's Exhibit 39-1; Director's Exhibit 39-15. The second claim was filed in January, 1994. Director's Exhibit 1. The administrative law judge found that because claimant's first claim was never finally denied by the district director, the two claims merged and that, therefore, claimant need not establish a material change in condition under 20 C.F.R. §725.309. Decision and Order at 3. The administrative law judge also determined that claimant established twenty-four years of coal mine employment and that Bowman Coal Company is the responsible operator. *Id*. at 4, 5. Considering the claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4). Decision and Order at 6, 11-12. Moreover, the administrative law judge found that the pulmonary function study and blood gas study evidence was not sufficient to establish the existence of a totally disabling respiratory or pulmonary impairment. Decision and Order at 7; *see* 20 C.F.R. §718.204(c)(1)-(2). Finally, the administrative law judge found that the evidence was insufficient to establish that coal mine employment contributed to any disability. Decision and Order at 12; *see* 20 C.F.R. §718.204(b). Accordingly, benefits were denied. Claimant appeals, arguing generally that the administrative law judge erred in denying benefits. Employer has submitted a response brief advocating affirmance of the administrative law judge's denial of benefits.[2] The Director, Office of Workers' Compensation Programs, has submitted a letter stating that he will not participate in the appeal unless specifically requested to do so by the Board.[3]

In an appeal by a claimant proceeding 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 Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's

[2] Employer also argues that the administrative law judge erred in designating it as the responsible operator. Employer's Brief at 3 n.1. Inasmuch as this argument is not supportive of the administrative law judge's ultimate disposition, we decline to address employer's contention as it has not been properly raised in an appeal or cross-appeal to the Board. *See King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87 (1983).

[3] We affirm the administrative law judge's finding of twenty-four years of coal mine employment inasmuch as it is not contested on appeal and is not adverse to claimant. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 order to establish entitlement to benefits under Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is a contributing cause of the miner's total disability. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).[4] Failure to prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order Denying Benefits and the evidence of record, we conclude that the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) is rational and supported by substantial evidence. With regard to Section 718.202(a)(1), the administrative law judge referenced the readers' qualifications and permissibly found that "the great preponderance" of the x-ray evidence is negative for pneumoconiosis.[5] Decision and Order at 6; Director's Exhibits 12, 16, 28, 32-34, 36, 37, 39-13; Employer's Exhibits 1-8, 10, 11; *see generally* 20 C.F.R. §718.202(a)(1); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Therefore, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the presence of pneumoconiosis at Section 718.202(a)(1).[6]

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[4] We will apply the law set forth by the United States Court of Appeals for the Fourth Circuit inasmuch as the miner's most recent coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 39-2, 39-3.

[5] The administrative law judge properly stated that Dr. Prakash noted various abnormalities on the September 18, 1990 film, but that Dr. Prakash failed to specify the profusion under the regulatory classification requirements. Director's Exhibit 39-14; *see* 20 C.F.R. §718.102(b). The administrative law judge also properly noted that while Drs. Rao and Wynne interpreted x-rays "descriptively" as positive for pneumoconiosis, they failed to comply with the classification requirements. Decision and Order at 6; Director's Exhibits 13, 30.

[6] In addition to the twenty-one negative x-ray readings, the record includes a statement by a doctor whose signature is illegible and whose credentials do not appear to be of record who diagnoses "chest (PA) - possible pneumoconiosis ILO type t/s prof 1/0 in lower lung zones." Director's Exhibit 39-7. We hold that any error by the administrative law judge in not discussing this evidence is harmless, inasmuch as the doctor's credentials do not appear to be of record and the doctor's reading is equivocal. *See* 20 C.F.R.

The administrative law judge properly found that there is no biopsy or autopsy evidence. Decision and Order at 11. Therefore, we affirm the administrative law judge's finding that the existence of pneumoconiosis cannot be established pursuant to Section 718.202(a)(2). The administrative law judge also correctly found that the presumptions set forth in 20 C.F.R. §§718.304, 718.305, and 718.306 are not applicable. *See* Director's Exhibits 1, 39-1; 20 C.F.R. §718.305(e). Therefore, we affirm the administrative law judge's finding that pneumoconiosis cannot be established under Section 718.202(a)(3).

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§718.202(a)(1); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *see also Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988).

With regard to Section 718.202(a)(4), the administrative law judge permissibly gave great weight to the medical opinions of Drs. Castle and Stewart over the contrary opinions of Drs. Prakash, Rao and Wynne because Drs. Castle and Stewart were Board-certified pulmonary specialists.[7] Decision and Order at 12; Director's Exhibits 10, 16, 30, 39-11; Employer's Exhibits 9, 12, 13, 16; *see Hicks*, *supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Moreover, the administrative law judge permissibly credited the opinions of Drs. Castle and Stewart on the basis that their conclusions were most consistent with claimant's "long history of tobacco abuse" and the credible objective evidence.[8] Decision

[7] The administrative law judge also indicated that she accorded enhanced weight to the opinions of Drs. Castle and Stewart on the basis that they are B readers. Decision and Order at 12. Inasmuch as a physician's B reader status is solely a radiological qualification, *see Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*), the administrative law judge erred in finding that the B reader status of Drs. Castle and Stewart was relevant in weighing the medical opinions under 20 C.F.R. §718.202(a)(4). However, this error is harmless inasmuch as the administrative law judge permissibly accorded enhanced weight to these physicians' opinions on the basis of their status as Board-certified pulmonary specialists. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

[8] Both Drs. Castle and Stewart opined that although claimant had a pulmonary impairment, he did not suffer from coal worker's pneumoconiosis. Employer's Exhibits 9, 12, 16, 17. Dr. Castle diagnosed bronchial asthma and tobacco induced chronic obstructive pulmonary disease and chronic bronchitis. Employer's Exhibits 9, 16, 17. Dr. Stewart also opined that claimant suffered from a cigarette induced impairment based on the nature of the abnormalities on pulmonary function testing and his history of smoking. Employer's Exhibit 12.

and Order at 12; Hearing Transcript at 20-21; Director's Exhibits 6, 7, 11, 25, 30, 39-12, 39-21; Employer's Exhibits 9, 12, 16; *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). We therefore affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) as supported by substantial evidence.

Since we affirm the administrative law judge's finding that the evidence was insufficient to establish the presence of pneumoconiosis, an essential element of entitlement, we decline to address the administrative law judge's findings concerning total disability and causation of disability pursuant to Section 718.204(c), (b), as any errors therein would be harmless. *See Perry*, *supra*; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge