BRB No. 97-0624 BLA

SIMON KIDD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
C & N COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
and	)	
	)	
SOMERSET 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 - Denying Benefits of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Simon Kidd, Harold, Kentucky, *pro se*.

Terri L. Bowman (Arter & Hadden), Washington, D.C., for C & N Coal Company and Old Republic Insurance Company.

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

PER CURIAM:

Claimant, without representation, appeals the Decision and Order - Denying Benefits (96-BLA-1040) of Administrative Law Judge Clement J. Kichuk (the administrative law judge) 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). Claimant filed his original claim for benefits in August, 1985. Director's Exhibit 55. The district director denied the claim on January 22, 1986 on the grounds that claimant failed to establish the existence of pneumoconiosis, that the disease was caused by coal mine work, or that he was totally disabled by the disease. Director's Exhibit 55. Claimant filed a second claim on December 18, 1990. Director's Exhibit 56 at 310. The district director denied the claim on June 6, 1991 on the basis that claimant again failed to establish any of the elements of entitlement and that the evidence did not support a finding of a material change in conditions pursuant to 20 C.F.R. §725.309. Director's Exhibit 56 at 6.

Claimant filed the current claim in April, 1995. Director's Exhibit 1. Initially, the administrative law judge determined that, inasmuch as Somerset Coal Company was financially unable to meet the payment obligations, C & N Coal Company (employer) was the responsible operator. 1997 Decision and Order at 8. The administrative law judge credited claimant with fourteen and three-fourths years of coal mine employment.[1] *Id.* at 9. The administrative law judge found that the evidence of record was insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4). *Id.* at 9-10. Further, the administrative law judge found that the evidence of record was insufficient to establish a disabling lung impairment pursuant to 20 C.F.R. §718.204(c)(1)-(4). *Id.* at 10-11. The administrative law judge also concluded that claimant failed to establish at least one essential element of entitlement pursuant to Section 725.309(d) and *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Accordingly, benefits were denied. *Id.* at 11. On appeal, claimant contends generally that the administrative law judge erred in denying benefits. Employer/carrier (employer) has filed a response brief advocating affirmance of the administrative law judge's decision.[2] The Director, Office of Workers'

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[1] We affirm the administrative law judge's finding of fourteen and three-fourth years of coal mine employment inasmuch as this finding is not contested on appeal and is not adverse to claimant. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); 20 C.F.R. §718.305(e).

[2] Employer attacks the material change standard of the United States Court of Appeals for the Sixth Circuit, and states that the Board and circuit courts should adopt the standard of the United States Court of Appeals for the Tenth Circuit enunciated in *Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996). Employer's Brief at 12 n.4. However, as employer acknowledges, the instant case is controlled by the United States Court of Appeals for the Sixth Circuit, inasmuch as claimant's coal mine employment occurred in Kentucky. Claimant's Exhibit 1; Director's Exhibits 55, 56; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Employer's Brief at 11. The Sixth Circuit held in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), that in determining whether claimant has established a material change in

Compensation Programs, has submitted a letter stating that he will not participate in the appeal.

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we note that claimant was not represented by counsel at his hearing before Administrative Law Judge Joel F. Gardiner on November 21, 1996. Hearing Transcript at 5, 23-24. At the hearing, Judge Gardiner informed claimant that he was entitled to have an attorney present and offered to postpone the hearing to allow claimant to retain an attorney. *Id.* at 5. Judge Gardiner allowed claimant the opportunity to submit evidence and to object to the admission of employer's evidence, and allowed claimant the opportunity to testify concerning relevant issues. *Id.* at 13-23. In the Decision and Order issued on January 15, 1997, the administrative law judge stated that the case was referred to him due to the departure of Judge Gardiner to another agency. Decision and Order at 2 n.1. Judge Gardiner's conduct of the hearing complied with *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984). Moreover, inasmuch as the disposition of the case was not dependent upon an assessment of claimant's testimony, claimant was not prejudiced by the reassignment of the case to the administrative law judge. *See generally Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove 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*).

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conditions under 20 C.F.R. §725.309, the administrative law judge must consider all of the newly submitted evidence and determine whether it is sufficient to establish at least one of the elements of entitlement previously adjudicated against him.

We affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). The administrative law judge properly found that none of the x-ray readings of record were positive for pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1); Director's Exhibits 13, 19-27, 53-56; Employer's Exhibit 2. In addition, the record contains no autopsy or biopsy evidence and the presumptions described in 20 C.F.R. §§718.304, 718.305 and 718.306 are inapplicable inasmuch as the record is devoid of evidence of complicated pneumoconiosis and this living miner's claim was filed after January 1, 1982. *See* 20 C.F.R. §§718.202(a)(2), 718.202(a)(3). Finally, the administrative law judge properly found that the medical opinions of record were insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).[3]

Because claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement under Part 718, the administrative law judge properly denied benefits on the merits. *See Perry*, *supra*. We therefore decline to address the administrative law judge's findings that claimant failed to establish a material change in conditions under Section 725.309 and that claimant failed to establish total disability pursuant to Section 718.204(c), as any errors therein would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).[4]

[3] All of the physicians who addressed the issue of whether claimant suffered from pneumoconiosis opined that claimant did not have coal worker's pneumoconiosis or any occupationally acquired pulmonary condition. Director's Exhibits 14-16, 55, 56; Employer's Exhibit 3.

[4] Employer, in its response brief, argues that the administrative law judge erred in determining that it is the responsible operator. Employer's Brief at 4 n.2. Inasmuch as we affirm the administrative law judge's denial of benefits, we decline to address this contention by employer. *See generally Angelo v. Bethlehem Mines Corp.*, 6 BLR 1-593 (1983).

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge