BRB No. 03-0822 BLA

WILLIAM MOLLETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 05/18/2004
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Robert L. Hillyard, Administrative Law Judge, Department of Labor.

William Mollett, Wheelersburg, Ohio, *pro se*.

Helen H. Cox (Howard M. Radzely, 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 – Denial of Benefits (2003-BLA-5329) of Administrative Law Judge Robert L. Hillyard rendered 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).[1] The administrative law judge stated that while claimant's status as a coal miner was not

[1] 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.

challenged, he was unable to make a finding as to the length of claimant's coal mine employment because the evidence was insufficient to verify the dates indicating coal mine work. Decision and Order at 3. The administrative law judge further determined that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability pursuant to 20 C.F.R. §718.204(b)(2). Benefits were, therefore, denied.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. The Director, Office of Workers' Compensation Programs, (the Director) responds, stipulating that claimant had at most seven years of coal mine employment that occurred prior to 1966. The Director further argues that in the absence of a credible medical opinion diagnosing the existence of pneumoconiosis or positive x-ray evidence for the disease, the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis. Likewise, the Director contends that the administrative law judge properly found that total respiratory disability was not established as Dr. Mavi's disability opinion was not credible and the pulmonary function study and blood gas study evidence of record were non-qualifying. Thus, the Director contends that the administrative law judge permissibly concluded that the medical evidence was insufficient to establish a totally disabling respiratory impairment arising out of coal mine employment and that the Decision and Order denying benefits should be affirmed.

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 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 he or she is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the evidence of record, we affirm as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). The administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis at 20

C.F.R. §718.202(a)(1) since the only x-ray of record dated May 21, 2002, was interpreted as negative for the disease. Decision and Order at 5; Director's Exhibit 13. Likewise, because there is no biopsy evidence in the record, the administrative law judge correctly determined that claimant was precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 6. The administrative law judge was also correct in finding that claimant was unable to establish the existence of pneumoconiosis based on the presumptions provided at 20 C.F.R. §718.202(a)(3). *See* 20 C.F.R. §§718.304, 718.305, 718.306.

In considering the single medical report in the record, prepared by Dr. Mavi, Director's Exhibits 7, 8, at Section 718.202(a)(4), the administrative law judge found it equivocal at best and not well-reasoned because it was based on Dr. Mavi's incorrect belief that claimant worked twenty years in the coal mines, when the administrative law judge determined that claimant's coal mine employment was not verifiable, and the Director conceded only seven years of coal mine employment, and it did not sufficiently explain whether pneumoconiosis caused claimant's respiratory condition. The administrative law judge further found that while Dr. Mavi referenced an x-ray in his report, the only x-ray of record was interpreted as negative. In addition the administrative law judge found that Dr. Mavi stated that his diagnosis was incomplete due to the lack of data available. The administrative law judge stated that Dr. Mavi described claimant as a poor historian with respect to his work and medical histories. Decision and Order at 7; Director's Exhibits 7, 8. Accordingly, the administrative law judge correctly found that Dr. Mavi did not provide a well-reasoned opinion regarding the existence of pneumoconiosis. *See Barnes v. Director, OWCP*, 19 BLR 1-71, 1-76 (1995)(*en banc*)(Smith, J., dissenting); *Smith v. Director, OWCP*, 12 BLR 1-156, 1-157 (1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Addison v. Director, OWCP*, 11 BLR 1-68, 1-69-70 (1988); *Hall v. Director, OWCP*, 8 BLR 1-193, 1-195 (1985). Likewise, the administrative law judge properly found that Dr. Mavi's report, opining that claimant was "certainly 100% impaired" due to his dyspnea, did not reflect to what extent, if any, claimant's dyspnea was caused by coal mine employment. Decision and Order at 8; *see* 20 C.F.R. §718.204(c).

Since claimant has the general burden of establishing entitlement, he bears the risk of non-persuasion when his evidence is found insufficient for any reason. *See Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1. Claimant has failed to provide sufficient information on which a doctor could make a reasoned determination. *See* Director's Exhibits 7, 8. Because claimant is unable to establish the existence of pneumoconiosis, or causation, requisite elements of entitlement, benefits are precluded. *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge