BRB No. 97-1507

JERRY R. DAVIS	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
WEST FORK ENERGY, INCORPORATED	)	
D&P COAL COMPANY	)	
JELWELL RIDGE COAL CORPORATION	)	
SEA "B" MINING COMPANY	)	
AETNA C & S	)	
	)	
Employers-Respondents	)	
Respondents	)	
	)	
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Jerry R. Davis, Cedar Bluff, Virginia, *pro se*.

Mark E. Solomons (Arter & Hadden), Washington, D.C., for employer, West Fork Energy, Incorporated and Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer, Sea "B" Mining Company.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order -

[1]Claimant's appeal was filed on claimant's behalf by Tim White, a lay

Denying Benefits (97-BLA-0142) of Administrative Law Judge Daniel L. Leland 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 relevant procedural history is as follows: Claimant filed his original claim for benefits on November 15, 1978. The district director denied the claim on the grounds that claimant failed to establish that his pneumoconiosis arose out of coal mine employment and that he was totally disabled due to pneumoconiosis. Director's Exhibit 48. Claimant did not appeal the district director's denial of benefits. Claimant filed the instant claim for benefits on October 30, 1993. Director's Exhibit 1. On March 17, 1994, the district director determined that claimant was eligible for benefits and identified Jewell Ridge Coal Corporation/Sea "B" Mining Company(Jewell Ridge) and D&P Coal Company (D&P) as potential responsible operators. Director's Exhibits 23, 24. The case was transferred to the Office of Administrative Law Judges for a hearing. At claimant's request, Administrative Law Judge Pamela Wood granted a continuance on January 11, 1995. Director's Exhibit 62. At the second hearing, Administrative Law Judge George A. Fath remanded the case for the limited purpose of establishing the correct responsible operator. Director's Exhibits 68, 71. On October 7, 1996, the district director again found claimant entitled to benefits and further found West Fork Energy, Incorporated (West Fork) to be the responsible operator. Director's Exhibit 88. The case was transferred to the Office of Administrative Law Judges on October 29, 1996. Director's Exhibit 93.

Administrative Law Judge Daniel L. Leland (the administrative law judge) found West Fork to be the responsible operator. He credited claimant with twenty-six years and six months of coal mine employment. He found claimant had "at least a thirty-five pack year cigarette smoking history." Decision and Order at 8. Based on the newly submitted evidence, the administrative law judge found that claimant established total respiratory disability and thereby established a material change in conditions at 20 C.F.R. §725.309(d) pursuant to the governing standard in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19

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representative with Stone Mountain Health Services in Vansant, Virginia. By Order dated August 11, 1997, the Board advised claimant that his appeal would be reviewed under the provisions provided at 20 C.F.R. §802.211(e), 802.220. *See generally Shelton v. Claude V. Keene Trucking Co.,* 19 BLR 1-88 (1995).

BLR 2-223 (4th Cir. 1995). Weighing the entirety of the medical evidence, the administrative law judge considered the case on the merits and found that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a). Accordingly, he denied benefits.

On appeal, claimant generally contends that he is entitled to benefits. Employer, West Fork, urges affirmance of the administrative law judge's Decision and Order denying benefits. Sea "B" Mining Company, successor to Jewell Ridge, urges affirmance of the administrative law judge's Decision and Order.[2] The Director, Office of Workers' Compensation Programs, has elected not to participate on appeal.

In an appeal by a claimant filed 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). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

After consideration of the administrative law judge's Decision and Order - Denying Benefits and the relevant evidence of record, we conclude that the administrative law judge's Decision and Order contains no reversible error, and therefore must be affirmed.

With respect to his finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), the administrative law judge correctly set forth the entirety of the x-ray evidence, which included a total of thirty-seven readings of eight x-rays covering the period from 1977 through 1996. Decision and Order at 4. He correctly found that only two of the readings were interpreted as positive. The administrative law judge properly gave greater weight to the physicians with superior qualifications and reasonably found the "overwhelming weight" of the x-ray evidence to be negative. *See generally Sterling Smokeless Coal Co. v. Akers,* 131 F.3d

[2]We affirm the administrative law judge's finding that West Fork is the responsible operator as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

438, 21 BLR 2-269 (4th Cir. 1997); *Adkins* v. *Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). We affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1).

The administrative law judge properly found that the record contains no autopsy or biopsy evidence and that claimant is not able to establish the existence of pneumoconiosis at Section 718.202(a)(2). Furthermore, he properly found that the presumptions provided at Section 718.202(a)(3) are not available in this living miner's claim, filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis in the record. 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306.

Regarding Section 718.202(a)(4), the administrative law judge considered the reports of Drs. Buddington, Shrader and Forehand, who opined that claimant had pneumoconiosis, and Drs. Sargent, Branscomb, Fino and Castle, who opined that claimant did not have pneumoconiosis and attributed his impairment to cigarette smoking.[3] Noting that Dr. Forehand's credentials were not in the record, the administrative law judge properly gave greater weight to the opinions of Drs. Castle, Sargent, Fino and Branscomb, based on their expertise as pulmonary specialists, to find that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4). See *Worley v. Blue Diamond Coal Co., 12 BLR 1-20 (1988); see generally Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). The administrative law judge reasonably gave less weight to the opinion of Dr. Buddington at Section 718.202(a)(4), because he found Dr. Buddington's diagnosis of pneumoconiosis to be based "solely" on a positive x-ray reading, later read as negative by more qualified readers, and because Dr. Buddington failed to provide an adequate rationale for his diagnosis. *See 20 C.F.R. §718.201; Akers, supra; see generally Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Taylor v. Director, OWCP, 1-22 (1986)*. The administrative law judge, within his discretion, reasonably found the "cursory" opinion of Dr. Shrader to be of little probative value because it lacked an adequate rationale. *See Akers, supra*. Similarly, the administrative law judge properly gave less weight to the opinion of Dr. Forehand on the grounds that Dr. Forehand based his opinion on an erroneous assumption of claimant's smoking history.[4] *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Maypray*

[3]Drs. Forehand, Shrader, Castle, Sargent and Buddington were examining physicians, Director's Exhibits 13, 43, 47, 48, 59, 84, 87; Employer's Exhibit 2. Drs. Fino and Branscomb provided consultative reviews of the medical record. Director's Exhibit 67; Employer's Exhibit 1,

[4]The administrative law judge found that Dr. Forehand diagnosed chronic

v. Island Creek Coal Co., 7 BLR 1-683 (1983); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that the administrative law judge is charged with making factual findings, including evaluating the credibility of witnesses and weighing contradicting evidence. See Doss v. Itmann Coal Co., 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995). Moreover, we note that the physicians' opinions on which the administrative law judge relies do not violate the mandates of the Fourth Circuit in *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996) and *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). We therefore affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), as it is supported by substantial evidence and is in accordance with law. Inasmuch as claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement, *see Trent v. Director, OWCP, 11 BLR 1-26 (1987); Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm the administrative law judge's denial of benefits.

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bronchitis from a combination of coal dust exposure and cigarette smoking. Decision and Order at 7. *See* 20 C.F.R. §718.201. He also found that "Dr. Forehand recorded a cigarette smoking history of only seven cigarettes a day (later four cigarettes a day) beginning in the 1980's." The administrative law judge found that claimant's smoking history was "considerably heavier," "at least a thirty-five pack year smoking history." Decision and Order at 8, 9.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge