BRB No. 01-0116 BLA

HOMER DANIELS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL	)	DATE ISSUED:
CORPORATION	)	
	)	
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 - Denial of Benefits of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (99-BLA-0667) of Administrative Law Judge Richard E. Huddleston on a claim[1] filed pursuant to the provisions

[1] Claimant filed a claim for benefits on August 11, 1993, Director's Exhibit 1. Benefits were awarded in a Decision and Order issued January 8, 1997 by Administrative Law Judge Frederick D. Neusner, Director's Exhibit 72. Subsequently, the Board vacated Judge Neusner's award of benefits as it vacated Judge Neusner's finding of pneumoconiosis

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).[2] At the outset, the administrative law judge denied employer's Motion for Partial Summary Decision because he concluded that the newly submitted evidence alone presented sufficient grounds for a request for modification. The administrative law judge then concluded that claimant had established a basis for modification because the newly submitted biopsy evidence established a change in conditions

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and total disability. Director's Exhibit 80; *Daniels v. Eastern Associated Coal Corp.*, 95-1626 BLA (Jan. 8, 1997)(unpub.). On remand, Judge Neusner denied benefits because he concluded that claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 83. Subsequent to an appeal by claimant, the Board affirmed Judge Neusner's finding and the denial of benefits. Director's Exhibit 89; *Daniels v. Eastern Associated Coal Corp.*, 97-1119 BLA (Apr. 29, 1998)(unpub.). Claimant subsequently submitted new biopsy evidence to the district director and was informed that the submission of that evidence would be treated as a request for modification. Director's Exhibit 90. Employer challenged the request for modification through a motion for partial summary judgement arguing that claimant's request for modification was an abuse of the modification process because it was an attempt to avoid the consequences of failing to file a timely appeal before the United States Court of Appeals. On May 16, 200, Judge Huddleston held a hearing and, on September 27, 2000, issued the Decision and Order denying the motion for partial summary decision and denying benefits from which claimant now appeals.

[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*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot any arguments made by the parties regarding the impact of the challenged regulations.

by demonstrating the existence of pneumoconiosis, an element of entitlement previously adjudicated against claimant, and that the claim must therefore be reevaluated under Part 718. Decision and Order at 11. Considering the merits of the claim, the administrative law judge found that the weight of the evidence established the existence of pneumoconiosis pursuant to the standard set forth by the United States Court of Appeals, within whose jurisdiction this cases arises, in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLA 2- (4th Cir. 2000). Decision and Order at 11-12. The administrative law judge further held that it was undisputed that claimant had worked for approximately 42 years in coal mine employment, that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment, and that there was no evidence, nor did employer argue, that claimant's pneumoconiosis did not arise out of coal mine employment. Additionally, the administrative law judge found that the evidence supported a finding that claimant was totally disabled from a respiratory standpoint and that employer did not dispute this. The administrative law judge found, however, that the evidence failed to establish that pneumoconiosis was a contributing factor to claimant's totally disabling respiratory impairment. Decision and Order at 13-14. Accordingly, benefits were denied.

On appeal, claimant contends that the medical opinion of Dr. Rasmussen is supportive of a finding that claimant's totally disabling respiratory impairment was due to pneumoconiosis. Claimant further asserts the administrative law judge erred in relying upon opinions of physicians who failed to recognize the existence of pneumoconiosis as demonstrated by x-ray evidence of record. Employer responds and urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[3]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 pursuant to Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20

[3] We affirm, as unchallenged on appeal, the administrative law judge's denial of employer's request for a partial summary decision. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We further affirm the findings that claimant established a basis for modification, the existence of pneumoconiosis, and total disability. *See* 20 C.F.R. §§725.310 (2000), 718.202(a); 718.204(b); *Skrack*, *supra*.

C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any of the foregoing elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant asserts that the medical opinion of Dr. Rasmussen, who concluded that claimant's pneumoconiosis prevented a return to coal mine employment, Director's Exhibits 10, 32, was the best reasoned medical opinion of record because it was based on a review of the medical record as a whole, and that the administrative law judge erred in relying on the opinions submitted by employer, that claimant's total respiratory disability was due to bronchiectasis, not coal workers' pneumoconiosis, because they were based on negative x-rays, "contrary to the language and spirit of the" Act. Accordingly, claimant asserts that he has carried his burden of establishing that pneumoconiosis was at least a contributing cause of his totally disabling respiratory impairment. We disagree.

In finding that claimant failed to establish that pneumoconiosis was a contributing cause of his totally disabling respiratory impairment, the administrative law judge accorded greatest weight to the medical opinions of Drs. Fino, Zaldivar, Hutchins Tuteur and Branscomb, all of whom recognized that biopsy evidence demonstrated the presence of pneumoconiosis and that claimant suffered a totally disabling respiratory impairment, Director's Exhibits 25, 37 38, 56; Employer's Exhibits 3, 4, 8, 10, 13, but, nonetheless concluded, that claimant's pneumoconiosis was minimal and thus insufficient to have played any role in claimant's disability and that claimant's disability was due entirely to bronchiectasis and that neither pneumoconiosis nor coal mine employment played any role in this totally disabling condition. Noting that the above mentioned physicians were highly qualified, the administrative law judge found that their opinions were well documented and explained how, despite consideration of the biopsy evidence of pneumoconiosis, they had concluded that claimant had no respiratory impairment caused by pneumoconiosis. Decision and Order at 14. This was rational. *See Milburn Colliery Co. v. Hicks*, 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); *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Thus, claimant's assertion that the administrative law judge erred in failing to find Dr. Rasmussen's opinion the most credible medical opinion of record is tantamount to a request that we reweigh the evidence, a role outside our scope of review, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Accordingly, we reject claimant's assertions and affirm the administrative law judge's determination that claimant has failed to establish the presence of a totally disabling respiratory impairment due to pneumoconiosis. *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, *see Trent, supra*; *Perry, supra*, we must affirm the denial of benefits.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge