BRB No. 07-0255 BLA

R.A.F.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BETHENERGY MINES, INCORPORATED	)	
	)	DATE ISSUED: 09/27/2007
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

R.A.F., Nanty Glo, Pennsylvania, *pro se*.

Rita Roppolo (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (04-BLA-5948) of Administrative Law Judge Richard A. Morgan 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). This case involves a claim filed on June 24, 2002. After crediting claimant with eighteen years of coal mine employment, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The

administrative law judge also found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's denial of benefits. Employer has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue 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 findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance 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 in a living miner's claim, a 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 establish 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*).

The administrative law judge correctly found that there were no positive x-ray interpretations in the record.[1] Decision and Order at 4. Consequently, we affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Because there is no biopsy evidence of record, the administrative law judge accurately found that claimant could not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 4. Furthermore, the

[1] The record contains interpretations of three x-rays taken on June 12, 2003, June 26, 2003, and November 29, 2004. Dr. Fino, a B reader, interpreted claimant's June 12, 2003 x-ray as negative for pneumoconiosis. Director's Exhibit 33. Dr. McNiesh, a reader whose radiological qualifications are not found in the record, interpreted claimant's June 26, 2003 x-ray as revealing "no worrisome finding." Director's Exhibit 16. Dr. Ranavaya, a B reader, interpreted claimant's June 26, 2003 x-ray for quality purposes only. *Id.* Dr. Pickerill, a B reader, interpreted claimant's November 29, 2004 x-ray as negative for pneumoconiosis. Employer's Exhibit 1.

administrative law judge properly found that claimant was not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3).[2] *Id.*

A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[3] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In considering whether the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge reviewed the reports and deposition testimony of Drs. Khan, Fino, and Zlupko. The administrative law judge permissibly found that Dr. Khan's opinion, that claimant's small airway obstructive disease was attributable to "probable tobacco [and] coal dust exposure," was too equivocal to constitute a diagnosis of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order at 8; Director's Exhibit 16.

The administrative law judge also correctly noted that Drs. Fino and Zlupko each opined that claimant did not suffer from pneumoconiosis. Decision and Order at 8; Director's Exhibit 33; Employer's Exhibits 1-3. The administrative law judge found that Dr. Fino's opinion, that claimant did not suffer from pneumoconiosis, was entitled to the greatest weight based upon Dr. Fino's superior qualifications.[4] *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Because it is based upon substantial evidence, the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) is affirmed.

In light of our affirmance of the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R.

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[2] Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed this claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, because this claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

[3] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[4] The administrative law judge correctly noted that, while Drs. Khan, Fino, and Zlupko are each Board-certified in Internal Medicine, Dr. Fino is also Board-certified in Pulmonary Disease. Decision and Order at 7; Director's Exhibits 16, 33; Employer's Exhibit 1.

§718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); *Trent*, 11 BLR at 1-27; *Gee*, 9 BLR at 1-5; *Perry*, 9 BLR at 1-2. Consequently, we need not address the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge