

BRB No. 05-0462 BLA

CLIFFORD H. MUCK)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED: 11/30/2005
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Clifford H. Muck, Poca, West Virginia, *pro se*.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (03-BLA-5054) of Administrative Law Judge Janice K. Bullard (the administrative law judge) on a claim¹ 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). The administrative law judge credited claimant with twelve years of coal mine employment pursuant to the parties' stipulation. On the merits of the claim, the administrative law judge

¹Claimant filed the instant claim on February 28, 2001. Director's Exhibit 2. The district director denied benefits on July 17, 2002. Director's Exhibit 16. At claimant's request, the case was subsequently transferred for a hearing. Director's Exhibits 17, 18.

found that the evidence of record failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) - (4), etiology at 20 C.F.R. §718.203(b), and total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(i) – (iv). Accordingly, benefits were denied. The Director, Office of Workers' Compensation Programs (the Director) responds to claimant's appeal, and urges the Board to affirm the decision below as it is supported by substantial evidence and is in accordance with law.

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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *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 by 30 U.S.C. §932(a).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that he is totally disabled due to a respiratory or pulmonary impairment arising out of coal mine employment. 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 of entitlement will preclude a finding of entitlement to benefits.

The administrative law judge found that the relevant evidence of record is insufficient to establish, *inter alia*, the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) - (4). At 20 C.F.R. §718.202(a)(1), the administrative law judge correctly noted that the x-ray evidence of record is entirely negative. Director's Exhibits 13, 14; Claimant's Exhibits 2, 3; *see* Decision and Order at 5. The administrative law judge thus rationally determined that the x-ray evidence does not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).

At 20 C.F.R. §718.202(a)(2), the administrative law judge correctly stated that the record contains no biopsy evidence and thus properly determined that claimant cannot establish the existence of pneumoconiosis thereunder. The administrative law judge also properly found that the presumptions referred to in 20 C.F.R. §718.202(a)(3) are not applicable in the instant claim because this is a living miner's claim filed after January 1, 1982 and there is no evidence relevant to invocation of the irrebuttable presumption of total disability due to pneumoconiosis provided at 20 C.F.R. §718.304. Decision and Order at 5.

At 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinion evidence and hospital treatment records.² The administrative law judge, within her discretion, accorded greater weight to Dr. Gaziano's opinion that claimant has asthmatic bronchitis unrelated to coal dust exposure or coal mine employment. Director's Exhibits 12, 21. Specifically, the administrative law judge properly found that Dr. Gaziano's opinion is well reasoned and well documented, as he assessed claimant's condition based on objective testing, physical examination, and claimant's medical history. *Id.*; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). The administrative law judge also weighed Dr. Fernandez's opinion dated January 12, 2001, which is the only medical opinion of record that could support claimant's burden at 20 C.F.R. §718.202(a)(4). *See* Claimant's Exhibit 6. The administrative law judge, within her discretion, found that "[t]he diagnosis sheet from Dr. Fernandez's office indicating a diagnosis of 'black lung disease' is entitled to no weight as it is wholly unreasoned."³ Decision and Order at 8; Claimant's Exhibit 6; *Milburn Colliery Co. v. Hicks*,

²The relevant medical evidence of record consists of the following:

By medical form dated January 12, 2001, Dr. Fernandez diagnosed black lung disease. Claimant's Exhibit 6.

By report dated May 29, 2001, Dr. Gaziano diagnosed "non-occupational" asthmatic bronchitis and chest pain due to unknown causes. Director's Exhibit 10. Dr. Gaziano also diagnosed a mild impairment due to claimant's asthmatic bronchitis. *Id.* By letter to the district director dated August 24, 2004, Dr. Gaziano explained that claimant's asthmatic bronchitis is not caused by coal dust or coal mine employment. Director's Exhibit 21.

In discharge instructions relevant to claimant's April 2002 stay at Thomas Memorial Hospital in South Charleston, West Virginia, Drs. Smaltz and Wright diagnosed chronic obstructive pulmonary disease. Claimant's Exhibit 4.

By report dated January 28, 2003, Dr. Moore diagnosed asbestosis and dyspnea with mild exertion. Claimant's Exhibit 1.

By Discharge Summary relevant to claimant's May 2003 stay at Thomas Memorial Hospital in South Charleston, West Virginia, Dr. Patel diagnosed, *inter alia*, chronic obstructive pulmonary disease and "Other lung disease, not otherwise specified." Claimant's Exhibit 9. Dr. Patel noted a history of "black lung disease" in the "Hospital Course" section of this Discharge Summary. Claimant's Exhibits 9, 10.

³The administrative law judge did not address Dr. Patel's notation of a history of black lung disease, which is contained in the "Hospital Course" section, as opposed to the "Discharge Diagnosis" section, of the Discharge Summary of claimant's May 2003 hospitalization. Claimant's Exhibits 9, 10. A physician's notation of a history of a disease, however, does not *per se* constitute an independent diagnosis of that disease. *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). We

138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

Based on the foregoing, we hold that the administrative law judge's findings at 20 C.F.R. §718.202(a)(1) - (4) are supported by substantial evidence and are in accordance with law, and we affirm them. Because claimant has failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202, an essential element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits, as a finding of entitlement is precluded. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-5.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

hold, therefore, that the administrative law judge did not err by not weighing Dr. Patel's notation in this case. Further, as set forth above, *see supra* at n.2, the record contains diagnoses of chronic obstructive pulmonary disease, asbestosis, and dyspnea. *See Claimant's Exhibits 1, 4, 9.* These diagnoses alone, however, without a link to claimant's coal mine employment, are insufficient to establish the existence of pneumoconiosis, as defined in 20 C.F.R. §718.201(a).