BRB No. 01-0949 BLA

RICHARD W. BATTLES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
POE COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
THE HARTFORD INSURANCE COMPANY	)	
	)	
Employer/ Carrier-	)	
Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

William Z. Cullen (Sexton, Cullen & Jones, P.C.), Birmingham, Alabama, for claimant.

J. Bentley Owens, III (Starnes and Atchinson, LLP), Birmingham, Alabama, for employer/carrier.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order-Denying Benefits (00-BLA-0909) of Administrative Law Judge Gerald M. Tierney on a duplicate 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).[2] The administrative law judge found that the newly submitted evidence established a totally disabling respiratory impairment pursuant to 20

[1]Claimant is Richard W. Battles, the miner, who filed four application for benefits with the Department of Labor (DOL). The first claim, filed on June 11, 1985, was administratively denied on December 13, 1985. Director's Exhibit 52. Claimant took no further action and this denial became final. *Id*. The second claim was filed with DOL on October 26, 1987, and was administratively denied on April 12, 1988. Director's Exhibit 53. Again, claimant took no further action and this denial became final. *Id*. Claimant filed a third claim, on June 30, 1994, which was administratively denied on October 13, 1994. Director's Exhibit 54. Claimant then filed the instant duplicate claim on March 31,1997. Director's Exhibit 1.

[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 they 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.

C.F.R. §718.204(b) and, therefore, the evidence was sufficient to establish a material change in condition pursuant to 20 C.F.R. §725.309(d)(2000).[3] On the merits, the administrative law judge denied the claim, because he found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

[3]While 20 C.F.R. §725.309 was amended, the amended regulation applies only to claims filed after January 19, 2001, and thus, is inapplicable to the instant claim.

On appeal, claimant challenges the administrative law judge's determination at Section 718.202(a)(4), asserting that the medical opinion evidence of record is sufficient to establish the existence of pneumoconiosis thereunder. Claimant also asserts that the Decision and Order of the administrative law judge does not comply with the requirements of the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(a), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Employer/carrier responds, asserting that the administrative law judge's findings are supported by substantial evidence, and must be affirmed. The Director, Office of Workers' Compensation Programs, has not filed a response brief in the instant appeal.[4]

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, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. Failure to prove any of these requisite elements of entitlement compels a denial of benefits. *See* 20 C.F.R. §§718.3, 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*).

[4]Inasmuch as no party has challenged the administrative law judge's findings that employer is the responsible operator, that the newly submitted evidence establishes total respiratory disability at Section 718.204(b), and that therefore, a material change in conditions is established at Section 725.309(d)(2000), or that the x-ray evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1),we affirm these findings. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Coal Co.*, 6 BLR 1-710 (1983).

After consideration of the administrative law judge's Decision and Order-Denying Benefits the arguments on appeal and the evidence of record, we conclude that the administrative law judge's decision and order is supported by substantial evidence and contains no reversible error. The administrative law judge considered the opinions of Drs. Sullivan, Chandra and Hasson pursuant to Section 718.202(a)(4). The administrative law judge found that only Dr. Sullivan, claimant's treating physician, opined that claimant suffers from pneumoconiosis, while Dr. Hasson, Director's Exhibits 52, 53, opined that claimant does not have pneumoconiosis. Decision and Order at 7. The administrative law judge correctly found that although Dr. Chandra diagnosed a pulmonary disease, his reply to the question of whether it was related to coal mine employment was unresponsive, and thus, Dr. Chandra's opinion did not constitute an opinion on the issue of pneumoconiosis. Claimant's Exhibit 1; Decision and Order at 8, n. 6. The administrative law judge, within his discretion, discounted Dr. Sullivan's opinion, the only opinion of record sufficient to satisfy claimant's burden to establish pneumoconiosis by medical opinion at Section 718.202(a)(4), on the basis that it was not reasoned.[5] *See Pettry v. Director, OWCP*, 14 BLR 1-98 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). We affirm, therefore, the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), as it is supported by substantial evidence.

Inasmuch as we have previously affirmed the administrative law judge's finding that the evidence fails to establish the existence of pneumoconiosis at Section 718.202(a)(1); *see* note 4, *supra,* and the record contains no evidence relevant to a finding of pneumoconiosis at subsections 718.202(a)(2) and (a)(3), a finding of pneumoconiosis is precluded. Inasmuch as claimant has failed to establish the existence of pneumoconiosis, an essential element of entitlement, we affirm the denial of benefits. *See Trent , supra; Perry, supra.*

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

[5]The administrative law judge noted that Dr. Sullivan's responses in a questionnaire regarding the issue of total respiratory disability were confusing, and that Dr. Sullivan never provided a concise, consistent statement addressing whether claimant was totally disabled due to a respiratory or pulmonary impairment, when "all of the records were considered as a whole." Decision and Order at 7, 9.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge