BRB No. 99-0491 BLA

DUANE ODEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHEELWRIGHT MINING, INCORPORATED	)	DATE ISSUED:
	)	
	)	
and	)	
	)	
TRAVELERS 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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Duane Oden, Wheelwright, Kentucky, *pro se*.

J. Logan Griffith (Wells, Porter, Schmitt & Jones), Paintsville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (98-BLA-0087) of Administrative Law Judge Robert L. Hillyard 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). After crediting claimant with at least seventeen years of coal mine employment, 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). Although the administrative law judge found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), the administrative law judge found that claimant failed to establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer/Carrier (employer) responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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 under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the 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); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Claimant argues that employer failed to timely controvert its liability in the instant case. The district director issued a "Proposed Decision and Order - Memorandum of Conference" awarding benefits on October 22, 1993. Director's Exhibit 47. Employer filed its notice of controversion on November 29, 1993. Director's Exhibit 45. Section 725.417(d) provides that a party has thirty days in which to reply to a district director's recommendation. 20 C.F.R. §425.417(d). However, Section 725.311 provides that in a situation where a party is responding to a mailed document, the relevant time period within which the party must so respond is extended by seven days. 20 C.F.R. §725.311(c). Employer accurately notes that the thirty-seventh day following the issuance of the district director's October 22, 1993 Proposed Decision and Order fell on Sunday, November 28, 1993. Employer's

notice of controversion was filed the next day on Monday, November 29, 1993.[1] Director's Exhibit 46.

Since employer filed its controversion of the district director's Proposed Decision and Order within thirty-seven (37) days of the date of its issue, we hold that employer's controversion of liability was timely filed. 20 C.F.R. §§725.311(c), 725.417(d); *see generally Duke v. United States Steel Corp.*, 7 BLR 1-914 (1985).

We now turn our attention to the administrative law judge's findings on the merits. In determining whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge properly accorded greater weight to the interpretations rendered by B readers and/or Board-certified radiologists. See *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 12. Of the sixteen x-ray interpretations rendered by physicians qualified as B readers and/or Board-certified radiologists, only one is positive for pneumoconiosis.[2] Director's

[1]The regulations provide that, in computing any time period, the last day of the period shall be included unless it is a Saturday, Sunday or a legal holiday, in which event the period extends until the next day which is not a Saturday, Sunday or a legal holiday. 20 C.F.R. §725.311(d).

[2]Dr. Mathur, a B reader and Board-certified radiologist, interpreted claimant's March 10, 1992 x-ray as positive for pneumoconiosis. Director's Exhibit 36. However, Dr. Wiot, an equally qualified physician, interpreted this x-ray as negative for pneumoconiosis. Director's Exhibits 54, 69. Dr. Shipley, a B reader, also interpreted claimant's March 10, 1992 x-ray as negative for pneumoconiosis. Director's Exhibit 55. Numerous physicians qualified as B readers and/or Board-

Exhibits 31- 33, 36, 54, 55, 58-61, 63, 69. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Since the record does not contain any biopsy or autopsy evidence, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 12. Furthermore, claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3). Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, inasmuch as the instant claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306. Consequently, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3). Decision and Order at 12.

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certified radiologists also rendered negative interpretations of claimant's July 25, 1990, October 31, 1990, September 16, 1992, February 10, 1993, March 10, 1993 and May 4, 1995 x-rays. Director's Exhibits 31-33, 32, 55, 58-61, 63.

The administrative law judge also found that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). While Drs. Sundaram, Modi, and Bayasi opined that claimant suffered from pneumoconiosis, Director's Exhibits 24, 25, 27, Drs. Vuskovich, Myers, Fino, Anderson, Jarboe and Broudy opined that claimant did not suffer from pneumoconiosis.[3] Director's Exhibits 23, 56, 57, 60-62. In considering Dr. Modi's opinion, the administrative law judge noted evidence of Dr. Modi's criminal conviction for defrauding the federal Black Lung Program. Decision and Order at 14. The administrative law judge properly exercised his discretion in finding that Dr. Modi's criminal conviction affected the credibility of his opinion. *See Brown v. Director*, OWCP, 7 BLR 1-730 (1985); *see also Peabody Coal Co. v. Benefits Review Board*, 560 F.2d 797, 1 BLR 2-133 (7th Cir. 1977); Decision and Order at 14. Moreover, the administrative law judge found that the opinions of Drs. Vuskovich, Myers, Fino, Anderson, Jarboe and Broudy were better reasoned and documented than the opinions of Drs. Sundaram, Bayasi and Modi.[4] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 14. Inasmuch as it is based upon substantial

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[3]Dr. Varney diagnosed chronic bronchial asthma which he noted was "probably allergic" in origin. Director's Exhibit 26. The administrative law judge properly noted that Dr. Varney's opinion did not support a finding of pneumoconiosis. Decision and Order at 14. The administrative law judge also noted that an attending physician, in separate statements dated September 8, 1993 and October 29, 1993, diagnosed, *inter alia*, asthma and chronic obstructive pulmonary disease. Director's Exhibits 29, 53. However, because the physician did not attribute these diagnosed conditions to claimant's coal mine employment, the administrative law judge properly found that his opinions did not support a finding of pneumoconiosis. Decision and Order at 14.

[4]The administrative law judge noted that while Dr. Sundaram may have relied upon more than a positive x-ray in making his diagnosis of pneumoconiosis, he failed to provide any other bases for his diagnosis. Decision and Order at 14; Director's Exhibits 24, 27, 89. Moreover, while Dr. Sundaram interpreted claimant's February 10, 1993 x-ray as positive for pneumoconiosis, Director's Exhibit 35, three better qualified physicians interpreted the x-ray as negative for pneumoconiosis. Director's Exhibits 32, 54, 55, 69.

The administrative law judge noted that Dr. Baysi, other than noting decreased air exchange and expiratory wheezing on physical examination, provided no support for his diagnosis of coal workers' pneumoconiosis. Decision and Order at 14; Director's Exhibit 27.

evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.204(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent*, *supra*; *Gee*, *supra*; *Perry*, *supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge