

BRB No. 98-0133 BLA

JESSIE J. JUSTUS)
)
 Claimant-Petitioner)
)
 v.)
)
 B & D COAL COMPANY)
)
 and)
)
 LIBERTY MUTUAL INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT OF)
 LABOR)
)
 Party-in-Interest)

DATE ISSUED:

DECISION AND ORDER

Appeal of the Decision and Order - Denial of Benefits of Joan Huddy Rosenzweig, Administrative Law Judge, United States Department of Labor.

Jessie J. Justus, Grundy, Virginia, *pro se*.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appears without the assistance of counsel and appeals the Decision and Order - Denial of Benefits (95-BLA-2609) of Administrative Law Judge Joan Huddy Rosenzweig with respect to 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.* (the Act).¹ The administrative law judge credited claimant with fourteen and three-tenths

¹Tim White, a benefits counselor employed by Stone Mountain Health Services, appeared on claimant's behalf at the hearing. Claimant's Notice of Appeal regarding the denial of benefits in the present case was accompanied by a letter written by Mr. White. In

years of coal mine employment and considered the claim, filed on February 28, 1994, pursuant to the regulations set forth in 20 C.F.R. Part 718. The administrative law judge found that the evidence of record was insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also determined that even if claimant proved that he has pneumoconiosis, the evidence of record did not support a finding of total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied. Neither employer/carrier nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.

In an appeal by a claimant filed 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). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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 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 prove that he suffers from 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. See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Upon review of the evidence of record and the administrative law judge's findings, we affirm the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4), as it is rational and supported by substantial evidence. With respect to Section 718.202(a)(1), the record contains three x-ray readings. Drs. Francke and Hickey, both of whom are Board-certified radiologists and B readers, interpreted a film obtained on April 13, 1994, as negative for pneumoconiosis. Director's Exhibits 16, 17. Dr. Sutherland, whose qualifications are not

an Order issued on October 20, 1997, the Board informed claimant that his appeal would be considered under the standard applicable to claimants who file appeals without the assistance of counsel. *Justus v. B & D Coal Co.*, BRB No. 98-0133 BLA (Oct. 20, 1997)(unpublished Order); see *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

of record, read an x-ray dated April 28, 1986, as positive for pneumoconiosis. Director's Exhibit 18. The administrative law judge concluded permissibly that the x-ray evidence of record did not support a finding of pneumoconiosis, as the negative readings proffered by the physicians with superior qualifications outweighed the single positive reading. Decision and Order - Denial of Benefits at 4; see *Clark v. Karst Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

The administrative law judge also found properly that Section 718.202(a)(2) is not relevant in the present case on the ground that the record does not contain any biopsy evidence. Decision and Order - Denial of Benefits at 4. Regarding Section 718.202(a)(3), the administrative law judge found correctly that the presumptions cited in Section 718.202(a)(3) are not available to claimant in the present case, as he is a living miner, there is no evidence that claimant has complicated pneumoconiosis, and the claim was filed after January 1, 1982. Decision and Order - Denial of Benefits at 4; 20 C.F.R. §§718.202(a)(3), 718.304-306.

With respect to Section 718.202(a)(4), the record contains the medical opinion of Dr. Iosif, who examined claimant on April 13, 1994. Dr. Iosif noted that the x-ray taken in conjunction with his examination was interpreted as negative for pneumoconiosis. Director's Exhibit 14. Dr. Iosif concluded that claimant is suffering from chronic bronchitis that is most likely attributable to cigarette smoking. *Id.* The doctor also stated that claimant does not demonstrate spirometric or "gastrometric" evidence of a respiratory impairment that would prevent him from performing his previous coal mine employment. *Id.* The administrative law judge determined properly that this opinion does not establish that claimant has pneumoconiosis, inasmuch as Dr. Iosif did not make a finding of pneumoconiosis or any pulmonary or respiratory impairment arising out of coal mine employment. Decision and Order - Denial of Benefits at 5; Director's Exhibit 14; 20 C.F.R. §718.201; see *Perry, supra*.

In light of the fact that the administrative law judge's findings under Section 718.202(a)(1)-(4) are rational and supported by substantial evidence, they are affirmed. Because we have affirmed the administrative law judge's determination that claimant did not prove the existence of pneumoconiosis under Section 718.202(a)(1)-(4), an essential element of entitlement, we must also affirm the denial of benefits under Part 718. See *Trent, supra*; *Gee, supra*; *Perry, supra*.

Accordingly, the Decision and Order - Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge