

BRB No. 96-1351 BLA

AMEDEO MERLI (deceased))	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	DECISION and ORDER
Respondent)	

Appeal of the Decision and Order on Remand of James Guill, Administrative Law Judge, United States Department of Labor.

Frank A. Mazzeo, Scranton, Pennsylvania, for claimant.

Jennifer U. Toth (J. Davitt McAteer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: SMITH, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand (87-BLA-0997) of Administrative Law Judge James Guill 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 is before the Board for the third time. The miner's claim for benefits, filed pursuant to 20 C.F.R. Part 727, was denied by Administrative Law Judge Frank J. Marcellino in a Decision and Order issued in 1984.

¹ Marie Merli, widow of Amedeo Merli, the miner, is pursuing this claim, which the miner filed on July 12, 1979. Director's Exhibit 1. Section 422(l) of the Act, 30 U.S.C. §932(l), relieves survivors of the burden of filing a claim and proving their own entitlement to benefits in cases involving awards to deceased miners on claims filed prior to January 1, 1982. *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989).

Director's Exhibit 18. The miner timely requested modification pursuant to 20 C.F.R. §725.310, which Administrative Law Judge John J. Forbes, Jr. denied after *de novo* consideration of the claim in a Decision and Order issued in 1988. Director's Exhibits 19, 23, 25. Pursuant to the miner's appeal, the Board vacated the denial of benefits for reasons that are not the subject of this appeal, and remanded the case in part for the administrative law judge to consider entitlement pursuant to 20 C.F.R. Part 718 if benefits were not awarded under Part 727. *Merli v. Director, OWCP*, BRB No. 88-1663 BLA (Apr. 26, 1990)(unpub.).

On remand, Administrative Law Judge James Guill concluded that entitlement was not established under either Part 727 or Part 718. Pursuant to the miner's appeal, the Board affirmed as unchallenged the administrative law judge's findings under Part 727 and Section 718.204(c)(1)-(3), but vacated the administrative law judge's finding pursuant to Section 718.202(a)(1) because he failed to consider a positive x-ray reading, and his findings at Sections 718.202(a)(4) and 718.204(c)(4) because he failed to discuss relevant testimony by the miner's treating physician. *Merli v. Director, OWCP*, BRB No. 93-0814 BLA (Sep. 27, 1994)(unpub.). Accordingly, the Board remanded the case for further consideration. On second remand, Judge Guill considered the evidence as instructed and found that the evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). He also concluded that the evidence established the existence of a totally disabling respiratory impairment pursuant to Section 718.204(c), but that disability causation pursuant to Section 718.204(b) could not be established in light of the failure to prove the existence of pneumoconiosis at Section 718.202(a).

On appeal, claimant contends that the administrative law judge erred in his weighing of the x-ray evidence. Claimant further asserts that the administrative law judge failed to adequately consider Dr. Aquilina's opinion or accord it proper deference as the opinion of a treating physician. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, the miner must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Pursuant to Section 718.202(a)(1), claimant contends that the administrative law judge erred in discrediting the positive x-ray readings by Drs. Parillo and Marshall.

Claimant's Brief at 6. The record contains eight readings of seven x-rays. Director's Exhibits 9, 10, 15, 29, 36; Claimant's Exhibits 1-3. Five readings were negative and three were positive. Four of the five negative readings were rendered by board-certified radiologists or B-readers. The administrative law judge properly weighed all of the readings in light of the readers' radiological qualifications and found the weight of the x-ray evidence to be negative for the existence of pneumoconiosis. [1996] Decision and Order on Remand at 2-3. In so doing, the administrative law judge permissibly accorded diminished weight to Dr. Parillo's positive reading because his credentials were not of record. See *Rankin v. Keystone Coal Mining Corp.*, 8 BLR 1-54, 1-56 (1985). Contrary to claimant's apparent contention that the administrative law judge found that Dr. Marshall was "not qualified," Claimant's Brief at 6, the administrative law judge considered Dr. Marshall's qualifications as a B-reader in weighing the x-ray evidence. [1996] Decision and Order on Remand at 2. Therefore, we reject claimant's contentions and affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).²

² In his prior Decision and Order, Judge Guill correctly found pursuant to Section 718.202(a)(2) and (3) that the record contains no biopsy evidence and the presumptions at Sections 718.304, 718.305, and 718.306 are inapplicable in this living miner's claim in which the miner established fewer than fifteen years of coal mine employment and in which there is no evidence of complicated pneumoconiosis. [1992] Decision and Order at 8; see 20 C.F.R. §§718.304, 718.305, 718.306. We now affirm those findings.

Pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge failed to consider Dr. Aquilina's diagnosis of pneumoconiosis as instructed or accord his opinion proper weight in light of his status as the miner's treating physician. Claimant's Brief at 6-8. Contrary to claimant's contention, the administrative law judge considered the entirety of Dr. Aquilina's written opinion and deposition testimony as instructed, and took into account his status as a treating physician. [1996] Decision and Order on Remand at 3-8. An administrative law judge may, but is not required to credit the opinion of a treating physician, see *Berta v. Peabody Coal Co.*, 16 BLR 1-69 (1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), and in this case, the administrative law judge permissibly concluded that Dr. Aquilina's reliance on an inaccurate history of occupational dust exposure "detract[ed] from an otherwise credible report." [1996] Decision and Order at 6; see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). Specifically, Dr. Aquilina stated that his diagnosis of pneumoconiosis was based in part on his belief that the miner had no other dust exposure beyond his ten and one-half years of coal mine employment, which ended in 1966.³ Director's Exhibits 1, 24. However, the miner provided a work history to Dr. Levinson and testimony indicating exposure to asbestos during his twenty years of non-coal mine employment as a pipefitter, a position he held subsequent to his coal mine employment. Director's Exhibits 1, 28; [1984] Hearing Transcript at 26-28; [1988] Hearing Transcript at 23-50. Under these circumstances, the administrative law judge permissibly questioned the basis of Dr. Aquilina's diagnosis. See *Clark, supra*. Therefore, we reject claimant's contentions and affirm the administrative law judge's finding pursuant to Section 718.202(a)(4).

Because claimant has failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a necessary element of entitlement under Part 718, the denial of benefits is affirmed. See *Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

³ Dr. Aquilina stated that the miner's work history was "[v]ery important in my diagnosis," and testified that the miner had "at least ten years [of] coal dust exposure with no hazard[ous] exposure that I'm aware of after leaving the mining industry. Certainly there was no exposure to asbestos." Claimant's Exhibit 5 at 24, 35.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge