BRB No. 02-0264 BLA

DENNIS CORNETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
BENHAM COAL COMPANY	)	
	)	
Employer-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 - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Dennis Cornett, Gilley, Kentucky, *pro se.*

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand - Denial of Benefits (96-BLA-1616) of Administrative Law Judge Robert L. Hillyard 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] This case is

[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 20 C.F.R. Parts 718, 722, 725 and 726 (2000). All citations to the regulations, unless otherwise noted refer to the amended regulation.

before the Board for the second time. On remand from the United States Court of Appeals for the Sixth Circuit, Administrative Law Judge Robert L. Hillyard (the administrative law judge) found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2).[2] Accordingly, the administrative law judge denied the claim.

The relevant procedural history of this case is as follows: Claimant filed his claim for benefits with the Department of Labor (DOL) on October 19, 1992. Director's Exhibit 1. Following a hearing, the administrative law judge issued a Decision and Order dated November 28, 1997, in which he denied benefits because the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2000) and total respiratory disability due to pneumoconiosis pursuant to Section 718.204(2000). Following claimant's appeal to the Board without the assistance of counsel, the Board affirmed the administrative law judge's finding that the evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2000), and thereby, affirmed the denial of benefits. *Cornett v. Benham Coal Co.*, BRB No. 98-0480 BLA(Dec. 22, 1998)(unpub.). Claimant's motion for reconsideration was denied by the Board in an Order dated March 19, 1999. Claimant filed an appeal with the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit vacated the administrative law judge's findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2000) and total respiratory disability due to pneumoconiosis pursuant to Section 718.204(2000) and remanded the case for the administrative law judge to reconsider the evidence pursuant to these subsections. *Cornett v. Benham Coal Co.*, 227 F. 3d 569, 22 BLR 2-107 (6th Cir. 2000). On remand, the administrative law judge again found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and total respiratory disability pursuant to Section 718.204(b)(2)(iv). Accordingly, the administrative law judge denied the claim. Claimant filed the instant appeal with the Board without the benefit of counsel.

In an appeal by a claimant filed 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. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's

[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).

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). Employer and the Director ,Office of Workers' Compensation Programs, have each declined to file a response brief in this appeal.

In order to establish entitlement to benefits in a living miner's claim, claimant must establish that the miner has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. Failure to prove any of these requisite elements of entitlement compels a denial of benefits. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).[3]

We first address the administrative law judge's findings that the medical opinion evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(4). When this case was on appeal to the Sixth Circuit, the court determined that the administrative law judge mischaracterized the opinions of Drs. Vaezy and Baker[4], as he erroneously found that

[3]The Board's affirmance of the administrative law judge's original findings that the evidence fails to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(3)(2000) was left undisturbed by the United States Court of Appeals for the Sixth Circuit. *Cornett v. Benham Coal Co.*, BRB No. 98-0480 BLA, slip op. at 2-3 (Dec. 22, 1998)(unpub.); *Cornett v. Benham Coal Co.*, 227 F. 3d 569 , 577, 22 BLR 2-107, 2-123 (6th Cir. 2000).

[4]Dr. Vaezy diagnosed pneumoconiosis and chronic obstructive pulmonary disease due to a combination of smoking and coal dust exposure. Director's Exhibit 44; Claimant's Exhibit 2. Dr. Baker opined that claimant suffers from pneumoconiosis and chronic obstructive pulmonary disease due to both cigarette smoking and coal dust exposure. Director's Exhibit

those opinions were based only upon an x-ray and a history of coal dust exposure, when in reality they were based upon a physical examination, an x-ray, work, smoking and personal histories, and pulmonary functions studies. In addition, the court held that the administrative law judge improperly gave less weight to the opinions of Drs. Vaezy and Baker because they both found that the obstructive ventilatory defect they observed could have been caused by either smoking or coal dust exposure. The court stated that "this can be viewed as tantamount to a finding that both coal dust exposure and smoking were operative factors."

10; Claimant's Exhibit 1.

Cornett, supra at 576; 22 BLR at 2-121. Thus, the court rejected the administrative law judge's bases for discounting the opinions of Drs. Vaezy and Baker. Citing *Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984),[5] the court held that the opinions of Drs. Vaezy and Baker could, in fact, establish the existence of statutory pneumoconiosis. The court remanded the case for reconsideration of these medical reports.

[5]The Sixth Circuit, in *Southard*, held that claimant need establish only that his respiratory impairment arose "at least in part" out of his coal mine employment in order to satisfy the statutory definition of pneumoconiosis set forth at 20 C.F.R. §718.201(c). *Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26, (6th Cir. 1994).

On remand, the administrative law judge weighed the relevant opinions, and concluded that they were insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4). Specifically, the administrative law judge weighed the opinions of Drs. Vaezy and Baker, who determined that claimant suffered from pneumoconiosis against those of Drs. Broudy, Dahhan and Fino, all of whom opined that claimant did not suffer from pneumoconiosis. The administrative law judge permissibly discounted the opinions of Drs. Vaezy and Baker because he correctly found that both doctors relied upon inaccurate smoking histories. Dr. Vaezy utilized a 12.5 pack year history (one-half pack for 25 years). Director's Exhibit 44; Claimant's Exhibit 2. Dr. Baker utilized a 5-6 pack year smoking history. Claimant's Exhibit 1; Decision and Order on Remand at 9. The administrative law judge permissibly found, based upon claimant's hearing testimony that claimant smoked at least 1 pack of cigarettes per day for 32 years for a 32 pack year history. H. Tr. at 20-21; Decision and Order on Remand at 7-8. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Piniansky v. Director, OWCP*, 7 BLR 1-171 (1984). In addition, the administrative law judge permissibly gave greater weight to the opinions of Drs. Broudy, Dahhan and Fino[6] because he found that they were based upon more extensive testing, and thus, were better supported by the objective evidence of record. *See Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *McMath v. Director, OWCP*, 12 BLR 1-6(1988); *Rafferty v. Jones & Laughlin Steel Corp*., 9 BLR 1-231 (1987). We affirm, therefore, the administrative law judge's finding that the evidence fails to establish the existence of pneumoconiosis at Section 718.202(a)(4).

Because claimant has failed to establish the existence of pneumoconiosis at Section 718.202(a), a finding of entitlement is precluded. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry, supra*.[7]

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[6]The Sixth Circuit stated that the administrative law judge did not consider whether these three "adverse" doctors, especially Dr. Fino, were using the more restrictive medical definition of pneumoconiosis when they determined that claimant did not suffer from that condition. *Cornett, supra;* 227 F. 3d 576; 22 BLR 2-122. On remand, the administrative law judge found that Dr. Fino addressed claimant's specific breathing impairment and explained why it was unrelated to claimant's coal mine work in the absence of significant fibrosis, consistent with the applicable definition of "legal pneumoconiosis". Decision and Order at 10-12. The administrative law judge also found that Dr. Fino's report was adequately documented, a finding that is within his discretion. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

[7]We decline to address the administrative law judge's findings with respect to total respiratory disability at Section 718.204(b)(2), as they are rendered moot by our disposition of the case. *See Cochran v. Director, OWCP*, 16 BLR 1-101 (1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge