BRB No. 00-0278 BLA

CHESTER COY ADAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HARLAND CUMBERLAND COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
EMPLOYERS INSURANCE OF WAUSAU	)	
	)	
Employer/Carrier Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Chester Coy Adams, Delphia, Kentucky, *pro se*.

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on

[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 is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Remand (96-BLA-1290) of Administrative Law Judge Donald W. Mosser 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). This is the second time this case has been on appeal before the Board. On May 4, 1999, the Board affirmed the administrative law judge's application to this claim of the regulations at 20 C.F.R. Part 718, and his findings of a 21 year qualifying coal mine employment history and that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(c). The Board also affirmed the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1)-(3), but vacated the administrative law judge's findings that the existence of pneumoconiosis and total disability due to pneumoconiosis were not established pursuant to Sections 718.202(a)(4), 718.204(b). The Board remanded the case for the administrative law judge to reconsider the evidence regarding the length of claimant's smoking history and coal mine employment, the qualifications of the physicians, and the opinions of Drs. Lane and Dineen pursuant to Sections 718.202(a) and 718.204(b). *Adams v. Harland Cumberland Coal Co.*, BRB No. 98-1095 BLA (May 4, 1999)(unpub.). On remand, the administrative law judge concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Accordingly, benefits were denied. On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in 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. *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 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. Failure 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*).

After consideration of the administrative law judge's Decision and Order, the arguments raised, and the evidence of record, we conclude that the administrative law judge's Decision and Order on Remand is supported by substantial evidence and contains no reversible error. Considering the various opinions regarding claimant's smoking history, the administrative law judge rationally accorded determinative weight to Dr. Gilbert's opinion on claimant's smoking history because he was claimant's treating physician and had been

treating claimant for breathing problems. Thus, we affirm the administrative law judge's finding that claimant smoked one pack per day beginning at age seventeen, continuing for twenty-six years until 1990, gradually reducing the amount he was smoking per day. *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Hall v. Director, OWCP*, 8 BLR 1-262 (1985). Turning to the physician's opinions regarding the existence of pneumoconiosis, the administrative law judge permissibly accorded little weight to the opinions of Drs. Sundaram and Baker, which diagnosed pneumoconiosis, because they based their opinions primarily on a positive x-ray and exposure history. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1982); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). In addition, the administrative law judge permissibly accorded less weight to Dr. Baker's opinion because he assumed a smoking history which was substantially less than that found by the administrative law judge and a length of coal mine employment greater than the 21 years established by the evidence. *Addison, supra*; *Stark, supra*. Regarding Dr. Lane's opinion which found no evidence of coal worker's pneumoconiosis, but found chronic obstructive pulmonary disease due to smoking, the administrative law judge permissibly found that Dr. Lane's opinion was entitled to less weight in light of his letter of August 9, 1997 stating that "coal worker's pneumoconiosis does not cause an obstructive impairment" which is contrary to the broad definition of pneumoconiosis provided by the Act. Employer's Exhibit 6; *see* 20 C.F.R. §718.201; *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 174-75, 19 BLR 2-265, 2-269 (4th Cir. 1995); *Eagle v. Armco Inc.*, 943 F.2d 509, 511 n.2, 15 BLR 2-

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[2] As instructed by the Board, the administrative law judge considered claimant's cigarette smoking history which included reports from four doctors: a 1992 report from Dr. Baker noting claimant's smoking history as one pack per day for sixteen to seventeen years and that he was currently smoking less than one pack per day, Director's Exhibit 28; a 1994 report from Dr. Sundaram noting that claimant started smoking at age eleven and was currently smoking one-third pack per day, Director's Exhibit 11; a report from Dr. Lane noting that claimant smoked less than one pack per day for thirty years and was currently smoking one-third pack per day, and a report from Dr. Dineen noting that claimant stated that he smoked one-half pack per day for seven or eight years and quit eight years ago, but stating that claimant's carboxyhemoglobin level confirmed continued exposure to significant amounts of smoke. Director's Exhibit 36. The administrative law judge also considered records from Dr. Gilbert (1990-1997), claimant's treating physician, which noted that claimant began smoking at 17 and smoked one pack per day for 26 years. Director's Exhibit 28; Claimant's Exhibit 3, and claimant's testimony that he started smoking in his twenties, never smoked much, and wasn't currently smoking. Tr. at 20-21.

[3] The Act defines pneumoconiosis as a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. 30 U.S.C. §902(b).

201, 2-203-04 n.2 (4th Cir. 1991). Turning to Dr. Dineen's opinion, that claimant did not have coal worker's pneumoconiosis, but did have obstructive disease secondary to chronic bronchitis, the administrative law judge concluded that Dr. Dineen's statements were not based on a premise contrary to the Act since Dr. Dineen stated that "he was aware of medical studies indicating pneumoconiosis could cause an obstructive impairment and that even with a negative x-ray, he believes coal dust can cause an obstructive defect, although it happens rarely." Decision and Order on Remand at 5; Director's Exhibit 39. *Stiltner*, *supra*; *Warth*, *supra*; *Eagle*, *supra*. The administrative law judge, therefore, permissibly accorded greater weight to Dr. Dineen's opinion, because of his superior qualifications, because his opinion was better supported by the objective evidence of record, *Onderko*, *supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985), and because he fully explained his position on deposition. We, therefore, affirm the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) as supported by substantial evidence and in accordance with law. Inasmuch claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *Trent*, *supra*; *Perry*, *supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[4] As instructed by the Board, the administrative law judge reconsidered the qualifications of the physicians of record and correctly stated that Dr. Lane is Board certified in internal medicine and that Dr. Baker is Board certified in internal and pulmonary medicine. Decision and Order on Remand at 2. The administrative law judge found that Dr. Dineen is Board-certified in pulmonary medicine. Decision and Order on Remand at 5.

REGINA C. McGRANERY
Administrative Appeals Judge