

BRB No. 01-0536 BLA

JOHN A. KINCAID	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PCR PARTNERSHIP JOINT VENTURE	)	DATE ISSUED:
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS'	)	
PNEUMOCONIOSIS FUND	)	
	)	
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 - Rejection of Claim of Edward T. Miller, Administrative Law Judge, United States Department of Labor.

John A. Kincaid, Mount Hope, West Virginia, *pro se*.

Robert Weinberger (State of West Virginia Employment Programs Litigation Unit), Charleston, West Virginia, for carrier.

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

PER CURIAM:

Claimant, representing himself,<sup>1</sup> appeals the Decision and Order - Rejection of Claim

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<sup>1</sup>Claimant appeared at an initial hearing before Administrative Law Judge John Holmes on March 16, 2000 without the assistance of counsel. Judge Holmes asked claimant whether he had attempted to find an attorney whereupon claimant stated that he wished to

(00-BLA-0080) of Administrative Law Judge Edward T. Miller 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).<sup>2</sup> The administrative law judge considered the

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proceed with the hearing because he was unable to find an attorney; Judge Holmes then gave claimant an opportunity to proceed with the hearing and to testify. Judge Holmes Hearing Tr. at 4 *et seq.* While eliciting claimant's testimony, Judge Holmes determined, however, that it would be appropriate to continue the hearing to afford claimant an opportunity to present fully his medical evidence. *Id.* at 19-21. Judge Holmes further noted that carrier's counsel, Nancy Tyler, was seeing a substantial amount of medical evidence for the first time at the hearing because carrier's long-time counsel, Keian Weld, had only recently resigned his position as carrier's representative. *Id.* at 19. Judge Holmes thus determined that a continuance of the hearing was also appropriate to afford carrier an opportunity to adequately present its case. *Id.*

Subsequently, the case was assigned to Administrative Law Judge Edward T. Miller (the administrative law judge), and a new hearing was held on September 19, 2000. Claimant appeared at this hearing without the assistance of counsel. The administrative law judge informed claimant of his right to counsel, and that he would not be liable for an attorney's fee. Judge Miller Hearing Tr. at 6. The administrative law judge offered to continue the hearing to a later date in the event claimant wished to obtain counsel, but claimant reiterated his willingness to proceed with the hearing without an attorney. *Id.* at 6-7. The administrative law judge thus proceeded with the hearing, informing claimant of the issues in this case, and providing claimant the opportunity to object to the submission of any evidence, as well as to present evidence on his own behalf. *Id.* at 8-10. The administrative law judge encouraged claimant to testify fully. *Id.* at 14-32. We, therefore, hold that there was a valid waiver of claimant's right to be represented, *see* 20 C.F.R. §725.362(b), and that the hearing before the administrative law judge on September 19, 2000 was properly conducted. *See Shapell v. Director, OWCP*, 7 BLR 1-304 (1984).

<sup>2</sup>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

instant claim, which was filed on January 19, 1999, pursuant to the applicable regulations at 20 C.F.R. Part 718 (2000). After crediting claimant with twenty-four years of coal mine employment, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). In addition, the administrative law judge found that claimant is entitled to the rebuttable presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that the presumption was not rebutted. The administrative law judge further determined, however, that the evidence was insufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iv), and insufficient to establish total disability due to pneumoconiosis under 20 C.F.R. §718.204(c). Accordingly, he denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer/Carrier responds in support of the decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend to participate in this appeal.

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).

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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. Employer and the Director, Office of Workers' Compensation Programs, responded to the Board's order, contending that the amended regulations would not impact this 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*, 160 F.Supp.2d 47 (D.D.C. 2001). The court's decision renders moot the contentions of the parties with regard to the impact of the challenged regulations.

In order to establish entitlement to benefits under 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*).

In determining that claimant failed to establish total disability due to pneumoconiosis under 20 C.F.R. §718.204(c), the administrative law judge correctly found that the two physicians of record who addressed the issue, namely, Drs. Rasmussen and Zaldivar, concluded that claimant is not totally disabled due to the disease. Decision and Order at 9. As the administrative law judge found, Dr. Rasmussen opined that claimant has a minimal loss of respiratory function and retains the pulmonary capacity to perform his last regular coal mine job as a “dozer operator.” Director’s Exhibit 8. Dr. Zaldivar opined that, while claimant does have a pulmonary impairment which would prevent him from performing his usual coal mine employment, the impairment is entirely due to asthma, and unrelated to pneumoconiosis. Director’s Exhibit 9. The administrative law judge properly found that, therefore, regardless of which opinion was worthy of greater weight, evidence relevant to the essential element of disability causation under Section 718.204(c) would fail. Decision and Order at 9. We affirm the administrative law judge’s finding that the evidence is insufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(c).

Inasmuch as claimant failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), a requisite element of entitlement under Part 718, the administrative law judge properly denied benefits.<sup>3</sup> See 20 C.F.R. §718.204(c); *Trent, supra*; *Gee, supra*; *Perry, supra*.

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<sup>3</sup>Since the administrative law judge properly found entitlement to benefits precluded, we need not address the administrative law judge’s findings under 20 C.F.R. §§718.202(a), 718.203(b) and 718.204(b).

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge