BRB No. 01-0338 BLA

SAMMY D. CHILDRESS)
)
Claimant-Petitioner)

)
v.)
)
RANDY J. MILLER TRUCKING) DATE ISSUED:
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 Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Sammy Childress, Breaks, Virginia, *pro se*.

Philip J. Reverman, Jr. (Boehl, Stopher and Graves, LLP), Louisville, Kentucky, for employer.

Timothy S. Williams (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (99-BLA-1347) of Administrative Law Judge Daniel F. Sutton (the administrative law judge) denying benefits on a claim[2] 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).[3] The administrative law judge credited claimant with at least twenty-one years of coal

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[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 December 21, 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.)

[2]The instant claim was filed on January 22, 1997. Director's Exhibit 1. The district director initially denied the claim on April 7, 1997 based on claimant's failure to establish any element of entitlement. Director's Exhibit 11. The district director's denial appears to have crossed in the mail with claimant's submission of additional evidence, by cover letter dated April 1, 1997, which was received in the district director's office on April 7, 1997. *See* Director's Exhibit 21. The district director considered claimant's letter to be a request for modification under 20 C.F.R. §725.310 (2000). Director's Exhibit 22. On July 11, 1997, the district director issued a Proposed Decision and Order Denying Request for Modification. Director's Exhibit 23. On July 24, 1997, claimant challenged the district director's denial and requested a hearing. Director's Exhibit 24. A conference was held before the district director on February 26, 1998. *See* Director's Exhibit 25. By Proposed Decision and Order Memorandum of Conference dated July 14, 1998, the district director determined that the claim must remain denied. Directors' Exhibit 25. Claimant thereafter submitted additional evidence by cover letter dated March 2, 1999. Director's Exhibit 26. The district director considered claimant's letter to be a request for modification under 20 C.F.R. §725.310 (2000), Director's Exhibit 28, and denied the request by Proposed Order dated May 25, 1999. Director's Exhibit 28. Pursuant to claimant's request, a hearing was held before the administrative law judge on February 9, 2000.

[3]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.

mine employment based on the parties' stipulation. Considering the evidence of record on the merits of the claim, the administrative law judge found that it failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a) (2000). The administrative law judge further found that the evidence of record was insufficient to establish that claimant had pneumoconiosis arising out of his coal mine employment, that he was totally disabled pursuant to 20 C.F.R. §718.204(c) (2000), or that he was totally disabled due to

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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 April 16, 2001, the Board received the response of the Director, Office of Workers' Compensation Programs (the Director). 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). The court's decision renders moot those arguments made by the Director regarding the impact of the challenged regulations.

pneumoconiosis under 20 C.F.R. §718.204(b) (2000).[4] The administrative law judge also found that claimant failed to establish modification of the district director's denial under 20 C.F.R. §725.310 (2000). Accordingly, benefits were denied.

In response to claimant's appeal, employer urges the Board to affirm the decision below as it is rational, supported by substantial evidence, and consistent with applicable law. The Director, Office of Workers' Compensation Programs, has not filed a response brief in the 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 20 C.F.R. 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*). Failure to establish any element will preclude a finding of entitlement to benefits.

Considering the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1) (2000), the administrative law judge found that it was, at best, inconclusive regarding the presence of pneumoconiosis. Specifically, the administrative law judge noted that the February 19, 1997 x-ray was read as negative by Drs. Forehand and Lippman who were both B readers; that the March 18, 1988 x-ray was read as positive by Dr. Modi, who had no special radiological qualifications, and as negative by Dr. Wiot, who was dually qualified as a B reader and

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[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).

Board-certified radiologist; and that the October 21, 1986 x-ray was read as positive for Dr. Alexander, who was a B reader and Board-certified radiologist. The administrative law judge found:

> Based on a comparison of radiological credentials, I give little weight to the interpretation by Dr. Modi who has no special qualification in interpreting x-rays for the presence of pneumoconiosis. This leaves the two divergent opinions by Drs. Alexander and Wiot regarding the older x-rays from 1986 and 1988 and the unanimous opinion of B readers Forehand and Lippmann that the most recent film is completely negative. On this record, I find that the x-ray evidence is at best inconclusive regarding the presence of pneumoconiosis.

Decision and Order at 7. Given the administrative law judge's findings regarding the weight and credibility of the x-ray evidence, it was not irrational for him to find that it was inconclusive and did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) (2000). *See Adkins v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).[5] The administrative law judge thus properly determined that claimant failed to meet his burden under 20 C.F.R. §718.202(a)(1) (2000). 20 C.F.R. §718.202(a)(1); *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).

The administrative law judge also correctly determined that there is no biopsy evidence of record. Decision and Order at 6. Further, there is no 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).

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. §§718.202(a)(3), 718.304, 718.305, 718.306.

The administrative law judge next considered Dr. Forehand's medical opinion dated February 19, 1997, the sole medical opinion of record, pursuant to 20 C.F.R. §718.202(a)(4) (2000). He properly determined that Dr. Forehand's report, in which the physician found no

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[5]The administrative law judge did not address Dr. Navani's negative reading of the x-ray dated March 18, 1988 contained in Director's Exhibit 21. The administrative law judge's error is harmless as this reading does not support claimant's burden at 20 C.F.R. §718.202(a)(1). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

evidence of coal workers' pneumoconiosis and diagnosed arteriosclerotic cardiovascular disease related to claimant's elevated cholesterol and cigarette smoking, Director's Exhibit 7, contained no diagnosis which would constitute a finding of pneumoconiosis within the meaning of the Act. *See* 30 U.S.C. §902(b); 20 C.F.R. §718.201; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000). The administrative law judge thus properly determined that Dr. Forehand's opinion was insufficient to meet claimant's burden at 20 C.F.R. §718.202(a)(4) (2000). 20 C.F.R. §718.202(a)(4).

Based on the foregoing, we hold that the administrative law judge properly determined that the evidence was insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4) (2000). 20 C.F.R. §718.202(a); *Compton*, *supra*. Inasmuch as the evidence fails to establish the existence of pneumoconiosis, an essential element of entitlement under 20 C.F.R. Part 718, a finding of entitlement in the instant claim is precluded. *See Trent, supra; Perry, supra*.[6] We, therefore, affirm the administrative law judge's denial of benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[6]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 modification of 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).

REGINA C. McGRANERY
Administrative Appeals Judge