BRB No. 00-0931 BLA

SEBERT R. OSBORNE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL 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 Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Kathy L. Snyder (Jackson & Kelly, PLLC), Morgantown, West Virginia, for employer.

Edward Waldman (Judith E. Kramer, 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-1159) of Administrative Law Judge Rudolf L. Jansen 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 administrative law judge found, and the parties stipulated to, twenty-six years of qualifying coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] Decision and Order at 3, 10; Director's Exhibit 1. The administrative law judge found that claimant established that he was totally disabled pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000) but further concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) or that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Decision and Order at 10-13. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established based upon the x-ray and medical opinion evidence and further erred in failing to find that his total disability was due to pneumoconiosis. Employer responds, urging affirmance of the denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[3]

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations

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[1]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. 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, refer to the amended regulations.

[2]Claimant filed this claim for benefits on April 1, 1998. Director's Exhibit 1.

[3]The administrative law judge's length of coal mine employment determination as well as his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(c)(1)-(4) (2000) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

implementing the Act, the United States District Court for the District of Columbia 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 March 16, 2001, to which employer and the Director have responded.[4] Claimant has not responded to the Board's order.[5] Based on the briefs submitted by employer and the Director, 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.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the law. 33 U.S.C. §921(b)(3), as

[4]The Director's brief, dated April 2, 2001, asserted that the regulations at issue in the lawsuit do not affect the outcome of this case. In a brief dated March 30, 2001, employer asserted that the regulations at issue in the lawsuit "could" affect the outcome of this case. Employer's Brief at 5-11. Employer contends that the provisions contained at 20 C.F.R. §§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 March 16, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

incorporated into the Act 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 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 disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2000); *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 Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. The administrative law judge, in the instant case, permissibly determined that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (2000). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) (2000) as the preponderance of the x-ray readings by physicians with superior qualifications was negative.[6] Director's Exhibits 24, 25, 31-33; Claimant's Exhibits 1-15; Employer's Exhibits 1-9, 11, 13-16, 19-22; Decision and Order at 10; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Warhach v. Director*, OWCP, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*).

[6]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the Commonwealth of Virginia. *See* Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

The administrative law judge also considered the entirety of the medical opinion evidence of record and properly found that the opinions were insufficient to establish pneumoconiosis as no physician opined that claimant suffered from pneumoconiosis or that coal dust contributed to any impairment.[7] Decision and Order at 11; Director's Exhibit 22; Employer's Exhibits 1, 7, 10, 12, 15, 17, 18, 21, 23, 24; *Clark, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee, supra*; *Perry, supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). Contrary to claimant's assertion, the physicians of record based their opinions not only on the x-ray interpretations but also on the miner's employment, smoking and medical histories, physical examination and pulmonary function and blood gas studies. Employer's Exhibits 1, 7, 10, 12, 15, 17, 18, 21, 23, 24. Additionally, claimant's contention that the opinions of employer's physicians should be rejected as the physicians are "predisposed" not to diagnose pneumoconiosis which demonstrates bias in favor of employer in this case, is without merit. Claimant's Brief at 6. Claimant's allegation of bias is not supported by the evidence of record as the physicians reviewed extensive medical records including coal mine employment and smoking histories as well as numerous objective studies. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *Zamora v. C.F.&I. Steel Corp.*, 7 BLR 1-568 (1984); Employer's Exhibits 1, 7, 10, 12, 15, 17, 18, 21, 23, 24. Moreover, the administrative law judge properly considered the evidence under 20 C.F.R. §718.202(a)(1)-(4) (2000) in accordance with the decision by the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR 2- (4th Cir. 2000), and rationally determined that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a) (2000) as claimant failed to establish pneumoconiosis under any of the relevant subsections.[8]

[7]Dr. Vasudevan examined claimant and based upon the examination as well as the miner's employment, medical and smoking histories, x-ray and pulmonary function study, opined that claimant has interstitial lung disease of unknown origin which has resulted in a mild to moderate impairment. Director's Exhibit 22. Drs. Zaldivar, Castle, Spangolo, Dahhan, Fino and Hippensteel concluded, based upon the miner's employment and medical histories, pulmonary function studies and a review of claimant's medical records, that claimant does not have occupational or coal workers' pneumoconiosis and that claimant's significant respiratory impairment is not related to coal dust exposure. Employer's Exhibits 1, 7, 10, 12, 15, 17, 18, 21, 23, 24.

[8]The United States Court of Appeals for the Fourth Circuit held that although 20 C.F.R. §718.202(a) (2000) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a claimant suffers from the disease. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR 2- (4th Cir. 2000).

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Trent, supra*; *Perry, supra*; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge rationally accorded greater weight to the negative readings by physicians with superior credentials and properly determined that no physician opined that the miner suffered from pneumoconiosis, claimant has not met his burden of proof on all the elements of entitlement. *Clark, supra*; *Trent, supra*; *Perry, supra*. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) as it is supported by substantial evidence and is in accordance with law. Decision and Order at 10-11; *Compton, supra*; *Trent, supra*; *Perry, supra*.

Inasmuch as claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement in a living miner's claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded and we need not address claimant's remaining contentions on appeal. *See Compton, supra*; *Trent, supra; Perry, supra.*

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

NANCY S. DOLDER
Administrative Appeals Judge