BRB No. 01-0901 BLA

GERALD T. FRANCIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
ISLAND CREEK 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 Determining Stay Unnecessary and Denying Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Gerald T. Francis, Swords Creek, Virginia, *pro se*.

Ashley M. Harman (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order

[1]Ron Carson, a benefits counselor with Stone Mountain Health Services in Vansant, Virginia, requested, on behalf of claimant, that the Board review the

Determining Stay Unnecessary and Denying Benefits (00-BLA-0304) of Administrative Law Judge Pamela Lakes Wood (the administrative law judge) on a claim[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 initially found that the amendments to the revised regulations will not affect the outcome of the case because the claim fails under the new or the old regulations. The administrative law judge noted that the

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administrative law judge's Decision and Order. By Order dated October 12, 2001, the Board stated that claimant would be considered to be representing himself on appeal. *See Shelton v. Claude V. Keen Trucking Co.,* 19 BLR 1-88 (1995)(Order.)

[2]The instant claim was filed on January 6, 1998. Director's Exhibit 1. The district director denied the claim on March 13, 1998 based on claimant's failure to establish the existence of pneumoconiosis arising from his coal mine employment and total disability due to the disease. Director's Exhibit 16. Claimant then requested a hearing. Director's Exhibit 17. A conference was held, and on August 13, 1998, the district director issued a Proposed Decision and Order - Memorandum of Conference denying the claim based on claimant's failure to establish any element of entitlement. Director's Exhibit 25. On June 23, 1999, claimant submitted new evidence and requested modification of the district director's denial of the claim. Director's Exhibit 29. The district director denied claimant's request for modification, and transferred the case to the Office of Administrative Law Judges for a hearing pursuant to claimant's subsequent request. Director's Exhibits 36, 38, 41.

[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 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). The National Mining Association has appealed the District Court's decision and that case is pending before the United States Court of Appeals for the District of Columbia Circuit.

claim involved claimant's request for modification of the district director's denial of the claim. He determined that the relevant inquiry on modification under 20 C.F.R. §725.310 (2000)[4] required him to consider all the evidence of record and thus he proceeded to consider the merits of the claim. On the merits of the claim, the administrative law judge found that the relevant evidence failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) - (4). Accordingly, benefits were denied.

In response to claimant's appeal, employer urges the Board to affirm the decision below as it is rational, supported by substantial evidence, and consistent with applicable law. The Director, Office of Workers' Compensation Programs, has not filed a response brief in the appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised 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 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that he is totally disabled due to a respiratory or pulmonary impairment arising out of coal mine employment. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Perry v. Director, OWCP,* 9 BLR 1-1 (1986)(*en banc*). Failure to establish any element will preclude a finding of entitlement to benefits.

Considering the x-ray evidence of record, which consists of a total of sixteen interpretations of three x-rays dated November 18, 1997, January 16, 1998 and October 27, 1998, the administrative law judge properly found that all but one interpretation is negative. He found that Dr. Cappiello, who is dually qualified as a B reader and Board-certified radiologist, read the November 18, 1997 x-ray as positive. *See* Director's Exhibit 24. The administrative law judge also found, however, that five other physicians, four of whom were

[4]The amendments to the regulation at 20 C.F.R. §725.310 (2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2, 65 Fed. Reg. 80,057.

also dually qualified, read the same x-ray as negative for pneumoconiosis. The administrative law judge further noted that the two later x-rays, dated January 16, 1998 and October 27, 1998, were uniformly read as negative. Substantial evidence thus supports the administrative law judge's finding that the weight of the x-ray evidence is negative and fails to support a finding of the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1). *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

The administrative law judge also correctly determined that there is no biopsy or autopsy evidence of record. Thus, claimant cannot meet his burden to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2).

Since there is no evidence of complicated pneumoconiosis and the instant claim is a living miner's claim filed after January 1, 1982, the administrative law judge properly determined that claimant cannot establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(3) because none of the presumptions referred to therein is applicable, *see* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306.

The administrative law judge next found that the medical opinions of record do not support a finding of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). He correctly noted that Dr. Forehand found no evidence of any pulmonary disease, *see* Director's Exhibit 12, Employer's Exhibit 5; that Dr. Castle determined that claimant does not suffer from a chronic dust disease of the lungs or its sequelae, that has been caused by, contributed to or substantially aggravated by exposure to coal mine dust, *see* Director's Exhibit 31, Employer's Exhibit 8; and that Drs. Fino and Altmeyer both found that there was insufficient evidence to justify a diagnosis of coal workers' pneumoconiosis. Employer's Exhibits 4, 7. The administrative law judge thus properly characterized the record as containing no diagnosis of coal workers' pneumoconiosis or any pulmonary or respiratory condition attributable to coal mine dust exposure. Decision and Order at 6. He properly determined that no physician in the instant case rendered a diagnosis of either legal or clinical pneumoconiosis as defined in the revised regulations. *See* 20 C.F.R. §718.201(a). Substantial evidence thus supports the administrative law judge's finding that the medical opinion evidence fails to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4).

Based on the foregoing, we hold that the administrative law judge properly determined that the relevant evidence of record is insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4). *See* 20 C.F.R. §718.202(a); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Inasmuch as the evidence fails to establish the existence of pneumoconiosis, an essential element of

entitlement under Part 718, a finding of entitlement in the instant claim is precluded. *See Trent, supra; Perry, supra*.[5] We, therefore, affirm the administrative law judge's denial of benefits in the instant case.

Accordingly, the administrative law judge's Decision and Order Determining Stay Unnecessary and Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge

[5]The administrative law judge determined that regardless of whether or not claimant established modification of the district director's denial of the claim, the claim must fail in light of claimant's failure to establish the existence of pneumoconiosis on the merits of the claim. The administrative law judge's finding is consistent with law. *See Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP,* 17 BLR 1-9 (1992).