BRB No. 00-0621 BLA

ALVIN NECESSARY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL 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 Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Alvin Necessary, Tannersville, Virginia, *pro se*.

Douglas A. Smoot and Kathy L. Snyder (Jackson & Kelly, PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order (99-BLA-0524) of Administrative Law Judge Stuart A. Levin denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, review of the administrative law judge's decision, but is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[2] In this duplicate claim, the administrative law judge found that claimant's prior claim had been finally denied in 1983 because the evidence failed to establish the existence of pneumoconiosis. In light of the parties stipulation at the hearing, the administrative law judge credited claimant with 26.47 years of coal mine employment, and based on the filing date of January 9, 1998, adjudicated this claim pursuant to 20 C.F.R. Part 718.[3] The administrative law judge found the evidence

[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.

[3] Claimant filed his initial application for benefits on September 14, 1973 which the district director denied in September 1979 after finding the evidence insufficient to establish the existence of pneumoconiosis arising out of coal mine employment and a totally disabling respiratory impairment due to pneumoconiosis. *See* Director's Exhibit 28. Claimant took no further action. On April 13, 1983, claimant filed his second application for benefits which the district director denied on August 13, 1984 on the grounds that claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment and a totally

of record insufficient to establish the existence of pneumoconiosis. Further, the administrative law judge found that even though new blood gas data was qualifying, when earlier blood gas data was nonqualifying, neither physician who reviewed the qualifying blood gas date attributed the results, or any respiratory impairment, to claimant's coal mine work. Accordingly, benefits were denied. On appeal, claimant generally challenges the findings of the administrative law judge under 20 C.F.R. Part 718. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as a matter of law. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.[4]

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 the Director has responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case.

Employer, however, contends that two challenged regulations, 20 C.F.R. §718.201(c)

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disabling respiratory impairment due to pneumoconiosis. *See* Director's Exhibit 29-1, 29-20. Claimant took no further action until he filed the present claim on January 9, 1998. *See* Director's Exhibit 1.

[4] We affirm the findings of the administrative law judge on the designation of employer as the responsible operator as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We also affirm the administrative law judge's crediting of claimant with 26.47 years of coal mine employment based on the parties stipulation at the hearing. *See Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996).

(defining pneumoconiosis as a latent and progressive disease), and 20 C.F.R. §718.204(a) (specifying that a nonrespiratory disability is irrelevant to whether a miner is totally disabled due to pneumoconiosis), affect the outcome of this case. Based on the briefs submitted by the parties and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Review of the record reveals no evidence implicating 20 C.F.R. §718.201(c). Further review indicates that all of the physicians agree that claimant has an impairment which is respiratory in nature, and that no physician believes that claimant suffers from a nonrespiratory or nonpulmonary disability. Therefore, contrary to employer's assertion, 20 C.F.R. §718.204(a) is not implicated on this record. Additionally, based on our review, we conclude that none of the other challenged regulations affects the outcome of this case. Therefore, we 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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 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 in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove 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 one 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. Claimant bears the burden of establishing each and every element of entitlement. *Perry, supra*; *Trent, supra*. The administrative law judge properly found that all the x-ray interpretations in evidence were negative for the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1). *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Perry, supra*. Likewise, the administrative law judge correctly determined that the existence of pneumoconiosis was not established since the record contained no biopsy or autopsy evidence, and claimant was a living miner whose claim was filed after January 1, 1982, and who did not have complicated pneumoconiosis. 20 C.F.R. §§718.202(a)(2), (3), 718.304, 718.305(e), 718.306.

Further, the administrative law judge properly found that the medical opinions of Drs. Forehand and Hippensteel did not diagnose clinical pneumoconiosis or pneumoconiosis as defined under the Act. *See* 20 C.F.R. §§718.202(a)(4), 718.201. In so doing, the administrative law judge correctly found that although the two most recent blood gas studies met the regulatory standards for disability, neither Dr. Forehand nor Dr. Hippensteel, who performed these tests, attributed the hypoxemia shown by the tests to claimant's coal mine employment. *See Nance v. Benefits Review Board*, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988); *Henley v. Cowan and Company, Inc.*, 21 BLR 1-147 (1999); *Perry*, *supra*. Thus, the administrative law judge properly determined that the evidence of record was insufficient to establish that the etiology of claimant's impairment was coal dust exposure, and thus, claimant failed to meet his burden of proof at 20 C.F.R. §§718.202(a)(4), 718.201, 718.204(c). We, therefore, affirm the finding of the administrative law judge as it is supported by substantial evidence and is in accordance with law.[5]

[5] Although the administrative law judge failed to discuss the opinions of Drs. Zaldivar, Loudon and Jarboe, who reviewed medical records of claimant relevant to his application for black lung benefits, and the 1983 medical report of Dr. Taylor, any error is harmless as none of these physicians diagnosed a respiratory impairment related to claimant's coal mine employment. *See* 20 C.F.R. §§781.202(a)(4), 718.201, 718.204(c). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Director's Exhibits 10, 29-14; Employer's Exhibits 7, 9.

Accordingly, the Decision and Order of the administrative law judge 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