BRB No. 00-1120 BLA

ARTHUR RONDAL HELTON Claimant-Petitioner v. GREAT WESTERN RESOURCES, INCORPORATED and UNDERWRITERS' SAFETY AND CLAIMS, INCORPORATED Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Remand of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Mark D. Goss (Goss & Goss Attorneys), Harlan, Kentucky, for claimant.

Ronald E. Gilbertson (Ben, Boyd & Lloyd, PLLC), Washington, D.C., for employer.

Helen H. Cox (Howard M. Radzely, 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 appeals the Decision and Order Denying Benefits on Remand (96-BLA-1192) of Administrative Law Judge Richard E. Huddleston on a claim[1] 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

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[1] Claimant is Arthur Helton, the miner, who filed his application for benefits on December 13, 1988. 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.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9,

initial Decision and Order, Administrative Law Judge Charles W. Campbell adjudicated this claim pursuant to 20 C.F.R. Part 718 (2000), credited claimant with seventeen and one-quarter years of qualifying coal mine employment, and found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b) (2000), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204 (2000). Accordingly, benefits were awarded. Director's Exhibit 37.

Pursuant to an appeal by employer, the Board affirmed Judge Campbell's findings pursuant to 20 C.F.R. §718.204(c)(1)-(3) (2000) because they were unchallenged on appeal, but vacated his weighing of the medical evidence under 20 C.F.R. §§718.202(a)(1), 718.204(b), and 718.204(c)(4) (2000), and remanded the case for reconsideration of the case under those sections. *Helton v. Great Western Resources, Inc.*, BRB. No. 92-1114 BLA (Jun. 21, 1995)(unpub.); Director's Exhibit 37.

On remand, the case was assigned to Administrative Law Judge Richard E. Huddleston (administrative law judge), who, based upon the parties' agreement, remanded the case to the district director for further development of the evidence of record. Following the receipt of this evidence, the district director returned the case to the administrative law judge for adjudication. Although the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment and total disability, he found that claimant failed to establish total disability due to pneumoconiosis, and accordingly, denied benefits.

Pursuant to claimant's appeal, the Board vacated the administrative law judge's determination that claimant failed to establish that his total disability was due to pneumoconiosis and remanded the case for further consideration of that issue. The Board

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2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

declined to address employer's arguments regarding the existence of pneumoconiosis, however, inasmuch as they were not raised in a cross-appeal. *Helton v. Great Western Resources, Inc.*, BRB. No. 98-1248 BLA (Jun. 16, 1999)(unpub.).

Subsequently, employer requested *en banc* reconsideration of the Board's decision. Although denying employer's request for *en banc* reconsideration, the Board granted employer's request for reconsideration and, upon further reflection, vacated the administrative law judge's finding that the x-ray and medical opinion evidence established the existence of pneumoconiosis and remanded the case for reconsideration of the x-ray and medical opinion evidence on that issue. Accordingly, the Board modified its previous Decision and Order and remanded the case for reconsideration of the evidence relevant to the existence of pneumoconiosis in addition to disability causation. *Helton v. Great Western Resources, Inc.*, BRB. No. 99-1248 BLA (Feb. 17, 2000)(unpub. Order).

On remand, the administrative law judge found that neither the x-ray evidence nor the medical opinion evidence was sufficient to establish the existence of pneumoconiosis. Benefits were, accordingly, denied.

On appeal, claimant argues that the administrative law judge erred in failing to consider claimant's significant coal mine exposure history in finding that the evidence did not establish the existence of pneumoconiosis. Employer responds, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating his intention not to participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and 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, a claimant must establish that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that his pneumoconiosis is totally disabling. 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*).

Claimant contends, in light of his significant coal dust exposure of twenty-three years, that the administrative law judge erred in not according greater weight to the opinions of the physicians who diagnosed the existence of pneumoconiosis. In finding the evidence insufficient to establish the existence of pneumoconiosis, the administrative law judge accorded greater weight to the x-ray readings of the readers who were both B-readers and

Board-certified radiologists, and greater weight to the opinions of the physicians who found the evidence insufficient to diagnose the presence of pneumoconiosis because they were better supported by the objective evidence than the opinions of the physicians who diagnosed the existence of pneumoconiosis.

Contrary to claimant's contention, the length of claimant's coal mine employment does not compel the conclusion that claimant suffers from coal worker's pneumoconiosis. *See Sahara Coal Co. v. Fitts*, 39 F.3d 781, 783, 18 BLR 2-384, 2-387 (7th Cir. 1994) (occupational exposure is not evidence of pneumoconiosis); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998) (length of coal mine employment does not compel conclusion that disability is solely respiratory); *Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985). We, therefore, reject claimant's contention in this regard. Further, because claimant offers no additional legal or factual challenge to the administrative law judge's consideration of the evidence, we must affirm the administrative law judge's finding that the medical evidence in the instant case is insufficient to establish the existence of pneumoconiosis. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-49 (6th Cir. 1986); *Sarf v. Director, OWCP*; 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Consequently, because we affirm the administrative law judge's finding that claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement in this Part 718 case, we must affirm the denial of benefits. *See Trent*, *supra*; *Perry*, *supra*.

Accordingly, the administrative law judge's Decision and Order Denying Benefits on Remand is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge