BRB No. 97-0487 BLA

BILLY STURGILL, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Billy Sturgill, Jr., Jenkins, Kentucky, *pro se*.

Rita A. Roppolo (J. Davitt McAteer, 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, the United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (95-BLA-1360) of Administrative Law Judge Daniel J. Roketenetz denying benefits on 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). After crediting claimant with at least five years of coal mine employment, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge's findings are erroneous. The Director, Office of Workers' Compensation Programs (the Director) has filed a motion to remand the case to the administrative law judge. In his motion to remand, the Director concedes the existence of a totally disabling respiratory impairment, urges affirmance of the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1) - (3), but requests that the Board vacate and

remand the case to the administrative law judge for further consideration of the evidence pursuant to 20 C.F.R. §718.202(a)(4).

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. *See Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *See 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 20 C.F.R. 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 C.F.R. §§718.3, 718.202, 718,203, 718,204. Failure of claimant to establish any of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

At Section 718.202(a)(1), the administrative law judge considered the nine x-rays of record, dated from August 6, 1991 to January 24, 1995, which were interpreted a total of nineteen times. Of these nineteen interpretations, five were read as positive, and only two were interpreted either by a board-certified radiologist or B-reader. Director's Exhibits 26, 28, 29, 31, 33. The administrative law judge found that the negative readings by board-certified radiologists and B-readers substantially outweigh the positive interpretations by physicians with lesser qualifications. Decision and Order at 5. Thus, the administrative law judge properly concluded that the preponderance of the evidence fails to establish pneumoconiosis pursuant to Section 718.202(a)(1) as he permissibly relied on the numerical superiority of the negative x-ray readings by physicians who had superior qualifications. *See Staton v. Norfolk and Western Railway Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

The administrative law judge next properly found that claimant could not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) because the record did not contain any autopsy or biopsy evidence. He also properly found that none of the presumptions were applicable pursuant to 20 C.F.R. §718.202(a)(3) in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §718.304, 718.305, 718.306; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

With regard to the administrative law judge's findings pursuant to Section 718.202(a)(4), we agree with the Director that the administrative law judge erred in finding that Dr. Broudy's opinion establishes that claimant does not suffer from pneumoconiosis.[1]

[1]Contrary to the Director's contention, Dr. Lane opined that claimant suffers from a chronic obstructive pulmonary disease and the physician did check the box stating that the

As the Director notes, Dr. Broudy, who is board-certified in internal medicine and pulmonary disease, determined that claimant did not have coal workers' pneumoconiosis on the basis of negative x-rays, but was inconclusive on whether claimant suffered from a pulmonary impairment and the cause of that impairment if it did exist. Director's Exhibit 60. The administrative law judge relied on the credentials of this physician in concluding that claimant failed to meet his burden at Section 718.202(a)(4). Decision and Order at 8. Thus, as Dr. Broudy did not state that there was no link between claimant's pulmonary condition and coal mine employment, we agree with the Director that this opinion is not supportive of a finding that claimant does not have legal pneumoconiosis, and we therefore vacate the administrative law judge's findings and remand the case for reconsideration of the finding of no pneumoconiosis pursuant to Section 718.202(a)(4).[2] *See Wilburn v. Director, OWCP*, 11 BLR 1-135 (1988); *Perry*, *supra*.

Additionally, as the Director states, the record indicates that claimant had potentially significant exposure to non-coal mine employment irritants in his employment as a coal mine security guard for nineteen years, and in his employment in a saw mill and a rock quarry. Thus, on remand, the administrative law judge should consider whether this evidence is suggestive of any causal factors other than coal dust exposure as a cause of claimant's pulmonary condition. *See Smith v. Director, OWCP*, 12 BLR 1-156 (1989).

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miner does not have an occupational lung disease caused by his coal mine employment. Director's Exhibit 19. Thus, this opinion cannot establish the existence of pneumoconiosis.

[2]On remand, the administrative law judge may not reject the opinions of Drs. Myers and Sundaram solely on the basis that their x-ray interpretations are contrary to the weight of the x-ray evidence. *Taylor v. Director,* OWCP, 12 BLR 1-83 (1988); *Fitch v. Director, OWCP*, 9 BLR 1-45 (1986).

Furthermore, after determining the significance of claimant's exposure to non-coal mine employment irritants, the administrative law judge must consider whether the employment history contained in each medical opinion is accurate, and whether the physician's opinion is credible in light of any inaccuracies. *Barnes v. Director, OWCP*, 19 BLR 1-73 (1995). Lastly, if the administrative law judge should determine that Dr. Sundaram's opinion is not credible due to an inaccurate work history, the administrative law judge may remand the case to the district director so that Dr. Sundaram may render his opinion regarding the etiology of claimant's respiratory condition in light of an accurate work history.[3]

[3]The Director states that if Dr. Sundaram's opinion is found not to be credible, then the United States Department of Labor will have failed to meet its statutory obligation to provide claimant with a complete pulmonary examination pursuant to 30 U.S.C. §923(b). We agree with the Director that if the administrative law judge finds that Dr. Sundaram's opinion is not credible on the basis of the work history supplied by claimant, claimant should not be penalized for having given Dr. Sundaram a coal mine employment history which combined his underground coal mine employment with his security guard employment, when claimant could not have known whether his nineteen year employment as a coal mine security guard constitued "coal mine employment" for purposes of the Act.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further consideration of the medical opinion evidence consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge