BRB No. 00-0834 BLA

CARL SCHLAGETER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TENNESSEE CONSOLIDATED 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 - Denying Benefits of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Carl Schlageter, Tuscaloosa, Alabama, *pro se*.

Ronald E. Gilbertson (Bell, Boyd & Lloyd, PLLC), Washington, D.C., for employer.

Before: SMITH and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order - Denying Benefits (98-BLA-1054) of Administrative Law Judge Mollie W. Neal (the administrative law judge) denying benefits on a duplicate claim[1] filed pursuant to the provisions of Title IV

[1]Claimant filed the instant claim on March 12, 1997. Director's Exhibit 1. Claimant's prior claim, filed on November 3, 1988, was denied by the district director on March 24, 1989 based on claimant's failure to establish any element of entitlement. Director's Exhibit 25 at 1, 12. Claimant took no action until he filed the instant claim in 1997.

of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[2] The administrative law judge found that claimant established a respiratory or pulmonary impairment and thereby a material change in conditions under 20 C.F.R. §725.309(d) (2000)[3] pursuant to *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Considering all the evidence of record on a *de novo* basis on the merits of the claim under 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis and the requisite cause of his totally disabling respiratory or pulmonary impairment. Accordingly, benefits were denied.

In response to claimant's *pro se* appeal, employer contends that substantial evidence supports the administrative law judge's findings that the evidence of record fails to establish that claimant has pneumoconiosis and that his totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. Employer thus urges the Board to affirm the administrative law judge's denial of benefits on the merits of the instant duplicate claim. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in the appeal.

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

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[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.

[3]The amendments to the regulation at 20 C.F.R. §725.309 (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.

the parties to the claim, determines that the regulations at issue in the lawsuit will 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). In the present case, the Board established a briefing schedule by order issued on March 9, 2001, to which claimant, employer and the Director have responded. Claimant generally requests that the Board further consider his case. Both employer and the Director assert that application of the amended regulations at issue will not affect the outcome of this case. Based on the pleadings submitted by claimant, 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.

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 Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, that he is totally disabled due to a respiratory or pulmonary impairment, and that his pneumoconiosis is a substantially contributing cause of this impairment. 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*).[4]

The administrative law judge's finding that the evidence of record fails to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a) (2000) is supported by substantial evidence. Considering the x-ray evidence under 20 C.F.R. §718.202(a)(1) (2000), the administrative law judge properly found that all the x-ray interpretations are negative for the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1). 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).[5]

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[4]We affirm the administrative law judge's finding that claimant established a totally disabling respiratory or pulmonary impairment and thus a material change in conditions under 20 C.F.R. §725.309 (2000) as it is unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5]The regulation at 20 C.F.R. §718.202(a)(2) (2000) was amended to add that a finding

in an autopsy *or biopsy* of anthracotic pigmentation, however, shall not be sufficient, by itself, to establish the existence of pneumoconiosis. Because the record in the instant case contains neither autopsy nor biopsy evidence, this amendment is not implicated herein. *See* 20 C.F.R. §718.202(a)(2).

Further, 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) (2000) because none of the presumptions referred to therein is applicable, *see* 20 C.F.R. §§718.304, 718.305, 718.306.

The administrative law judge also considered the medical opinions of record rendered by Drs. Gilley, Hasson[6] and Lipscomb, and found that they were insufficient to establish the existence of pneumoconiosis or that claimant's totally disabling respiratory or pulmonary impairment is significantly related to, or substantially aggravated by, claimant's coal mine employment.

Dr. Gilley examined claimant on December 7, 1988, and diagnosed mild chronic bronchitis which he indicated was "(p)ossibly aggravated by exposure to air pollution in mines and as a welder."[7] Director's Exhibit 25 at 8. He added that claimant's chronic bronchitis contributes twenty-five percent to his impairment. Dr. Gilley also diagnosed Parkinsonism. *Id.*

Dr. Lipscomb attended to claimant during his March 14, 1998 to March 17, 1998 hospitalization. He diagnosed, "(s)yncope and loss of consciousness presumably secondary to excessive alcohol level and possibly with combined effect of Sinemet;" chronic obstructive pulmonary disease, and Parkinson's disease. Director's Exhibit 17. In a follow-up report, and in response to the question of whether claimant has a chronic pulmonary impairment related to his coal mine employment Dr. Lipscomb responded, "Unsure." Director's Exhibit 22. Dr. Lipscomb also indicated that claimant has a moderate pulmonary impairment which renders claimant unable to perform his usual coal mine employment or other comparable work in a dust-free environment. In response to the question of whether

[6]The administrative law judge misspelled Dr. Hasson's name. Decision and Order at 5, 8; *see* Director's Exhibit 8.

[7]Claimant testified at the hearing that the welding work he did was part of his coal mine employment and that during this work he was exposed to welding fumes and coal dust. Hearing Transcript at 8, 13.

there was any other possible etiology for claimant's impairment Dr. Lipscomb answered in the affirmative, indicating "COPD [secondary to] tobacco" and "arch welding." *Id.*

Dr. Hasson examined claimant on April 16, 1997, and found no evidence of pneumoconiosis. He diagnosed asthmatic bronchitis with a "multifactoral" etiology, and "mild HCVD" with an "idiopathic" etiology. He also diagnosed severe Parkinsonism. Director's Exhibit 8. In a follow-up report, Dr. Hasson indicated that claimant did not have an occupational lung disease which was caused by his coal mine employment; that claimant does have a pulmonary impairment of which his coal mine employment was not a substantially contributing cause but which does prevent him from performing his usual coal mine employment or comparable work in a dust-free environment. *Id.*

The administrative law judge properly found that the medical opinions rendered by Drs. Gilley, Lipscomb and Hasson were too equivocal to support a finding that claimant established his burden on disability causation. 20 C.F.R. §718.204(c);[8] *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). Further, given these physicians' specific findings as set forth above, we hold that substantial evidence supports the administrative law judge's conclusion that the record contains no unequivocal medical opinion which links claimant's chronic obstructive pulmonary disease and resulting respiratory impairment to his coal mine employment. Director's Exhibits 8, 17, 22, 25; 20 C.F.R. §§718.202(a)(4), 718.204(c).

Based on the foregoing, we hold that the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis and that he is totally disabled due to pneumoconiosis, are supported by substantial evidence, rational and in accordance with law. 20 C.F.R. §§718.202(a), 718.204(c). Inasmuch as claimant fails to establish these essential elements of entitlement under Part 718, a finding of entitlement in the instant claim is precluded. *Trent, supra; Perry, supra.* We, therefore, affirm the administrative law judge's denial of benefits on the merits of the instant duplicate claim.

[8]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

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