BRB No. 98-1383 BLA

CHARLIE L. SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTH BRANCH COAL COMPANY	)	DATE ISSUED: 7/13/99
	)	
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 Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Charlie L. Smith, Tazewell, Virginia, *pro se*.[1]

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (97-BLA-1193) of Administrative Law Judge Stuart A. Levin denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act

[1]Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). After noting the parties' stipulation to at least fifteen years of coal mine employment, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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).

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*).

We initially reject claimant's contention that the administrative law judge erred in considering evidence submitted by Island Creek Coal Company (Island Creek).[2] Inasmuch as Island Creek was a potentially liable party, the administrative law judge properly considered this evidence. *See generally Martinez v. Clayton Coal Co.*, 10

[2]Under cover letter dated February 3, 1997, Island Creek submitted Dr. Castle's January 31, 1997 report to the district director. Director's Exhibit 22. Island Creek also subsequently submitted several negative x-ray interpretations. *See* Director's Exhibits 23, 24.

BLR 1-24 (1987). Moreover, inasmuch as claimant had an opportunity to object to the admission of this evidence before the administrative law judge and failed to do so, claimant cannot raise its objection on appeal to the Board.[3] *See generally Kauzlarich v. Director, OWCP*, 4 BLR 1-744 (1982); Transcript at 5.

[3]Claimant was represented at the hearing by Tim White, a benefits counselor with Stone Mountain Health Services.

We now turn our attention to the administrative law judge's consideration of the merits of the claim. In determining whether the x-ray evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge properly noted that only one of the thirty x-ray interpretations of record was positive for pneumoconiosis. Decision and Order at 6. While Dr. Fisher, a B reader and Board-certified radiologist, interpreted claimant's September 5, 1990 x-ray as positive for pneumoconiosis, the administrative law judge noted that two equally qualified physicians, Drs. Scott and Wheeler, interpreted this x-ray as negative for pneumoconiosis.[4] *Id.*; Director's Exhibit 16; Employer's Exhibits 21, 22. The administrative law judge also noted that all of the subsequent x-rays of record, x-rays taken on August 27, 1991, May 16, 1990, May 20, 1990, September 12, 1996, January 8, 1997 and February 10, 1997, were uniformly interpreted as negative for pneumoconiosis. Decision and Order at 6; Director's Exhibits 14, 15, 22-24, 26, 27; Employer's Exhibits 3, 4, 7, 10, 14-19. The administrative law judge, therefore, found that the x-ray evidence was insufficient to establish the existence of pneumoconiosis. *Id.* Inasmuch as it is supported by substantial evidence, the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis is affirmed.

Since the record does not contain any biopsy or autopsy evidence, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 6. Furthermore, the administrative law judge properly found that claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3). *Id.* at 7. 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 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.

[4]The administrative law judge further noted that Dr. Fino, a B reader, also interpreted claimant's September 5, 1990 x-ray as negative for pneumoconiosis. Decision and Order at 6; Employer's Exhibit 20.

The administrative law judge also found that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). While Dr. Forehand opined that claimant suffered from pneumoconiosis, Director's Exhibit 11, Drs. Castle, Sargent and Fino opined that claimant did not suffer from pneumoconiosis. Director's Exhibits 22, 25; Employer's Exhibit 23. The administrative law judge properly found that Dr. Forehand's diagnosis of pneumoconiosis was outweighed by the contrary opinions of Drs. Castle and Sargent based upon their superior qualifications.[5] *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 6. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 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 pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent*, *supra*; *Gee*, *supra*; *Perry*, *supra*.

[5]Drs. Castle and Sargent are Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibits 22, 25. Dr. Forehand's qualifications are not found in the record.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge