BRB No. 02-0686 BLA

HUBERT G. FULFORD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Hubert G. Fulford, West Terre Haute, Indiana, *pro se*.

Jeffrey S. Goldberg (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2001-BLA-1107) of Administrative Law Judge Rudolph L. Jansen denying benefits on a claim[1] 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

[1]Claimant filed his application for black lung benefits on August 23, 2000. Director's Exhibit 1.

[2]The Department of Labor has amended the regulations implementing the

administrative law judge found that claimant's employment with Indiana Gas and Chemical Company (IG&C) does not qualify as coal mine employment under the Act and regulations. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds conceding that claimant has established eight and one-quarter years of covered coal mine employment and requests the Board to vacate the administrative law judge's Decision and Order denying benefits and remand the case to the administrative law judge for consideration of the medical evidence to determine entitlement on the merits. The Director urges the Board to allow the administrative law judge, if on remand he finds the evidence insufficient to establish entitlement of benefits, to remand the case to the district director to provide claimant with a complete pulmonary evaluation in accordance with 30 U.S.C. §932(b); 20 C.F.R. §718.202(a) because claimant was unable to attend the Department-sponsored medical examination. Director's Brief at 7.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *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 supported by substantial evidence, are rational, and are consistent with applicable 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 (1985).

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 & Sons,* 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are 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.

At the hearing the Director contested that claimant was not a miner. Hearing Transcript at 16. The administrative law judge found that claimant worked as a laborer, welder, foreman and coke coordinator at IG&C, a coke production facility that received its raw coal via railroad. Decision and Order at 4. The administrative law judge further found that because claimant's employment was not in or around a coal mine and that his work was not necessary to the extraction and preparation of coal, claimant was not a coal miner as defined by the Act. Decision and Order at 5. The Director now argues in his response brief that claimant's work as a yardman crushing, sizing and mixing raw coal established eight and one-quarter years of coal mine employment pursuant to 20 C.F.R. §725.101(a)(19). Director's Brief at 5.

The regulations define a "miner" or "coal miner" as:

> any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. The term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal mine dust as a result of such employment (*see* §725.202). For purposes of this definition the term does not include coke oven workers.

20 C.F.R. 725.101(19). The Director however argues that since claimant performed "custom coal preparation, and did not work at the actual coke ovens, his work site must be considered a coal mine in light of his work as a yardman." *See* 20 C.F.R. §725.101(a)(12)-(13); Director's Brief at 6. In light of the Director's concession that claimant may have engaged in covered coal mine employment, we vacate the administrative law judge's Decision and Order denying benefits and remand this case for the administrative law judge to consider whether or not any of claimant's employment with IG&C qualifies as coal mine employment under the Act and if so, the length of the qualifying coal mine employment, which the Director and claimant dispute. On remand, if the administrative law judge finds that claimant is a miner under the Act, he must determine whether the evidence is sufficient to establish entitlement under 20 C.F.R. Part 718.[3]

[3]The Director states that because claimant was unable to attend the Department-sponsored medical examination pursuant to 30 U.S.C. §923(b), the Director has submitted only claimant's clinical and hospital records. Director's Brief at 7. The Director suggests that if on remand the administrative law judge finds that the medical record is insufficient to establish entitlement to benefits, the case should be

remanded to the district director in order to provide claimant with a complete and credible evaluation as required by the Act pursuant to 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); Director's Brief at 7-8.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge