BRB No. 01-0799 BLA

ROBERT L. NEWSOME	)	
	)	
Claimant-Petitoner	)	
	)	
v.	)	DATE ISSUED:
	)	
WILGAR LAND 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 - Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Robert L. Newsome, Virgie, Kentucky, *pro se*.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER. Administrative Appeals Judges.

PER CURIAM:

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

[1] Susie Davis, a benefits counselor with Kentucky Black Lung Association of Pikeville, Kentucky, has requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Davis is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

(2000-BLA-0387) of Administrative Law Judge Joseph E. Kane 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).[2] Claimant filed the instant claim on January 15, 1998. Based on a stipulation by the parties, the administrative law judge credited claimant with at least twenty-three years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718 (2000). The administrative law judge found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). Accordingly, benefits were denied. On appeal, claimant generally contests the denial of benefits. Employer has not responded to this appeal. The Director, Office of Workers' Compensation Programs, has not filed a brief on the merits in this appeal.

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. *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, are supported by substantial evidence, and are in accordance with 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, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2000). Failure of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. In his consideration of the evidence pursuant to Section 718.202(a)(1) (2000), the administrative

[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 20 C.F.R. Parts 718, 722, 725, and 726. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

law judge discussed the thirty-one x-ray readings of twenty x-rays, as well as the qualifications of the readers. Decision and Order at 5-7; Director's Exhibits 9-11, 23, 26-27, 29. The administrative law judge correctly found that all of the x-ray readings were negative for the presence of pneumoconiosis, except the readings by Drs. Anderson and Myers. Decision and Order at 15; Director's Exhibit 10. The administrative law judge assigned diminished weight to the interpretations by Drs. Anderson and Myers in light of the negative readings by dually qualified B readers and Board-certified radiologists that came before and after these readings. Decision and Order at 15. The administrative law judge thus reasonably found that the clear preponderance of the x-ray interpretations by the readers with superior qualifications was negative. *See Staton v. Norfolk & Western Railway Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc)*; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Decision and Order at 15. We, therefore, affirm the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) (2000) as it is supported by substantial evidence.

Further, the administrative law judge properly concluded that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(2) (2000) as there was no biopsy evidence in the record. *See* 20 C.F.R. §718.202(a)(2) (2000); Decision and Order at 15. In addition, the administrative law judge correctly found that the presumptions enumerated at Section 718.202(a)(3) (2000) are inapplicable to this claim as the record contains no evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304 (2000); claimant filed his claim after January 1, 1982, *see* 20 C.F.R. §718.305 (2000); and this is not a survivor's claim. *See* 20 C.F.R. §718.306 (2000); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986); Decision and Order at 15.

In weighing the medical opinions of record on the issue of the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000), the administrative law judge rationally concluded that this evidence failed to establish the existence of pneumoconiosis by a preponderance of the evidence. *Perry*, *supra*. In so finding, the administrative law judge acted within his discretion as fact-finder in concluding that the opinion of Dr. King in the hospitalization records and treatment notes, noting a history of pneumoconiosis and silicosis, failed to provide medical evidence supportive of the diagnosis. Decision and Order at 15; Director's Exhibits 13, 29. In addition, Dr. King's statement that claimant suffered from asthma failed to establish the existence of pneumoconiosis since he did not relate the respiratory condition to coal mine employment. *See Shaffer v. Consolidation Coal Co.*, 17 BLR 1-56 (1992); *Biggs v. Consolidation Coal Co.*, 8 BLR 1-317 (1987).

The opinions of Drs. Anderson and Myer diagnosing pneumoconiosis were also

rationally accorded little weight as they were based upon the physicians' positive x-ray readings which were reread as negative by more qualified readers. Decision and Order at 16; Director's Exhibit 10; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark*, *supra*. In addition, the administrative law judge permissibly found that Dr. Younes's opinion, that claimant has chronic obstructive pulmonary disease and chronic bronchitis due to asthma which was "probably" aggravated by occupational dust exposure, was too equivocal as the physician failed to identify the specific etiology which formed the basis for his diagnosis, and therefore the administrative law judge properly accorded this opinion little weight. Decision and Order at 16; Director's Exhibit 9; *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Trumbo*, *supra*; *Clark*, *supra*; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Moreover, the administrative law judge rationally found that the contrary medical opinions of Drs. Wise, Fino and Broudy, who concluded that claimant had asthma and did not have pneumoconiosis or an impairment related to coal mine employment, were well reasoned and well documented, *see* Decision and Order at 11-14, and their conclusions were supported by the hospitalizations which show a continuing diagnosis of asthma. *Clark*, *supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-146 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); Decision and Order at 16, Director's Exhibits 10, 21, 26, 29; Employer's Exhibits 1-2. The administrative law judge thus acted within his discretion as fact-finder in concluding that there was no basis in the record to credit the opinions of Drs. King, Anderson, Myers and Younes, who diagnosed pneumoconiosis, over the contrary opinions of Drs. Wise, Fino and Broudy.

The administrative law judge is empowered to weigh and draw inferences from the medical evidence, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark*, *supra*. The administrative law judge's findings pursuant to Section 718.202(a)(1)-(4) (2000) are supported by substantial evidence, and thus are affirmed. Inasmuch as claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement under Part 718, *see Trent*, *supra*, we affirm the administrative law judge's finding that claimant is not entitled to benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge