BRB No. 00-0671 BLA

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| RAYMOND E. RICHLIN | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| SUSCON SALES CORPORATION | ) | DATE ISSUED: |
| | ) | |
| and | ) | |
| | ) | |
| AMERICAN MINING 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 of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Raymond E. Richlin, Dushore, Pennsylvania, *pro se*.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (99-BLA-0419) of Administrative Law Judge Ainsworth H. Brown 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).[1] The administrative law judge credited

[1]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

claimant with twenty years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4)(2000). The administrative law judge also found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(2000).[2] Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Neither employer nor the Director, Office of Workers' Compensation Programs (the Director), has filed a brief in response to claimant's appeal.[3]

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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.

[2]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

[3]Inasmuch as the administrative law judge's length of coal mine employment finding, which is not adverse to this *pro se* claimant, is not challenged on appeal, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 Ass'n 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,[4] to which claimant and the Director have responded. In a brief dated March 19, 2001, the Director indicated that it is her position that the instant case would not be affected by application of the revised regulations. The Director, therefore, indicated that the Board could decide the instant case. In a letter dated March 17, 2001, claimant did not address the issue of whether application of the amended regulatory provisions would affect the outcome of the instant case. Rather, claimant indicated that he was unable to obtain a lawyer to assist him in this case. Claimant also indicated that he wanted to either have all of the x-ray readings taken out of the record or have all of the x-ray readings reread.[5] Based on the brief submitted by 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 on appeal to be whether the Decision and Order below is supported by substantial evidence. *See 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 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).

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[4]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 March 2, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case. Employer has not filed a brief in response to the Board's Order.

[5]In view of our holding that claimant waived his right to be represented and that the administrative law judge provided claimant with a full and fair hearing, *see* discussion, *infra*, we reject claimant's assertion that he did not receive a fair hearing with regard to the development of the x-ray evidence. *See Shapell v. Director, OWCP*, 7 BLR 1-304 (1984). Nonetheless, we note that claimant may file a request for modification pursuant to 20 C.F.R. §725.310.

Initially, we note that claimant appeared before the administrative law judge without the assistance of counsel. Based on the facts of the instant case, we hold that there was a valid waiver of claimant's right to be represented, *see* 20 C.F.R. §725.362(b), and that the administrative law judge provided claimant with a full and fair hearing, *see Shapell v. Director, OWCP*, 7 BLR 1-304 (1984); Hearing Transcript at 15, 16, 18, 29-30, 35-37, 38-59.

We next address the administrative law judge's consideration of the claim on the merits pursuant to 20 C.F.R. Part 718. Since all of the x-ray readings of record are negative for pneumoconiosis, we affirm the administrative law judge's finding that this evidence is insufficient to establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1); Employer's Exhibits 1-5, 14, 15. Next, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis by biopsy or autopsy evidence as there is no such evidence in the record. *See* 20 C.F.R. §718.202(a)(2). In addition, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis since there is no evidence of complicated pneumoconiosis in this living miner's claim which was filed after January 1, 1982. *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306.

Further, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4)(2000). The record contains the newly submitted reports of Drs. Dittman, Galgon and Levinson. Drs. Dittman and Galgon opined that claimant does not suffer from coal workers' pneumoconiosis. Employer's Exhibits 4, 5. Dr. Levinson diagnosed chronic obstructive pulmonary disease due to obstructive sleep apnea and exogenous obesity. Director's Exhibit 12. Since none of the physicians of record opined that claimant suffers from pneumoconiosis or any chronic obstructive lung disease arising out of coal mine employment, we hold that substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis by medical report. *See* 20 C.F.R. §718.202(a)(4); *Shoup v. Director, OWCP*, 11 BLR 1-110 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Since claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement, we hold that the administrative law judge properly denied benefits under 20 C.F.R. Part 718.[6] *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry, supra*.

[6]In view of our disposition of the case at 20 C.F.R. §718.202(a), we decline to address the administrative law judge's findings at 20 C.F.R. §718.204(c)(2000). *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge