BRB No. 02-0764 BLA

RONALD D. PHILLIPS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SCOTT LOGGING, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
PHILBROS MINING AND EXCAVATING, INCORPORATED	)	
	)	
	)	
Employers-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Ronald D. Phillips, Pioneer, Tennessee, *pro* se.

Herbert B. Williams (Stokes, Rutherford, Williams, Sharp & Davies, PLLC), Knoxville, Tennessee, for Scott Logging, Incorporated.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for Philbros Mining and Excavating, Incorporated.[1]

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.
PER CURIAM:

[1] The administrative law judge incorrectly identified "Philbros Mining and Excavating, Incorporated" as "Phillips Mining and Excavating, Incorporated." *See* Decision and Order at 1, 6.

Claimant, representing himself, appeals the Decision and Order (01-BLA-0803) of Administrative Law Judge John C. Holmes 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 instant case involves a duplicate claim filed on February 3, 1995.[3] The administrative law judge indicated that his decision was based upon a review of the entire record. After crediting claimant with less than eight years of coal mine employment, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge further found that the evidence was insufficient to establish that claimant suffered from a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(b). Assuming *arguendo* that claimant suffered from a totally disabling pulmonary impairment, the administrative law judge found that the evidence was insufficient to establish that claimant's pulmonary impairment was due to his coal dust exposure pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the

[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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on June 30, 1982. Director's Exhibit 57. The district director denied the claim on October 28, 1982. *Id.* There is no indication that claimant took any further action in regard to his 1982 claim. Claimant filed a second claim on February 3, 1995. Director's Exhibit 1. (The administrative law judge indicated that that the miner's second claim was filed on January 2, 1995. Decision and Order at 1. While claimant's application is dated January 2, 1995, it is stamped as having being filed on February 3, 1995. *See* Director's Exhibit 1.)

administrative law judge erred in denying benefits. Scott Logging, Incorporated responds in support of the administrative law judge's denial of benefits. Philbros Mining and Excavating, Incorporated also responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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 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 determining whether the x-ray evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge accurately found that none of the x-ray interpretations of record is positive for pneumoconiosis.[4] Decision and Order at 4. Consequently, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Inasmuch as there is no biopsy evidence of record, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 4. Furthermore, the administrative law judge properly found that claimant is not entitled

[4] Claimant's x-rays taken on August 26, 1982, June 10, 1994, February 8, 1995, February 27, 1995, March 20, 1997, July 1, 1997, September 12, 1997, October 17, 1997, December 18, 1997, June 2, 1998, July 28, 1998, September 15, 1998, November 27, 1998, November 30, 1998, June 3, 1999, June 14, 1999, March 21, 2000, July 10, 2000, December 6, 2000 and January 15, 2001 were uniformly interpreted as negative for pneumoconiosis. *See* Director's Exhibits 14, 15, 41, 43, 49, 50, 52, 57, 62, 66, 68, 71, 76, 81, 82; Employer's Exhibits 4-8.

to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3).[5] *Id*.

[5] Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, inasmuch as the instant claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

In his consideration of whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge accurately found that "none of the many physicians who have examined and/or treated claimant have found that he suffers from pneumoconiosis."[6] Decision and Order at 4. Although several physicians diagnosed chronic obstructive pulmonary disease and/or asthma, *see* Director's Exhibits 44, 80-82; Employer's Exhibit 8, none of these physicians attributed these illnesses to claimant's coal mine employment. *See* 20 C.F.R. §718.201(a)(2). Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R.

[6] Dr. Swann examined claimant on August 26, 1982. In a report dated August 30, 1982, Dr. Swann diagnosed chronic bronchitis, but indicated that the disease was not related to claimant's coal dust exposure. Director's Exhibit 57.

Dr. Seargeant examined claimant on February 27, 1995. In a report dated February 28, 1995, Dr. Seargeant opined that claimant did not suffer from chronic obstructive pulmonary disease or pneumoconiosis. Director's Exhibit 12.

In a letter dated July 13, 1998, Dr. Coffey diagnosed, *inter alia*, severe chronic obstructive pulmonary disease. Director's Exhibit 71. Dr. Coffey did not express an opinion regarding the etiology of claimant's chronic obstructive pulmonary disease.

Dr. Hudson examined claimant on September 15, 1998. In a report dated September 15, 1998, Dr. Hudson diagnosed, *inter alia*, a "[h]istory of asthma and COPD not confirmed…." Director's Exhibit 67. Dr. Hudson opined that the miner's asthma "would be unrelated to his coal mining exposure." *Id.*

§718.202(a),[7] an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent*, *supra*; *Gee*, *supra*; *Perry*, *supra*. Consequently, we need not address the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b) and (c). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[7] Before addressing the merits of claimant's 1995 claim, the administrative law judge should have addressed whether the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). However, in light of our affirmance of the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis, the administrative law judge's failure to make an initial finding pursuant to 20 C.F.R. §725.309 (2000) constitutes harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1284 (1986).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge