BRB No. 00-1127 BLA

FRANK J. SAMULEVICH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
SILVERBROOK ANTHRACITE, INC.	)	
	)	
and	)	
	)	
CONSTITUTION STATE SVCS., CO.	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Maureen Herron and A. Judd Woytek (Marshall, Dennehey, Warner, Coleman & Goggin), Bethlehem, Pennsylvania, for employer.

Edward Waldman (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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2000-BLA-00307) of Administrative Law Judge Robert D. Kaplan awarding 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 adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718 (2000).[2] The administrative law judge accepted employer's stipulation that

[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 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, 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.

[2] Claimant filed his initial claim for black lung benefits on July 6, 1978, which was denied by the district director on March 28, 1979. Claimant filed his second claim for benefits on June 16, 1980, which was denied by the district director on September 5, 1980. Claimant filed his third claim for benefits on June 10, 1981, which was denied by the district director on July 23, 1981. Claimant filed his fourth claim for benefits on May 24, 1982, which was denied by the district director on October 13, 1982 and October 3, 1983. These claims were subsequently denied by Administrative Law Judge Paul H. Teitler and the decision was ultimately affirmed by the Board. *Samulevich v. Silverbrook Anthracite, Inc.*, BRB No. 88-165 BLA (June 30, 1989)(unpub.); Director's Exhibit 41. Claimant filed his fifth claim for benefits on August 31, 1990, which was denied by the district director on November 27, 1990. Director's Exhibit 42. Claimant filed his sixth claim for benefits on December 5, 1991, which was denied by the district director on February 25, 1992. Director's Exhibit 43. Claimant filed his seventh claim for benefits on March 5, 1993, which was denied by the district director in an undated letter. Director's Exhibit 44. Claimant filed his eighth claim for benefits on June 6 , 1994, which was denied by the district director on October 20, 1994.

claimant had eighteen and one-half years of coal mine employment and suffers from pneumoconiosis arising out of coal mine employment and a totally disabling respiratory impairment pursuant to 20 C.F.R. §§718.204(a), 718.203(c) and 718.204(c) (2000) and thus that a material change in conditions was established pursuant to 20 C.F.R. §725.309(d) (2000). The administrative law judge further found, based on the evidence submitted subsequent to the previous denial and on his review of all of the evidence in the record, that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in his determination that claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204(b) (2000).[3] Claimant has not filed a response brief and the Director, Office of Workers' Compensation Programs (the Director), has not filed a brief on the merits of 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 applicable law, they are binding upon the 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Director's Exhibit 45. Claimant filed his ninth claim for benefits on October 27, 1995, which was denied by the district director on February 20, 1996. Director's Exhibit 46. Claimant filed his tenth claim for benefits on March 6, 1997, which was denied by the district director on April 23, 1997. Director's Exhibit 47. No further action was taken on these claims. The instant claim was filed on May 4, 1998. Director's Exhibit 1.

[3] The administrative law judge's finding that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b) (2000) and total disability pursuant to 20 C.F.R. §718.204(c) (2000) are unchallenged on appeal and are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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. 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)(*en banc*).

Employer contends that the administrative law judge erred in finding that the evidence was sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) (2000). We agree. The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that to establish total disability due to pneumoconiosis pursuant to Section 718.204 (2000), claimant must prove the causal connection of pneumoconiosis and total disability by showing that the disease is a "substantial contributor" to the disability. *Bonessa v. United States Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).

In the instant case, the administrative law judge considered the medical reports of Drs. Talati, Sahillioglu, Wolanin, Stienmetz, Naeye, Levinson, Shane and Katlic. Decision and Order at 4-6; Director's Exhibits 7, 20-21, 23, 24B, 25, 35, 46-47; Claimant's Exhibits 1-2; Employer's Exhibit 2. The administrative law judge found that Drs. Talati, Sahillioglu, Wolanin, Stienmetz, Naeye, Levinson and Shane either did not address the issue or opined that claimant's impairment was not due to pneumoconiosis. Decision and Order at 6. The administrative law judge, however, found that claimant established he was totally disabled due to pneumoconiosis by according greater weight to the opinion of Dr. Katlic as claimant's treating physician. Decision and Order at 6. The administrative law judge specifically stated:

> As I noted at the hearing, Dr. Katlic's reports upon which Claimant relies, are far from crystal clear regarding the causation question. (Transcript 28-33). Upon further reflection, I find that the physician's statements are clear enough to determine that he was of the opinion that Claimant's pneumoconiosis was serious, and so serious as to be a substantial contributor to his total pulmonary disability that was primarily due to the lung cancer. In his first letter, Dr. Katlic was explicit in stating that Claimant's lungs were "jet black in color ... with anthracotic nodules surrounded by interstitial chronic inflammation and fibrosis." In his second letter, the physician reiterated the "jet black" color of the right lung "due to exposure to coal dust." Although it might be argued that Dr. Katlic's statements go to the issue of the presence of pneumoconiosis, I infer that he intended to convey the opinion that Claimant's pneumoconiosis was a substantial contributor to his pulmonary impairment. The physician's

> final statement that Claimant has "severe lung disease from which he is totally disabled" bolsters this conclusion.

Decision and Order at 6.

A review of the record indicates that Dr. Katlic, who treated claimant for lung cancer, diagnosed pneumoconiosis and also opined that claimant "clearly has severe lung disease from which he is totally disabled." Decision and Order at 4-5; Claimant's Exhibits 1-2. While an administrative law judge is charged with the evaluation and weighing of the medical evidence and may draw appropriate inference, therefrom, *see Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986), the administrative law judge's inference, in this case, that Dr. Katlic "intended to convey the opinion" that claimant's pneumoconiosis was a substantial contributor to his totally disabling respiratory impairment, is not supported by the evidence of record. Decision and Order at 6; Claimant's Exhibits 1, 2.

Employer correctly argues that the administrative law judge's conclusion regarding Dr. Katlic's opinion is speculative and mischaracterizes the evidence. Contrary to the administrative law judge's finding, Dr. Katlic did not specifically express an opinion that claimant's pneumoconiosis is a substantial contributor to his totally disabling respiratory impairment. Claimant's Exhibits 1-2. Therefore, Dr. Katlic's opinion is insufficient as a matter of law to establish the causal connection that claimant's total disability was due to his pneumoconiosis. Moreover, given this record, the administrative law judge's finding, "that the medical evidence as a whole establishes that pneumoconiosis was a substantial contributor to Claimant's total disability," is not supported by substantial evidence. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); Decision and Order at 13.

Furthermore, inasmuch as we have determined that the only evidence relied on by claimant to establish total disability due to pneumoconiosis is insufficient to meet claimant's burden of proof, we must reverse the administrative law judge's award of benefits.

Accordingly, the Decision and Order of the administrative law judge awarding benefits is reversed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge