BRB No. 01-0807 BLA

ARSON BLANKENSHIP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
McCOY CANEY COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Arson Blankenship, Sadieville, Kentucky, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

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

[1]Susie Davis of the Kentucky Black Lung Association, Pikeville, Kentucky, requested on behalf of claimant that the Board review the administrative law judge's decision, but Ms. Davis

of Benefits (00-BLA-0906) of Administrative Law Judge Daniel J. Roketenetz 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).[2] Claimant filed a claim on December 13, 1993, which the district director denied on December 20, 1996. Subsequently, claimant filed additional medical evidence, which the district director treated as a request for modification. The district director again denied benefits, and the claim was forwarded to the administrative law judge, who held a hearing on October 20, 1998. In a Decision and Order dated July 16, 1999, the administrative law judge credited claimant with thirteen years of coal mine employment and stated that he would render a determination as to whether claimant established a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).[3] The administrative law judge ultimately considered all of the evidence of record under the applicable regulations at 20 C.F.R. Part 718 (2000), and found

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is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2]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.

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). The Board subsequently issued an order requesting supplemental briefing in the instant case. 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). On August 10, 2001, the Board rescinded its prior order requiring the parties to submit briefs on the issue of the impact of the amended regulations to this case.

[3]The administrative law judge was not required to address modification of a district director's denial of benefits, *see Motichak v. Bethenergy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992), but to the extent that the administrative law judge erred in doing so, any error was harmless as the administrative law judge properly reviewed the entire record. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1983).

the evidence insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4) (2000), and total disability under 20 C.F.R. §718.204(c) (2000). Accordingly, he denied benefits.

On May 2, 2000, claimant filed with the district director a request for modification of the administrative law judge's decision denying benefits. The district director denied modification, and the case was referred to the Office of Administrative Law Judges on July 10, 2000. In a Decision and Order dated June 28, 2001,[4] the administrative law judge again credited claimant with thirteen years of coal mine employment and considered the claim under Part 718. The administrative law judge stated that as claimant did not submit any new evidence in support of modification, he failed to establish a change in conditions under Section 725.310 (2000).[5] He further found the evidence of record insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4), and total disability under 20 C.F.R. §718.204(b). The administrative law judge thus found that claimant did not establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000), and accordingly denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he presently does not intend to participate in this appeal.

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

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[4]In correspondence to the administrative law judge dated September 26, 2000, claimant requested that a decision be made on the record. The administrative law judge granted claimant's request in an Order dated October 23, 2000, cancelling a hearing which had been scheduled for November 8, 2000.

[5]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.

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 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*).

In considering the x-ray evidence pursuant to Section 718.202(a)(1), the administrative law judge correctly stated that no new x-ray evidence was submitted since his previous, July 16, 1999 Decision and Order. Decision and Order at 7. Reaffirming his finding from his previous Decision and Order, the administrative law judge found the overwhelming majority of the x-ray interpretations was negative for pneumoconiosis and that, therefore, claimant failed to establish the presence of the disease under Section 718.202(a)(1). *Id.*; July 26, 1999 Decision and Order at 5-7. Substantial evidence supports the administrative law judge's finding. The record contains thirty-two x-ray readings, only four of which are positive for pneumoconiosis. The administrative law judge properly found that these four positive readings were outweighed by the numerous negative readings of physicians highly qualified as B readers and/or Board-certified radiologists. *See Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); July 16, 1999 Decision and Order at 6. Specifically, the administrative law judge properly found that the positive readings of the December 8, 1993 film, which were submitted by Dr. Sundaram, a physician with no special radiological qualifications, and Drs. Grimes and Bassali, who are B reader/Board-certified radiologists, were outweighed by nine negative readings of the same film, all of which were submitted by dually qualified B reader/Board-certified radiologists.[6] July 16, 1999 Decision and Order at 6; Director's Exhibits 18, 24-26, 29, 54, 71, 72. The administrative law judge further correctly stated that the August 4, 1997 film interpreted as positive by Dr. Joyce, a B reader, was reread as negative by Drs. Sargent, Barrett, Spitz and Wiot, who are all dually-qualified radiologists. July 16, 1999 Decision and Order at 6; Director's Exhibits 82, 83, 92. Finally, the

[6]The December 8, 1993 x-ray was read as negative by Drs. Sargent, Barrett, Wheeler, Scott, Spitz, Wiot, Westerfield, West and Halbert. Director's Exhibits 24-26, 29, 54, 71, 72. We note that the administrative law judge inadvertently stated at one point in his discussion of the x-ray evidence that these readings correspond to an x-ray dated *August* 8, 1993. July 16, 1999 Decision and Order at 6. The record does not indicate that a film was taken on August 8, 1993, and the readings actually correspond to the *December* 8, 1993 film.

administrative law judge correctly recognized that the interpretations of the remaining four films of record were all negative, and were submitted mostly by B reader/Board-certified radiologists. July 16, 1999 Decision and Order at 6-7; 12, 14, 15, 21-23, 27, 29, 71-73, 92. We, therefore, affirm the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *See Staton, supra; Woodward, supra; Edmiston, supra*.

Additionally, the administrative law judge properly found that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2), as there is no autopsy or biopsy evidence in the record. Decision and Order at 8. He also properly found that claimant was precluded from establishing the existence of pneumoconiosis under Section 718.202(a)(3), as none of the presumptions thereunder applies.[7] *Id*. We, therefore, affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2), (a)(3).

In considering the medical opinions under Section 718.202(a)(4), the administrative law judge correctly stated that claimant did not submit any new medical opinion evidence on modification. Decision and Order at 8. He reaffirmed his prior findings with regard to the medical opinion evidence, and concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4). *Id.* at 8-9. The administrative law judge's finding in this regard was rational, supported by substantial evidence, and in accordance with applicable law. In his prior Decision and Order, the administrative law judge properly discounted Dr. Sundaram's opinion that claimant has pneumoconiosis, which is the only opinion of record indicating claimant suffers from the disease, because Dr. Sundaram relied, in part, on his own positive interpretation of the x-ray taken on December 8, 1993, a film which, as discussed *supra*, was reread negative by physicians with superior radiological qualifications. *See Winters v. Director, OWCP*, 6 BLR 1-877 (1984); *See* July 16, 1999 Decision and Order at 9; Director's Exhibits 18, 25, 26, 29, 54, 71, 72. The administrative law judge also properly found Dr. Sundaram's opinion was outweighed by the contrary opinions of Drs. Fino, Broudy, Westerfield, and Chandler because these physicians are pulmonary specialists, a qualification which Dr. Sundaram lacks.[8] *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); July 16, 1999 Decision

[7]The record does not contain any evidence supportive of invocation of the presumption under 20 C.F.R. §718.304. Furthermore, as claimant's claim for benefits was filed after January 1, 1982, the presumption at 20 C.F.R. §718.305 does not apply. Finally, as this is not a survivor's claim, the presumption at 20 C.F.R. §718.306 is inapplicable.

[8]The administrative law judge properly found that Drs Fino, Broudy, Westerfield and Chandler are all Board-certified in internal medicine with a subspecialty in pulmonary diseases, while Dr. Sundaram is Board-certified in internal

and Order at 8-9; Director's Exhibits 18, 27, 53, 73, 92; Employer's Exhibit 1. Moreover, the administrative law judge properly credited Dr. Broudy's most recent, September 29, 2000, opinion as well-reasoned and well-documented on the basis that Dr. Broudy reviewed all of the medical evidence of record in addition to the report of his own examination of claimant in opining that claimant does not suffer from pneumoconiosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); Decision and Order at 9; Employer's Exhibit 1. We, therefore, affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4).

Inasmuch as the administrative law judge properly found the evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a requisite element of entitlement under Part 718, he properly denied benefits. *Trent*, *supra*; *Gee*, *supra*; *Perry*, *supra*. Consequently, we need not address the administrative law judge's findings under 20 C.F.R.§718.204(b), inasmuch as any errors therein would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

medicine only. July 16, 1999 Decision and Order at 8-9; Director's Exhibits 27, 53.

BETTY JEAN HALL
Administrative Appeals Judge