BRB No. 02-0412 BLA

TAMER E. CALHOUN, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
CONSOLIDATION 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-Rejection of Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Tamer E. Calhoun, Amonate, Virginia, *pro se*.

Douglas A. Smoot and Ashley N. Harman (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order-Rejection of Claim (2000-BLA-1030) of Administrative Law Edward Terhune Miller denying benefits with respect to 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 relevant procedural history of

[1]Claimant is Tamer E. Calhoun, Sr., the miner. Ron Carson, a counselor employed by Stone Mountain Health Services, requested, on claimant's behalf, that the Board

this case is as follows: Claimant filed an application for benefits on March 22, 1994. Director's Exhibit 24-1. In a Decision and Order issued on December 31, 1996, Administrative Law Judge Gerald M. Tierney determined that claimant was not entitled to benefits because he did not prove that he had pneumoconiosis. Director's Exhibit 24-38. The Board affirmed the denial of benefits in a Decision and Order dated December 23, 1997. *Calhoun v. Consolidation Coal Co.*, BRB No. 97-0643 BLA (Dec. 23, 1997)(unpub.).

Claimant subsequently filed a second application for benefits on January 26, 1999, which the district director denied on April 26, 1999, on the grounds that claimant failed to establish any of the elements of entitlement and, therefore, failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000).[2] Director's Exhibit 1. Claimant then submitted a timely request for modification and submitted new evidence. Director's Exhibit 18. A hearing was held before Administrative Law Judge Edward Terhune Miller (the administrative law judge). In the Decision and Order that is the subject of this appeal, the administrative law judge credited claimant with sixteen years of coal mine employment and considered whether the newly submitted evidence

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review the administrative law judge's Decision and Order, but Mr. Carson is not representing claimant on appeal. *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2]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 (2002). The amended regulations pertaining to duplicate claims and requests for modification do not apply to claims, such as the present one, filed before January 19, 2001. *See* 20 C.F.R. §725.2. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

established a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge determined that Judge Tierney's Decision and Order denying benefits did not contain any errors. The administrative law judge further found that the newly submitted evidence was insufficient to establish either the existence of pneumoconiosis or the presence of a totally disabling respiratory or pulmonary impairment. The administrative law judge concluded, therefore, that claimant did not establish the prerequisites for modification under Section 725.310. Accordingly, benefits were denied.

Employer has responded to claimant's appeal and urges affirmance of the denial of benefits.[3] The Director, Office of Workers' Compensation Programs, has submitted a reply brief in which he maintains that the amended regulations are valid.[4]

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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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[3]Employer also asserts that the amended regulations set forth in 20 C.F.R. §§718.104 and 718.201 cannot be applied in this case, as they are impermissibly retroactive. We reject employer's contention. Section 718.104 is not applicable in this case in which the evidence was developed before January 19, 2001. *See* 20 C.F.R. §725.2. In addition, Section 718.201 is not relevant to the disposition of claimant's appeal. Moreover, the validity of this regulation was upheld by the United States Court of Appeals for the District of Columbia Circuit in *Nat'l Mining Ass'n v. United States Dep't of Labor*, 292 F.3d 849, ___ BLR ___ (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47, ___ BLR ___ (D.D.C. 2001).

[4] 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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis arising out of his coal mine employment, that he is suffering from a totally disabling respiratory or pulmonary impairment, and that pneumoconiosis is a contributing cause of his total respiratory or pulmonary disability. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one 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 on appeal and the evidence of record, we conclude that the denial of benefits is supported by substantial evidence and does not contain reversible error, as the administrative law judge properly determined that the evidence of record does not support a finding of pneumoconiosis pursuant to Section 718.202(a)(1)-(4). In considering whether the record before Judge Tierney contained a mistake in a determination of fact, the administrative law judge rationally determined that the evidence submitted with claimant's initial application for benefits is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4). The administrative law judge correctly found that regarding Section 718.202(a)(1) and (a)(2), the record before Judge Tierney did not include any positive x-ray readings or biopsy evidence. Decision and Order at 11; Director's Exhibit 24. The administrative law judge further determined appropriately that the presumptions referenced in Section 718.202(a)(3) were not applicable in the initial claim. *Id*. With respect to the medical opinion evidence, the administrative law judge accurately found that none of the physicians then of record diagnosed pneumoconiosis or any respiratory or pulmonary impairment related to coal dust exposure. *Id*.

The administrative law judge's finding that the evidence submitted subsequent to Judge Tierney's Decision and Order denying benefits is insufficient to support a finding of pneumoconiosis, is also rational and supported by substantial evidence. As determined by the administrative law judge, this evidence does not include any positive x-ray readings or biopsy evidence relevant to Sections 718.202(a)(1) and (a)(2), and the presumptions referenced in Section 718.202(a)(3) are not applicable. Decision and Order at 12-13; Director's Exhibits 11, 12; Employer's Exhibits 2, 3, 6, 11. In addition, the administrative law judge's determination that none of the physicians whose opinions appear in the record diagnosed pneumoconiosis or a coal dust related respiratory or pulmonary impairment pursuant to Section 718.202(a)(4) accords with the record. Director's Exhibit 9; Employer's Exhibits 2, 4, 5, 7, 9-11.

Because the administrative law judge independently addressed all of the evidence of record and rationally determined that it was insufficient to support a finding of pneumoconiosis, claimant has failed to establish the existence of pneumoconiosis, an essential element of entitlement. *See Gee*, *supra*; *Trent*, *supra*; *Perry*, *supra*. Thus, the administrative law judge properly found that claimant did not establish entitlement to benefits under Part 718.[5] *Id*.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[5]In light of our affirmance of the administrative law judge's determination that the evidence of record, as a whole, is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), we need not address the administrative law judge's finding that claimant did not establish a material change in conditions under 20 C.F.R. §725.309(d) (2000), as error, if any, in his finding is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

BETTY JEAN HALL
Administrative Appeals Judge