BRB No. 00-0556 BLA

DONALD R. HENLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COWIN AND COMPANY, INCORPORATED	)	
	)	
	)	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 on Second Remand of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Donald R. Henley, Rogersville, Tennessee, *pro se*.

Bobby Steve Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant in response to Order of February 21, 2001.

Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

Michael J. Rutledge (Judith E. Kramer, 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, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order on Second Remand (1995-BLA-0025) of Administrative Law Judge Clement J. Kichuk 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] This case is before the Board for the third time. In the initial Decision and Order, Administrative Law Judge Christine McKenna found that employer was not the responsible operator herein because it rebutted the presumption that claimant was regularly exposed to coal dust in its employ pursuant to 20 C.F.R. §725.492(c) (2000). Judge McKenna then found that although claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000), the evidence of record was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000), or disability causation pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, benefits were denied.

On appeal, the Board reversed Judge McKenna's finding of rebuttal at Section 725.492(c) (2000) and reinstated employer as the responsible operator herein. The Board affirmed Judge McKenna's findings that claimant established total respiratory disability but failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(3) (2000). The Board, however, vacated Judge McKenna's finding pursuant to Section 718.202(a)(4) (2000) and remanded the case to the administrative law judge to determine whether the medical opinions of record

[1]Claimant is Donald R. Henley, the miner, who filed a claim for benefits on July 26, 1993. Director's Exhibit 1.

[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

established the existence of pneumoconiosis as defined at 20 C.F.R. §718.201 (2000), to calculate the length of claimant's coal mine employment, and, if necessary, to determine whether his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203 (2000) and if pneumoconiosis was a substantial contributing factor in the cause of claimant's total disability at Section 718.204(b) (2000). *Henley v. Cowin & Co., Inc.*, BRB Nos. 96-1170 BLA and 96-1170 BLA-A (Sept. 29, 1997)(unpub.).

On remand, Administrative Law Judge Clement J. Kichuk (the administrative law judge) credited claimant with seventeen years of qualifying coal mine employment and found that claimant established the existence of pneumoconiosis arising out his coal mine employment and total disability due to pneumoconiosis. Accordingly, benefits were awarded. On appeal, the Board vacated the administrative law judge's findings and remanded the case to the administrative law judge to determine whether the medical opinion evidence establishes that claimant's pulmonary condition is significantly and permanently aggravated by dust exposure in coal mine employment and, consequently, establishes the existence of pneumoconiosis. *Henley v. Cowin & Co., Inc.*, 21 BLR 1-147 (1999).

On remand, in the instant Decision and Order, the administrative law judge considered the medical opinion evidence and found that claimant failed to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. Accordingly, benefits were denied. In the instant appeal, claimant generally contends that the administrative law judge erred in failing to find that claimant established entitlement to benefits. Employer responds urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, responds, declining to submit a brief on appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which claimant, employer and the Director have responded.[3] Based on the briefs submitted by the parties,

[3]In briefs dated March 5 and March 13, 2001, employer asserted that the regulations at issue in the lawsuit do not affect the outcome of the case. Employer also stated that if the Board believes that the new regulations somehow affect the disposition of this appeal, the

and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of 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 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 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 pursuant to 20 C.F.R. Part 718 (2000), claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2000); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Failure to prove any of these requisite elements compels a denial of benefits. *See Anderson*, *supra*; *Baumgartner*, *supra*. Additionally, all elements of entitlement must be established by a preponderance of the evidence. *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Pursuant to Section 718.202(a)(4) (2000), the Board remanded the case for the administrative law judge to determine whether claimant's pulmonary condition is significantly and permanently aggravated by dust exposure in coal mine

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case must be stayed for the duration of the briefing, hearing and decision schedule in accordance with the preliminary injunction of the United States District Court for the District of Columbia. In a brief dated March 2, 2001, the Director, Office of Workers' Compensation Programs, asserted that the regulations at issue in the lawsuit do not affect the outcome of the case. However, in a brief dated February 27, 2001, claimant asserted that the amended regulations would affect the outcome of the case. The amendments to the regulations cited by claimant at 20 C.F.R. §718.104(d) apply only to claims filed after January 19, 2001, and thus do not apply to the instant claim. Although claimant also argues that 20 C.F.R. §718.201(c), as amended, explicitly recognizes that pneumoconiosis is a latent and progressive disease, claimant has not demonstrated, and we cannot discern, how the administrative law judge's analysis and weighing of the evidence is impacted by the revisions to this regulation.

employment. *Henley,* 21 BLR at 1-151. In the instant Decision and Order, the administrative law judge reconsidered the medical opinions of Drs. Harding, Deaton, Russakoff and Branscomb regarding claimant's pulmonary condition. Drs. Harding, Deaton and Russakoff opined that claimant has sarcoidosis which, though not caused by claimant's coal mine dust exposure, is aggravated by his exposure to coal mine dust. Director's Exhibits 11, 30, 31. Dr. Branscomb diagnosed sarcoidosis and asthma and stated that it was his opinion that:

> the coal mine dust aggravates the symptoms of sarcoid and asthma when he is in the coal mine and for a day or two after he comes out but not longer...Furthermore, the temporary adverse effects of coal mining on his two diseases is non-specific and no different than would be any other dust, for example working as a motor grader or any other dusty job.

Director's Exhibit 32.

The administrative law judge, while accepting the opinions of the physicians who opined that claimant's sarcoidosis is aggravated by his exposure to coal mine dust, acted within his discretion in giving the greatest weight to Dr. Branscomb's opinion that the effects of claimant's breathing coal dust do not permanently aggravate his sarcoidosis because Dr. Branscomb's opinion is well reasoned, fully documented, supported by the doctor's medical findings and test data, and presented in a detailed and persuasive report based on his examination of claimant and his review of the medical evidence of record. Decision and Order on Second Remand at 6; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Hutchens v. Director,* OWCP, 8 BLR 1-16 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Inasmuch as the administrative law judge rationally found that claimant's pulmonary condition is not permanently aggravated by his exposure to coal mine dust, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000) and total disability due to pneumoconiosis pursuant to Section 718.204(b) (2000), as well as the denial of benefits. 20 C.F.R. §718.201 (2000); *Henley, supra.*

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge