BRB No. 04-0239 BLA

HERBERT A. MANN	)	
	)	
Claimant-Petitioner	)	
	)	
	)	
v.	)	
	)	
	)	DATE ISSUED: 11/18/2004
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Herbert A. Mann, Fayetteville, West Virginia, *pro se.*

Jeffrey S. Goldberg (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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order – Denying Benefits (01-BLA-0969) of Administrative Law Judge Richard A. Morgan on a miner's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health

[1]Claimant is Herbert A. Mann, the miner, who filed his claim for benefits on November 19, 1997. Director's Exhibit 1.

and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[2] This case is before the Board for the second time. Initially, Administrative Law Judge Edward Terhune Miller credited claimant with "not more than six months" of coal mine employment. Director's Exhibit 33 at 3. Applying the regulations pursuant to 20 C.F.R. Part 718, Judge Miller found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) and total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000). *Id.* at 5. However, Judge Miller found the evidence insufficient to establish that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c) (2000) or that his total respiratory disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). *Id.* Accordingly, benefits were denied.

In response to claimant's appeal and the response brief of the Director, Office of Workers' Compensation Programs (the Director), the Board vacated Judge Miller's denial of benefits and remanded this case to the district director for a complete and credible pulmonary evaluation.[3] *Mann v. Director, OWCP*, BRB No. 99-1226 BLA (Aug. 30, 2000)(unpub.). On remand, the United States Department of Labor submitted Dr. Spagnolo's opinion in order to satisfy its obligation to claimant to provide a complete and credible pulmonary evaluation. Director's Exhibits 39, 40. The district director subsequently denied the claim. Claimant requested a hearing, and the case was forwarded to the Office of Administrative Law Judges. *Id.* at 41, 42, 43.

Administrative Law Judge Richard A. Morgan (hereinafter, the administrative law judge) excluded from the record Dr. Rasmussen's January 10, 2003 report, which was submitted by the Director, in light of claimant's objection. Decision and Order at 2. The administrative law judge credited claimant with five and one-half years of coal mine employment based upon the Director's concession, Director's Exhibit 36. Decision and Order at 5. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis

---

[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 Board held that, as the Director, Office of Workers' Compensation Programs (the Director), contended, Dr. Rasmussen's 1997 opinion was not credible because it was based upon an inaccurate length of coal mine employment. *Mann v. Director, OWCP*, BRB No. 99-1226 BLA (Aug. 30, 2000)(unpub.).

pursuant to 20 C.F.R. §718.202(a) and total respiratory disability pursuant to 20 C.F.R. §718.204(b). *Id.* at 11-13. However, the administrative law judge found the evidence insufficient to establish that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c) or that his total respiratory disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.* at 12-15. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. The Director responds, urging affirmance of the administrative law judge's denial of benefits.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

We first address the issue of whether the case should be remanded to provide claimant with a complete and credible pulmonary evaluation. In his response brief, the Director states that "normally, we would ask the Board to remand this case a second time so that the Director could provide [claimant] with a complete and credible pulmonary evaluation" in accordance with the Act and regulations, *see* 30 U.S.C. §923(b); 20 C.F.R. §718.101 (2000); 20 C.F.R. §§725.401, 725.405(b). Director's Brief at 10-11. The Director asserts, however, that Dr. Rasmussen's January 10, 2003 report, which he also developed, "cures the defects in the prior report [of Dr. Spagnolo] and thus satisfies the Director's statutory obligation." *Id.* at 11. In his brief, the Director states "that Dr. Spagnolo's opinion is not credible regarding disability causation." *Id.* at 9. Specifically, the Director asserts that Dr. Spagnolo's statement that "the lung function test results in 1997 provide no evidence for restrictive impairment" is contrary to the Act "to the extent that [this physician] was suggesting that coal dust exposure causes only a restrictive defect." *Id.* at 10. Additionally, the Director contends, "more significantly," that Dr. Spagnolo's assertion that "category one x-ray changes do not result in lung dysfunction and do not contribute to lung dysfunction" is also contrary to the Act. *Id.*

In the instant case, Dr. Spagnolo opined that claimant's "current respiratory impairment is not attributable to pneumoconiosis or related in any way to his prior coal mine employment." Director's Exhibit 40. Dr. Spagnolo based his finding, in part, on his "opinion that category one x-ray changes do not result in lung dysfunction and do not contribute to lung dysfunction." *Id.* In making such a statement, Dr. Spagnolo based his opinion on an assumption which is hostile to the Act, namely, that category one x-ray

changes do not contribute or result in lung dysfunction. Accordingly, we hold that Dr. Spagnolo's opinion is contrary to the Act and not credible. *Lane v. Union Carbide Corp.*, 105 F.3d 166, 173, 21 BLR 2-34, 2-46 (4th Cir. 1997); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719, 18 BLR 2-16, 2-24-25 (4th Cir. 1993).[4]

Regarding Dr. Rasmussen's January 10, 2003 report, which the Director states he submitted to cure the defects in Dr. Spagnolo's opinion, the Director notes that the administrative law judge declined to admit Dr. Rasmussen's 2003 report into the record in light of claimant's objection. Director's Brief at 11. The Director contends that it is his duty to provide a complete and credible evaluation, but he "cannot be responsible if the claimant himself prevents the resulting opinion from appearing in the record." *Id.* The hearing in this case was scheduled for June 11, 2003. Under cover letter, dated June 6, 2003, the Director sought to submit into evidence the January 10, 2003 supplemental report of Dr. Rasmussen. On June 9, 2003, claimant requested that the case be decided on the record[5] and objected to the Director's submission of Dr. Rasmussen's 2003 report. The administrative law judge issued an Order Cancelling Hearing and Granting Decision on the Record. Thereafter, claimant renewed his objection to the Director's submission of Dr. Rasmussen's 2003 report because this opinion was not received within twenty days of the scheduled date of the hearing. In his Decision and Order, the administrative law judge noted that Dr. Rasmussen's January 10, 2003 report was stamped as received by the U.S. Department of Labor on January 16, 2003 and that notice of the formal hearing was issued on February 12, 2003. Decision and Order at 2. The administrative law judge found merit in claimant's objection to the submission of Dr. Rasmussen's January 10, 2003 supplemental report because the Director failed to show good cause for the delay in

---

[4]The United States Court of Appeals for the Fourth Circuit in *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997), rejected the contention of the miner in that case that the administrative law judge erred in crediting a medical diagnosis of no total disability where the physician noted that early simple coal workers' pneumoconiosis would "not be expected" to cause pulmonary impairment. The Fourth Circuit noted that this statement demonstrated that the physician based his opinion on the evidence in the case and not upon any assumption "hostile" to the Act. *Lane*, 105 F.3d at 173, 21 BLR at 2-46. The Fourth Circuit indicated that this medical diagnosis was unlike the medical opinion in *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719, 18 BLR 2-16, 2-24-25 (4th Cir. 1993). The Fourth Circuit stated that the court in *Thorn* rejected a medical opinion stating that "simple pneumoconiosis does not 'as a rule' cause total disability," because it was based on a premise "antithetical" to the Act. *Lane*, 105 F.3d at 173, 21 BLR at 2-46.

[5]The Director did not object to claimant's request that this case be decided on the record.

submitting it, the result of which was that it was submitted less than twenty days before the scheduled hearing in this case. *Id.*

An administrative law judge is given broad discretion to handle procedural matters. *Dempsey v. Sewell Coal Co.*, BRB Nos. 03-0615 BLA, 03-0615 BLA-A (June 28, 2004)(*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*). On the facts of this case, we detect no abuse of discretion in the administrative law judge's determination that the Director failed to establish good cause for the untimely submission of Dr. Rasmussen's January 10, 2003 report pursuant to 20 C.F.R. §725.456(b)(2) (2000). The record indicates that the Department of Labor received Dr. Rasmussen's 2003 supplemental report on January 16, 2003, which would have given the Director adequate time to submit this report on or before twenty days prior to the hearing, scheduled for June 11, 2003, as required by 20 C.F.R. §725.456(b)(1) (2000).[6] Accordingly, we affirm the administrative law judge's exclusion of Dr. Rasmussen's January 10, 2003 supplemental report.[7]

The Director maintains that he fulfilled his duty to provide claimant with a complete and credible pulmonary evaluation by submitting Dr. Rasmussen's 2003 opinion and that claimant, by his counsel's actions, prevented the opinion from appearing in the record. Because the Director is charged with administration of the Black Lung Benefits Act, special deference is generally given to the Director's position on issues involving interpretation or application of the Act. *Saginaw Mining Co. v. Mazzulli*, 818 F.2d 1278, 1283, 10 BLR 2-119, 2-127 (6th Cir. 1987); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979, 16 BLR 2-90, 2-92 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993)(*citing BethEnergy Mines, Inc. v. Pauley*, 501 U.S. 680, 15 BLR 2-155 (l991), *aff'g* 890 F.2d l295, 13 BLR 2-162 (3d Cir. l989) and *Adkins v. Director, OWCP*, 878 F.2d

---

[6]The relevant portion of 20 C.F.R. §725.456(b)(1) (2000) states that "other documentary material . . . may be received in evidence subject to the objection of any party, if such evidence is sent to all other parties at least 20 days before a hearing is held in connection with the claim."

[7]The administrative law judge additionally noted that Dr. Rasmussen's report, dated January 10, 2003, was based on an inaccurate length of coal mine employment and, therefore, that its admission would not have changed his decision. Decision and Order at 2 n.2. However, the Director informed Dr. Rasmussen, in a letter dated January 7, 2003, that claimant had five and one-half years of coal mine employment, and Dr. Rasmussen acknowledged receipt of the letter in his report dated January 10, 2003. We, therefore, accept the Director's characterization of Dr. Rasmussen's 2003 report, specifically that it was based on an accurate length of coal mine employment and, therefore, is credible.

151, 12 BLR 2-313 (4th Cir. 1989)). Therefore, we agree with the Director, that as administrator of the Act, in this case he fulfilled his duty to provide claimant with a complete and credible pulmonary evaluation and that claimant prevented Dr. Rasmussen's 2003 report from being admitted into the record.

We next address whether claimant is entitled to benefits. 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*).

Pursuant to Section 718.203(c), the administrative law judge considered all of the relevant evidence and determined that claimant failed to meet his burden of establishing a relationship between his coal mine employment and his pneumoconiosis. Decision and Order at 13. Specifically, the administrative law judge considered the opinions of Drs. Gaziano and Rasmussen and properly found Dr. Gaziano's opinion, that claimant's limited coal dust exposure did not produce coal workers' pneumoconiosis, to be entitled to "no weight" because he relied on an understated coal mine employment history of less than one year.[8] *See Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985); *Long v. Director, OWCP*, 7 BLR 1-254, 1-256-57 (1984)(Ramsey, C.J., concurring). Moreover, the administrative law judge found that Dr. Rasmussen's December 22, 1997 opinion and his August 24, 1998 opinion "do[] not constitute competent evidence of a causal relationship" between claimant's pneumoconiosis and his coal mine employment. Decision and Order at 12. The administrative law judge permissibly reasoned that Dr. Rasmussen, in his 1997 opinion, found a causal relationship based on an inflated nine year coal mine employment and that this physician's 1998 "subsequent rejection of such a relationship was based upon an understated (only a few months) coal mine employment." *Id.*; *see Oggero*, 7 BLR at 1-865; *Long*, 7 BLR at 1-256-57.

[8]The administrative law judge found that Dr. Spagnolo's opinion "is not probative regarding the 'causal relationship' issue." Decision and Order at 12. However, Dr. Spagnolo opined that claimant does not have any chronic restrictive or obstructive pulmonary disease from coal mine employment. Director's Exhibit 40. We deem any error the administrative law judge may have made in failing to consider Dr. Spagnolo's opinion pursuant to 20 C.F.R. §718.203(c) to be harmless, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), because it does not support claimant in establishing that his pneumoconiosis arose out of his coal mine employment, *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986).

We affirm the administrative law judge's finding that claimant failed to establish that his pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(c) because the record contains no credible medical opinion evidence relating claimant's pneumoconiosis to dust exposure during his coal mine employment.[9] *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Because we affirm the administrative law judge's determination that claimant did not establish that his pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(c), a requisite element of entitlement under Part 718, we further affirm the administrative law judge's denial of benefits. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

[9]Because an additional six months of coal mine employment would not assist claimant in establishing that his pneumoconiosis arose out of his coal mine employment, the administrative law judge properly stated that "any discrepancy between the 5½ years conceded by the Director, and the 'about 6 years' alleged by claimant is inconsequential for the purpose of rendering a decision herein," Decision and Order at 5; *see Baumgartner*, 9 BLR at 1-66; *Stark*, 9 BLR at 1-37 (1986).