BRB No. 99-0777 BLA

ROY K. NICHOLS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BEATRICE POCAHONTAS COMPANY	)	DATE ISSUED:
	)	
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 Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

Roy K. Nichols, Grundy, Virginia, *pro se*.

Douglas A. Smoot (Jackson & Kelly, PLLC), Charleston, West Virginia, for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order (98-BLA-00889) of Administrative Law Judge Lawrence P. Donnelly denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety

[1]Ron Carson, 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, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Act of 1969, as amended, 30 U.S.C. § 901 *et seq*. (the Act). The administrative law judge found at least twenty-nine years of coal mine employment and based on the date of filing, adjudicated the claim pursuant to the provisions of 20 C.F.R. Part 718.[2] Decision and Order at 2-3. The administrative law judge concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(c). Accordingly, benefits were denied. On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he would not participate 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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *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, supported by substantial evidence, and are in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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. Failure 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)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, 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. The administrative law judge, in the instant case, permissibly determined that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) as all of the x-ray readings were negative. Director's Exhibits 15, 16, 29, 30, 32, 36; Employer's Exhibit 1; Decision and Order at 3-4; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir.

[2]Claimant filed this claim for benefits on May 23, 1997. Director's Exhibit 1.

1992); *Edmiston v. F & R Coal Co*., 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1988)(*en banc*). We, therefore, affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) as it is supported by substantial evidence.

Further, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) since the record does not contain any biopsy results demonstrating the presence of pneumoconiosis. Decision and Order at 3. Additionally, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) since none of the presumptions set forth therein are applicable to the instant claim.[3] *See* 20 C.F.R. §§718.304, 718.305, 718.306; Decision and Order at 3; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

The administrative law judge also properly considered the entirety of the medical opinion evidence of record and properly determined that the medical opinions were insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4) as all of the opinions indicate that claimant does not suffer from the disease or any coal dust related condition.[4] Decision and Order at 4-5; Director's Exhibits 13, 29; *Clark, supra*; *Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987); *Perry, supra*; *King v. Consolidation Coal Co*., 8 BLR 1-262 (1985).

[3]The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 because he filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

[4]Dr. Forehand examined claimant on June 27, 1997, and opined that there was no evidence of active pulmonary disease and no respiratory impairment. Director's Exhibit 13. Dr. Hippensteel examined claimant on January 20, 1998, and opined that claimant did not have coal workers' pneumoconiosis or any pulmonary impairment from any cause that would keep him from working at his regular job in the mines. Director's Exhibit 29.

With respect to 20 C.F.R. §718.204(c), the administrative law judge rationally found the evidence insufficient to establish total disability. *Piccin, supra*. The administrative law judge properly found that total disability was not established pursuant to Section 718.204(c)(1)-(3) as all of the pulmonary function studies and blood gas studies of record produced non-qualifying values[5] and there is no evidence of cor pulmonale with right sided congestive heart failure in the record. See 20 C.F.R. §718.204(c)(1)-(3); Director's Exhibits 12, 14, 29; Decision and Order at 5; *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Further, the administrative law judge considered the relevant medical opinion evidence of record and properly found that the opinions were insufficient to establish claimant's burden of proof as no physician opined that claimant was totally disabled. Decision and Order at 5; Director's Exhibits 13, 29; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Perry, supra*.

Consequently, we affirm the administrative law judge's findings that the evidence of record is insufficient to establish the existence of pneumoconiosis and total disability pursuant to Sections 718.202(a) and 718.204(c) as they are supported by substantial evidence and are in accordance with law. Inasmuch as claimant has failed to establish the existence of pneumoconiosis and total disability, requisite elements of entitlement pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *Trent, supra*; *Perry, supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[5]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix B, C respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

MALCOLM D. NELSON, Acting
Administrative Appeals Judge