BRB No. 00-0868 BLA

DONALD D. CONLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK 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 On Request for Modification of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Donald D. Conley, Vansant, Virginia, *pro se*.

Natalie Brown (Jackson & Kelly), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits On Request for Modification (99-BLA-1331) of Administrative Law Judge Daniel

[1]Ron Carson, a benefits counselor with Stone Mountain Health Services in Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's Decision and Order. In a letter dated May 30, 2000, 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.)

F. Sutton (the administrative law judge) 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).[2] The administrative law judge initially noted claimant's request for modification of the district director's denial of the claim based on claimant's failure to establish any element of entitlement. 20 C.F.R. §725.310 (2000);[3] Director's Exhibits 16, 21, 25. He also noted the parties' stipulation to at least twenty years of coal mine employment. Considering all the evidence of record under 20 C.F.R. Part 718, the administrative law judge found that the evidence failed to establish that claimant has pneumoconiosis arising from his coal mine employment, that claimant has a totally disabling respiratory or pulmonary impairment, or that claimant is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.202 (2000), 718.203 (2000), 718.204 (2000).[4] The administrative law judge thus found that claimant had not established a change in conditions

[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. §723.310 (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.

[4]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).

or a mistake in a determination of fact contained in the prior denial pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied claimant's request for modification and the claim.

In response to claimant's appeal, employer contends that the administrative law judge's findings are supported by substantial evidence, and urges the Board to affirm the decision below. 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 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 employer and the Director have responded.

Employer argues that the revised regulations at 20 C.F.R. §718.104(d), 20 C.F.R. §718.201(a)(2), 20 C.F.R. §718.201(c) and 20 C.F.R. §718.204(a), if applied, could affect the outcome of this case and therefore employer requests a stay of the Board's disposition.[5]

The Director asserts that applying the revised regulations at issue in this claim will not alter its outcome. Specifically, the Director asserts that the revised regulation at 20 C.F.R. §725.310 (2000) applies only to claims filed after January 19, 2001, and is not implicated in this case. *See* discussion *supra* at n.3. The Director also argues that the revised regulations at 20 C.F.R. §§718.201, and 718.204 (b), (c) have not been changed in any material way and thus application of these revised regulations will not affect the outcome of this case.

Based on the pleadings submitted by employer and the Director, and our review, we

[5]Employer generally contends that the amendments to 20 C.F.R. Part 725 affecting the procedural rules governing the identification of the responsible operator and the submission of evidence, and the amendment to 20 C.F.R. Part 718 affecting the nature and interpretation of medical data, should not be retroactively applied to claims filed prior to January 19, 2001, such as the instant claim, as the parties did not develop evidence under those regulations. In this regard, employer characterizes as a "drastic change in law," the amendments to, *inter alia*, the definition of pneumoconiosis at 20 C.F.R. §718.201 and the weight to be accorded medical opinions rendered by treating physicians at 20 C.F.R. §718.104(d).

hold that the disposition of this case is not impacted by the application of the challenged regulations. Specifically, 20 C.F.R. §718.104(d) applies only to evidence developed after January 19, 2001. 20 C.F.R. §718.101(b). Further, neither the amendment to 20 C.F.R. §718.201(a)(2), adding language which indicates that exposure to coal mine dust may cause an obstructive, as well as a restrictive, pulmonary disease, nor the amendment to 20 C.F.R. §718.201(c), adding language which recognizes that pneumoconiosis is a latent and progressive disease, is at issue in this case. Likewise, the amendment to 20 C.F.R. §718.204(a) regarding non-pulmonary or non-respiratory conditions or diseases, is not implicated in the instant case. 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*).

In the instant case, the administrative law judge found, based on all the evidence of record, that the evidence fails to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a) (2000). Considering the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1) (2000), the administrative law judge found:

> Of the thirteen interpretations of the three chest x-ray films, only Dr. Alexander's interpretation of the August 30, 1999 film qualifies as positive evidence of pneumoconiosis, and just barely so as his 1/0 classification is the minimum finding recognized by the Regulations. 20 C.F.R. §718.102(b). Under these circumstances, and noting the fact that the seven radiologists retained by the Employer possess radiological qualifications that are equal to Dr. Alexander's, I find that the Claimant has not established the presence of pneumoconiosis by a preponderance of the x-ray interpretation evidence under section 718.201(a)(1).

Decision and Order at 6. The administrative law judge properly found that the quantitative and qualitative weight of the x-ray interpretations of record is negative for the existence of pneumoconiosis. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991).

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).[6]

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 next considered the medical opinions of record rendered by Drs. Forehand, McSharry, Fino, Altmeyer and Sutherland, and found that they were insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4) (2000). Dr. Forehand examined claimant. He found no evidence of coal workers' pneumoconiosis and attributed claimant's cardiopulmonary deconditioning to a sedentary lifestyle and chronic bronchitis due to cigarette smoking. Dr. Forehand also opined that claimant has the residual ventilatory capacity to return to his last coal mine work. Director's Exhibit 10, Employer's Exhibit 14. Dr. McSharry examined claimant. He found insufficient evidence to justify a diagnosis of coal workers' pneumoconiosis. Dr. McSharry opined that claimant's mild respiratory impairment was unrelated to his coal mine employment and that claimant has sufficient respiratory capacity to perform his usual coal mine employment as an inside laborer. Director's Exhibit 30. Dr. McSharry's opinions remained unchanged after his consideration of additional medical evidence. Employer's Exhibits 2, 8, 13, 17.

Dr. Fino reviewed the medical evidence. He found insufficient objective evidence to justify a diagnosis of simple coal workers' pneumoconiosis, and opined that claimant does not suffer from an occupationally acquired pulmonary condition or respiratory impairment.

[6]The regulation at 20 C.F.R. §718.202(a)(2) 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.

Dr. Fino attributed claimant's reduced lung volume abnormality to his obesity, and indicated that claimant was neither totally nor partially disabled from returning to his last coal mine employment or a job requiring similar effort. Employer's Exhibit 6. Dr. Fino's opinion remained unchanged after his consideration of additional medical evidence. Employer's Exhibit 16.

Dr. Altmeyer reviewed the medical record. He found insufficient evidence to justify a diagnosis of coal workers' pneumoconiosis. Dr. Altmeyer indicated that claimant's minimal obstructive ventilatory impairment was due to smoking-related chronic bronchitis and/or a minimal degree of naturally occurring asthma. He also indicated that claimant's mild restrictive impairment was due to obesity and that claimant had no significant impairment which would prove disabling for the coal mine work claimant described or jobs requiring a similar degree of effort. Employer's Exhibit 7.

Dr. Sutherland indicated by letter dated January 17, 2000, that he had been examining claimant since 1988. He opined that claimant's severe restrictive and obstructive lung disease is a direct result of his coal mine employment. Dr. Sutherland indicated that claimant was being treated for chronic bronchitis/emphysema with chronic obstructive pulmonary disease. He also indicated that claimant has sleep apnea which he described as "a secondary condition associated with severe lung condition". Claimant's Exhibit 2. Dr. Sutherland opined that claimant was unable to perform gainful employment and was totally and permanently disabled based on his pulmonary status. *Id.*

In weighing these medical opinions, the administrative law judge initially noted that Dr. Sutherland's opinion is entitled to great, although not dispositive weight based on his status as claimant's treating physician. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Analyzing the credibility of the medical opinions pursuant to the factors set forth by the United States Court of Appeals for the Fourth Circuit[7] in *Underwood v. Elkay Mining Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 31, 32 (4th Cir. 1997), the administrative law judge permissibly determined that the overall quality of the opinions of Drs. Forehand, McSharry, Fino and Altmeyer was substantially superior to the quality of the opinion of Dr. Sutherland. *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997).

First, the administrative law judge properly found that Drs. McSharry, Fino and Altmeyer are all Board-certified pulmonary specialists, while the record does not establish that Dr. Sutherland possesses any special medical qualifications. Director's Exhibit 30;

[7]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Employer's Exhibits 6, 7; Claimant's Exhibit 2; *Akers, supra*; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

Second, the administrative law judge noted that Dr. Sutherland, unlike Drs. Forehand, McSharry, Fino and Altmeyer, did not discuss any objective testing. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Lastly, the administrative law judge properly found that Dr. Sutherland's failure to mention claimant's smoking history "seriously compromises the reliability of his opinion that the Claimant's respiratory impairment is a direct result of coal mine dust exposure." Decision and Order at 10; *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The administrative law judge thus properly determined that claimant failed to establish by a preponderance of the reasoned and documented medical opinions that he suffers from pneumoconiosis. 20 C.F.R. §718.202(a)(4); *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).

Based on the foregoing, we hold that the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis is supported by substantial evidence, rational and in accordance with law. 20 C.F.R. §718.202(a)(1)-(4). Inasmuch as claimant 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.[8] *See Trent, supra; Perry, supra*. We, therefore, affirm the administrative law judge's denial of benefits in the instant case.

[8]Inasmuch as a finding of entitlement is precluded in the instant case, we need not address the administrative law judge's finding that claimant failed to establish a change in conditions or a mistake in a determination of fact in the district director's denial of the claim. *Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992).

Accordingly, the administrative law judge's Decision and Order Denying Benefits on Request for Modification is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge