BRB No. 00-0913 BLA

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

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Robert W. Pritchard, MacArthur, West Virginia, *pro se*.

Rita Roppolo (Judith E. Kramer, 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, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (99-BLA-858) of Administrative Law Judge John C. Holmes 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).[1] In this duplicate claim, the administrative law

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine 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, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

judge found the evidence insufficient to establish the existence of pneumoconiosis and insufficient to demonstrate that pneumoconiosis was at least a contributing cause of claimant's totally disabling respiratory impairment. Accordingly, benefits were denied.[2]

On appeal, claimant generally challenges the denial of benefits by the administrative law judge. The Director, Office of Workers' Compensation Programs (the Director), responds, in a letter, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence inasmuch as the administrative law judge properly rejected the medical opinions which were supportive of a disability causation finding.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United District Court for the District of Columbia granted limited injunctive relief and stayed for the duration of the lawsuit, 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 claims, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 16, 2001, to which only the Director has responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case.[3] Based on the brief submitted by the Director and our review, we hold that the

[2] Although the administrative law judge erred in failing to determine whether claimant established a material change in conditions pursuant to 20 C.F.R. §725.309(d), *see Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir.1995) *cert. denied*, 117 S.Ct. 763 (1997), this error is harmless inasmuch as the administrative law judge considered all the evidence on the merits. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Accordingly, we will address the administrative law judge's findings on the merits.

[3] Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 16, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

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 in a living miner's claim pursuant to 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. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant must establish by a preponderance of the evidence that pneumoconiosis was a substantially contributing cause of his disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). In the instance, the administrative law judge acted within his discretion when he concluded, that the medical opinion of Dr. Rasmussen, which indicated the presence of a totally disabling respiratory impairment principally due to pneumoconiosis, was insufficient to establish causation. Director's Exhibit 10. In so doing, the administrative law judge permissibly found Dr. Rasmussen's opinion on the issue of causation not well-analyzed or well-reasoned because Dr. Rasmussen did not explain how claimant's coal dust exposure was the causative factor of a totally disabling respiratory impairment, when claimant's shortness of breath was not a perceived problem until twenty-five years after claimant last worked in the coal mines, and approximately ten years after Dr. Brezler had found that there was no coal dust related disease present. Director's Exhibit 19-5. In addition, the administrative law judge did not err when he found Dr. Rasmussen's report unpersuasive because he failed to accurately account for claimant's continued heavy smoking and heart problems. Decision and Order at 13; *see Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-81 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). We, therefore, affirm the administrative law judge's decision not to credit the medical opinion of Dr. Rasmussen on causation. Likewise, the administrative law judge correctly found that Dr. Figueroa's opinion lacked credibility as Dr. Figueroa merely affirmed Dr. Rasmussen's conclusions, but did not discuss any findings or notes which would support his opinion. Further, as Director contends, Dr. Figueroa's opinion was

not credible because he did not even note claimant's extensive smoking history. Director's Exhibit 9. Additionally, as the Director contends, the administrative law judge rationally rejected the opinion of Dr. Hasan, contained in hospital records, that respiratory failure was due to coal workers' pneumoconiosis, because it was unreasoned. Decision and Order at 10; Claimant's Exhibit 2; *see Carson*, *supra*; *Sellards*, *supra*; *Bobick*, *supra*; *Hutchens*, *supra*; *Maypray*, *supra*. We must therefore affirm the denial of benefits by the administrative law judge as it is supported by the record. *See* Director's Exhibits 19-5, 18-23, 15, 14, 9, 8. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *see also Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, BLR (4th Cir. 2000); *U.S. Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-186 (6th Cir. 1997).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge