BRB No. 01 - 0103 BLA

LARRY WAYNE WOODWARD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
ISLAND CREEK COAL COMPANY	)	
	)	
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 Claim of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Larry Wayne Woodward, Rosedale, Virginia, *pro se*.

Douglas A. Smoot and Kathy L. Snyder (Jackson & Kelly, PLLC), Morgantown, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant[1], without the assistance of counsel, appeals the Decision and Order Denying Claim (00-BLA-0649) of Administrative Law Judge Daniel F. Solomon on a request for modification 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*.[2] The administrative law judge found that the parties stipulated that claimant suffered from pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2000) and 718.203(2000), but that the evidence was insufficient to establish

[1]Claimant is Larry Wayne Woodward, the miner, who filed a claim with the Department of Labor (DOL) on April 7, 1998, which was denied by DOL on June 5, 1998. Director's Exhibit 28. Claimant then retained counsel and requested a hearing on July 15, 1998, less than 60 days following the informal denial. Director's Exhibits 18, 25. DOL then issued a Proposed Decision and Order dated October 5, 1998. Director's Exhibit 28. This Proposed Decision and Order became final 30 days after it was issued in accordance with its terms, as claimant took no further action. Claimant then changed counsel and again requested a formal hearing on July 15, 1999, less than one year from the date that the denial became final. Director's Exhibits 34, 35. DOL interpreted claimant's action as a request for modification. Director's Exhibit 44. A formal hearing was conducted by Administrative Law Judge Daniel F. Solomon on August 2, 2000.

[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.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would 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). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001). Accordingly, on August 24, 2001, the Board issued a second order in which it rescinded its earlier order requesting supplemental briefing.

total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c)(2000).[3] Accordingly, the administrative law judge found that the evidence failed to establish a change in conditions and he found that there was no mistake in a determination of fact pursuant to 20 C.F.R. §725.310(2000). The administrative law judge, therefore, denied the request for modification and the claim.

On appeal, claimant generally challenges the denial of modification and benefits. Employer, in response, asserts that the administrative law judge's finding that the evidence fails to establish total disability due to pneumoconiosis pursuant to Section 718.204(b), (c)(2000) is supported by substantial evidence, and accordingly, it urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter, indicating that he will not respond to the instant appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986)*; Antonio v. Bethlehem Mines Corp.*, 6 BLR 1-702 (1983). The Board's scope of review is defined by statute. 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 in a living miner's claim, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. Failure to prove any of these requisite elements of entitlement compels a denial of benefits. *See* 20 C.F.R. §§718.3, 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*).

[3]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 total disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

The administrative law judge correctly concluded that the applicable Section 718.204(b)(2000) standard in effect at the time of his decision required that claimant establish that pneumoconiosis was a contributing cause of the miner's total disability. *See Jewell Smokeless v. Street*, 42 F. 3d 241 (4th Cir. 1994); *Hobbs v. Clinchfield Coal Co.*, 917 F. 2d 740, 15 BLR 2-225 (4th Cir. 1990); *Robinson v. Pickands Mather & Co.*, 914 F. 2d 35, 14 BLR 2- 68 (4th Cir. 1990). The administrative law judge considered the seven opinions of record from Drs. Forehand, Hippensteel, Michos, Castle, Byers, Naeye and Bush. Decision and Order at 17-18. The administrative law judge concluded that each of the seven doctors failed to establish a causal link between claimant's pneumoconiosis and total disability. Decision and Order at 17.

A review of the record indicates that Dr. Forehand opined that claimant's disability was due to arthritis and musculoskeletal problems not caused nor aggravated by coal workers' pneumoconiosis. Director's Exhibit 13; Employer's Exhibit 13. Dr. Hippensteel's opinion was that claimant's disability was due to coronary artery disease, obesity, and deconditioning not related to coal workers' pneumoconiosis. Director's Exhibit 32; Employer's Exhibits 7, 15. Dr. Michos stated that claimant is totally disabled due to a combination of factors including coronary artery disease, and obesity with deconditioning, a back injury and multiple heart attacks, but that they were unrelated to claimant's prior coal mine employment. Employer's Exhibits 9, 14. Dr. Castle opined that claimant was permanently and totally disabled due to coronary artery disease, arthritis and obesity but stated that claimant had no impairment due to his simple coal workers' pneumoconiosis. Employer's Exhibit 11. Dr. Byers, whom the administrative law judge found was claimant's treating physician, Decision and Order at 10, opined that claimant had coal workers' pneumoconiosis, but his only statement relevant to causation was " I do not think black lung is causing his increased dyspnea recently." Director's Exhibit 36. Finally, both Drs. Naeye and Bush concluded that claimant was totally disabled due to severe coronary artery disease, arthritis and obesity, but that claimant suffered from no impairment that was due to coal workers' pneumoconiosis. Director's Exhibit 47. Thus, the administrative law judge correctly concluded that there is no opinion of record which could establish that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b)(2000).

Subsequent to the issuance of the administrative law judge's Decision and Order, the disability causation regulation was amended. Pursuant to 20 C.F.R. §718.204(c), claimant must establish that pneumoconiosis is "a substantially contributing cause" of his total disability in order to establish disability causation. 20 C.F.R. §718.204(c). We need not remand this case for further consideration pursuant to 20 C.F.R. §718.204(c), however, as the administrative law judge's findings on disability causation at 20 C.F.R. §718.204(b)(2000) preclude a finding of causation under the new regulations. We affirm, therefore, the administrative law judge's finding that the evidence is insufficient to

establish total disability due to pneumoconiosis, as it is supported by substantial evidence and is in accordance with applicable law. *See* 20 C.F.R. §718.204(c).

Inasmuch as claimant has failed to establish disability causation, a requisite element of entitlement pursuant to Part 718, we affirm the administrative law judge's denial of benefits in the instant claim. *See Trent, supra; Perry, supra.*[4]

Accordingly, the administrative law judge's Decision and Order Denying Claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[4]We need not address the administrative law judge's findings that the evidence fails to establish a change in conditions and that a mistake in a determination of fact has not been established pursuant to 20 C.F.R. §725.310(a)(2000), as they are rendered moot by our disposition of the case. *See Cochran v. Director, OWCP,* 16 BLR 1-101(1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).