

BRB No. 97-0643 BLA

TAMER E. CALHOUN, SR.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	Date Issued:
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Tamer E. Calhoun, Sr., Amonate, Virginia, *pro se*.

Douglas A. Smoot and Kathy L. Snyder (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the representation of counsel,¹ appeals the Decision and Order - Denying Benefits (95-BLA-2333) of Administrative Law Judge Gerald M. Tierney 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 found that claimant established sixteen years and ten months of coal mine employment and based on the filing date, applied the regulations found at 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and consequently denied benefits.

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 appeals, generally contending that the administrative law judge erred in failing to award benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider 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). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent 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 under Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any one of these elements precludes entitlement. See *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

The administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). The administrative law judge properly found that none of the nine x-ray readings of record was positive for pneumoconiosis, and that the record contained no biopsy or autopsy evidence. Accordingly, the existence of pneumoconiosis is not established at Section 718.202(a)(1) and (a)(2). Additionally, as this is a living miner's claim filed after January 1, 1982 in which there is no evidence of complicated pneumoconiosis, the presumptions enumerated at Section 718.202(a)(3) are inapplicable to this claim.

The administrative law judge determined that the medical evidence at Section 718.202(a)(4) is insufficient to establish the existence of pneumoconiosis. The administrative law judge properly found that none of the physicians whose opinions were in the record diagnosed pneumoconiosis. Director's Exhibit 12; Employer's Exhibit 2, 3, 4.² Noting specifically that Dr. Vasudevan's and Dr. Castle's opinions did not constitute a diagnosis of pneumoconiosis, his failure to separately consider the reports of Dr. Jarboe and Loudon is harmless error, as both physicians find that claimant did not have coal workers' pneumoconiosis. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984);

² Dr. Vasudevan found chronic obstructive pulmonary disease due to smoking, which is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.201.

See *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 416, 18 BLR 2-301 (4th Cir. 1994); Director's Exhibit 12. The remaining physicians, Drs. Castle, Loudon and Jarboe, all found no coal workers' pneumoconiosis. Employer's Exhibits 2, 3, 4.

Employer's Exhibits 2, 4. We, therefore, affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement, and affirm the denial of benefits. *See Robinson, supra; Scott, supra; Trent, supra; Gee, supra; Perry, supra.*

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge