

BRB No. 01-0638 BLA

JOHN H. COOK)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED:
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

John H. Cook, East Cleveland, Ohio, *pro se*.

Timothy S. Williams (Eugene Scalia, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (99-BLA-0831) of Administrative Law Judge Daniel L. Leland 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).¹ The instant case involves a duplicate claim filed on

¹The 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,

January 29, 1996.² In the initial decision, Administrative Law Judge Daniel J. Roketenetz found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis or total disability. Judge Roketenetz, therefore, found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Accordingly, Judge Roketenetz denied benefits. Judge Roketenetz also subsequently denied claimant's motion for reconsideration.

Claimant thereafter requested modification of his denied claim. Administrative Law Judge Daniel L. Leland (the administrative law judge) found that the evidence submitted since the denial of claimant's 1973 claim was sufficient to establish the existence of a totally disabling pulmonary impairment and was, therefore, sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). However, in his consideration of the merits of claimant's 1996 claim, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's denial of benefits.

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 &*

refer to the amended regulations.

²The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on August 13, 1973. Director's Exhibit 16. The district director finally denied the claim on April 16, 1981. *Id.* There is no indication that claimant took any further action in regard to his 1973 claim.

Claimant filed a second claim on January 29, 1996. Director's Exhibit 1.

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*).

In his consideration of whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge properly found that all of the x-ray interpretations submitted in connection with claimant's 1973 claim are negative for pneumoconiosis. Decision and Order at 5; Director's Exhibit 16. In regard to the remaining x-ray evidence of record, the administrative law judge acknowledged that Dr. Lucas, a B reader, rendered a positive interpretation of a January 22, 1996 x-ray.³ Decision and Order at 5; Director's Exhibit 13. The administrative law judge, however, noted that Dr. Lie, a B reader and Board-certified radiologist, and Dr. Gaziano, a B reader, interpreted claimant's March 13, 1996 x-ray as negative for pneumoconiosis. Decision and Order at 5; Director's Exhibits 6, 7. The administrative law judge, therefore, found that the preponderance of the x-ray evidence was negative for pneumoconiosis. *Id.* 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. 20 C.F.R. §718.202(a)(1); *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

Since the record does not contain any biopsy or autopsy evidence, claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). 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

³The administrative law judge noted that although Dr. Lewis interpreted claimant's January 22, 1996 x-ray as having a profusion of 1/1, Dr. Lewis indicated that the x-ray changes were consistent with asbestosis. Decision and Order at 5; Director's Exhibit 13.

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, claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3).

In his consideration of whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge initially addressed the evidence submitted in connection with claimant's 1973 claim. The administrative law judge acted within his discretion in discrediting Dr. Sopko's opinion because the doctor did not adequately explain how he was able to make a nexus between claimant's chronic bronchitis and his coal dust exposure.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 5; Director's Exhibit 16. The administrative law judge also properly noted that Drs. Lipham and Tomashefski, in a report dated March 30, 1981, opined that there was no evidence of coal workers' pneumoconiosis. Decision and Order at 5; Director's Exhibit 16.

In regard to the remaining medical opinion evidence of record, the administrative law judge properly found that the opinions of Drs. Polster, Shtull and Holmes were insufficient to support a finding of pneumoconiosis.⁵ Decision and Order at 5; Director's Exhibits 4, 13. Finally, because neither Dr. Kirby nor Dr. Montenegro provided any basis for their respective diagnoses of "black lung," the

⁴In a report dated November 1, 1980, Dr. Sopko diagnosed chronic bronchitis. Director's Exhibit 16. Although Dr. Sopko indicated that claimant's chronic bronchitis was related to dust exposure in claimant's coal mine employment, he provided no basis for his opinion. *Id.*

⁵In a report dated March 13, 1996, Dr. Polster diagnosed chronic bronchitis and chronic obstructive pulmonary disease. Director's Exhibit 4. Dr. Polster opined that claimant's chronic bronchitis was probably secondary to his twenty years of cigarette smoking. *Id.* Dr. Polster did not address the etiology of claimant's chronic obstructive pulmonary disease. *Id.*

Dr. Shtull examined claimant on April 15, 1996 in order to screen for asbestosis. In an undated report, Dr. Shtull did not render a diagnosis. Director's Exhibit 13.

In a report dated May 1, 1996, Dr. Holmes diagnosed asbestosis. Director's Exhibit 13.

administrative law judge properly found that their opinions were not sufficiently reasoned.⁶ *See Lucostic, supra*; Decision and Order at 5; Director's Exhibits 22, 28. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Trent, supra*; *Gee, supra*; *Perry, supra*.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁶In a letter dated August 7, 1998, Dr. Kirby opined, without explanation, that claimant's findings at the time of his surgery for lung cancer were compatible with "black lung." Director's Exhibit 22.

In a letter dated September 9, 1999, Dr. Montenegro diagnosed claimant as suffering from lung cancer, chronic obstructive pulmonary disease, impotence, and dizziness. Director's Exhibit 28. In a letter dated September 28, 1999, Dr. Montenegro stated, without explanation, that claimant suffered from "bronchogenic carcinoma, black lung, and asbestos exposure." Director's Exhibit 28.