BRB No. 00-0664 BLA

CHARLES WILSON GARRETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
KARST ROBBINS COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Charles Wilson Garrett, Ben Hur, Virginia, *pro se*.

Laura Metcoff Klaus and Darren E. Pogoda (Arter & Hadden, LLP), Washington, D.C., for employer.

Helen H. Cox (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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of legal counsel,[1] appeals the Decision and Order (1999-BLA-0634) of Administrative Law Judge Daniel A. Sarno, Jr., 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] The administrative law judge adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718 (2000).[3] The administrative law judge reviewed the evidence submitted subsequent to the previous denial to determine whether claimant established a material change in conditions pursuant to 20 C.F.R. §725.309(d) (1999)[4] in accordance with *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994) and found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, 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).

[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 claim for benefits on February 17, 1987, which was denied by the district director on June 19, 1987. Decision and Order at 2; Director's Exhibit 42-1. No further action was taken on that claim. *Id*. Claimant filed his second claim for benefits on February 13, 1990, which was denied by the district director and and administrative law judge. The denial was ultimately affirmed by the Board. *Garrett v. Karst Robbins Coal Co.*, BRB No. 95-1799 BLA (June 26, 1996)(unpub.). Decision and Order at 2; Director's Exhibits 43. No further action was taken on that claim. *Id*. The instant claim was filed on January 2, 1998. Decision and Order at 2; Director's Exhibit 1.

[4] The amendments to the regulation at 20 C.F.R. §725.309 do not apply to claims, such as this, which were pending on January 19, 2001; rather, the version of this regulation as published in the 1999 Code of Federal Regulations is applicable. *See* 20 C.F.R. §725.2(c), 65 Fed. Reg. 80,057 (2000).

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 March 2, 2001, to which employer and the Director have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case.[5] Based on the briefs submitted by employer and the Director, 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 administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, are supported by substantial evidence, and are in accordance with 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 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 (2000). Failure of claimant 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).

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. In his consideration of the evidence pursuant to Section 718.202(a)(1) (2000), the administrative law judge listed the sixteen interpretations of the five new x-rays taken between October 28, 1997 and May 5, 1999, as well as the

[5] Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on February 21, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

qualifications of the readers. Decision and Order at 4; Director's Exhibits 16-17, 20-21, 35; Claimant's Exhibits 1, 4; Employer's Exhibits 1-2, 6. The administrative law judge assigned diminished weight to the October 28, 1997 and May 5, 1999, positive x-ray interpretations by Dr. Smiddy since the doctor possessed no special radiological qualifications. Decision and Order at 4; Director's Exhibit 18; Claimant's Exhibit 1. Of the remaining readings, the administrative law judge noted there was only one positive reading, by a dually qualified B reader and Board-certified radiologist, whereas there were thirteen negative readings, ten by dually qualified B readers and board-certified radiologists and three by B readers. Decision and Order at 4; Director's Exhibits 16-17, 20-21, 35; Employer's Exhibits 1-2, 6. Relying on the dually qualified B readers and Board-certified radiologists, the administrative law judge reasonably found that the clear preponderance of the x-ray interpretations by the readers with superior qualifications was negative. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc)*; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Decision and Order at 4.

Further, the administrative law judge properly concluded that the provisions of Section 718.202(a)(2) (2000) and the presumptions enumerated at Section 718.202(a)(3) are inapplicable to this claim as the record contains no biopsy evidence or evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304 (2000); claimant filed his claim after January 1, 1982, *see* 20 C.F.R. §718.305 (2000); and this is not a survivor's claim. *See* 20 C.F.R. §718.306 (2000); Decision and Order at 4.

In weighing the newly submitted medical opinions of record, the administrative law judge also rationally concluded that this evidence failed to establish the existence of pneumoconiosis by a preponderance of the evidence pursuant to Section 718.202(a)(4) (2000).[6] *Perry*, *supra*. In so finding, the administrative law judge acted within his discretion as fact-finder in concluding that the opinions of Drs. Paranthaman, Smiddy and Irvin, who diagnosed the existence of pneumoconiosis, were conclusory and thus entitled to little weight, as the physicians failed to explain the rationale for their diagnoses. *Clark*, *supra*; Decision and Order at 5-9. Moreover, while acknowledging Dr. Paranthaman's credentials as a pulmonary specialist, the administrative law judge ultimately discounted the physician's opinion, that claimant's impairment was due to a combination of smoking and coal dust exposure, because Dr. Paranthaman's reports, one in 1990 and the newly submitted 1998 report, did not differ qualitatively and both lacked an explanation for the physician's

[6] The record also contains the medical reports of Drs. Dahhan, Michos and Fino, who concluded that claimant does not have pneumoconiosis. Director's Exhibits 19, 21; Employer's Exhibit 4.

conclusion that coal dust exposure played a role in claimant's impairment. *Ross, supra*; Decision and Order at 6-7; Director's Exhibits 13-4, 43-19-4. Similarly, the administrative law judge gave less weight to the opinions of Drs. Smiddy and Irwin because the physicians relied on previously discredited evidence, provided no rationale for their conclusions and did not specify the effect of claimant's smoking history. *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); Decision and Order at 7-9. The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000). *Anderson*, *supra*; *Trent, supra*. Inasmuch as claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (2000), we affirm the administrative law judge's denial of benefits. *Trent, supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge