BRB No. 00-1025 BLA

HADLEY OWENS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GARDEN CREEK POCAHONTAS COMPANY	)	DATE ISSUED:_____
	)	
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 of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Hadley Owens, Haysi, Virginia, *pro se*.[1]

Natalie D. Brown (Jackson & Kelly, PLLC), Lexington, Kentucky, for employer.

Timothy S. Williams (Howard M. Radzely, Acting 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: SMITH, DOLDER, Administrative Appeals Judges and NELSON,

[1]Ron Carson, a benefits counselor with Stone Mountain Health Services in Vansant, Virginia, on behalf of claimant, requested an appeal of the administrative law judge's Decision and Order, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2000-BLA-0160) of Administrative Law Judge Thomas M. Burke denying benefits on a request for modification [2] 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).[3] The administrative law judge found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R §§718.202(a) (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, employer argues that the administrative law judge's decision is supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a brief regarding the merits of claimant's appeal in this case.

[2]Claimant's first claim, filed on October 2, 1995 was denied by Administrative Law Judge Edward Terhune Miller on July 28, 1997. Director's Exhibits 1, 38. The Board affirmed the denial of benefits based on claimant's failure to establish the existence of pneumoconiosis. Director's Exhibit 43. On May 18, 1999, claimant submitted new evidence and filed the instant petition for modification. Director's Exhibit 44.

[3]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. 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 forty-seven of the regulations implementing the Act, the United States District Court for the District of Colombia granted limited injunctive relief and stayed for the duration of the lawsuit, 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, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao,* No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on April 23, 2001, to which the Director and employer have responded.[4] Claimant has not responded to the Board's order.[5] Based on the brief submitted by the Director and employer, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider whether the Decision and Order below is supported by substantial evidence. *See 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 supported by substantial evidence, are rational, and are consistent with applicable 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 (1985).

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 the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally

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[4]The Director, Office of Workers' Compensation Programs, asserts that the regulations at issue in the lawsuit do not affect the outcome of this case. Employer contends that the regulations at issue, if applied, could impact this claim. Employer also states that the case must be stayed for the duration of the briefing, hearing, and decision schedule in accordance with the preliminary injunction of the United States District Court for the District of Columbia or the case must be remanded to the district director to allow the parties to develop evidence in light of the new regulations. Employer contends that the provisions contained at 20 C.F.R. §§718.201(a)(2), 718.201(c), and 718.204(a) may affect the disposition of this case, but has not specifically indicated how the application of the new regulations to the facts of the case herein could affect the outcome of the instant appeal.

[5]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on April 23, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2000); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the Decision and Order and the relevant evidence of record we conclude that the administrative law judge's decision is supported by substantial evidence and contains no reversible error. The administrative law judge correctly found that of the twenty interpretations of record, all by B readers or dually qualified physicians[6], only Dr. Alexander, a dually qualified physician, interpreted, as positive for pneumoconiosis, the x-ray taken on January 5, 1999. Decision and Order at 6; Director's Exhibit 55; Employer's Exhibits 1, 2. The administrative law judge correctly found that the same x-ray was read as negative by Dr. Spitz, who is also a dually qualified physician and as unreadable by three dually qualified physicians, Drs. Wiot, Meyer and Shipley. *Id.*. The administrative law judge, within his discretion, accorded greater weight to Dr. Wiot because of his superior credentials as he assisted in the development of the ILO-U/C[7] classification system. Decision and Order at 6; *MacMath v. Director, OWCP*, 12 BLR 1-6 (1988). In addition, the administrative law judge reasonably found that the preponderance of the x-ray evidence is negative for the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1) (2000)

Further, the administrative law judge correctly found that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(2) and (a)(3) (2000), because the record contains no biopsy evidence or evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304 (2000), and the presumptions contained in 20 C.F.R. §718.305 and 718.306

[6]A dually qualified physician is a B reader and a Board-certified radiologist. A "B - reader" is a physician who has demonstrated proficiency in evaluating chest roentgenograms for roentgenographic quality and in the use of the ILO-U/C classification for interpreting chest roentograms for pneumoconiosis and other diseases by taking and passing a specially designed proficiency examination given on behalf of or by the Appalachian Laboratory for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E) (2000); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n. 16, 11 BLR 2-1, 2-16 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A designation of "Board-certified" means certification in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the American Osteopathic Association. *See* 20 C.F.R. §718.202(a)(1)(ii)(C) (2000).

[7]International Labour Organization-Union Internationale Contra Cancer/Cincinnati (1971) International Classification of Radiographs of the Pneumoconiosis (ILO-U/C 1971). 20 C.F.R. §718.102(b).

(2000) are inapplicable in this living miner's claim filed after January 1, 1982. Decision and Order at 4; 20 C.F.R. §718.305(e) (2000); Director's Exhibit 1.

The administrative law judge also correctly found the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(4) (2000), as he found that none of the physicians of record, who either examined claimant or reviewed his medical record, diagnosed pneumoconiosis. Decision and Order at 7; Director's Exhibits 13, 28, 46; Employer's Exhibits 1, 5, 9. Accordingly, substantial evidence supports the administrative law judge's finding that after weighing all the evidence of record together under Section 718.202(a) (2000), the chest x-ray and the medical opinion evidence are insufficient to establish the existence of pneumoconiosis. Decision and Order at 7; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge