BRB No. 01-0160 BLA

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

Appeal of the Decision and Order of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Jerry E. Harless, New Bloomfield, Pennsylvania, *pro se*.

Barry H. Joyner (Howard M. Radzely, 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 DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2000-BLA-0159) of Administrative Law Judge Ainsworth H. Brown denying benefits on a petition for modification of a duplicate claim filed pursuant to the provisions of Title IV

[1]The administrative law judge found that claimant filed three claims. Claimant's first claim, filed on September 11, 1981, was administratively denied as abandoned on March 10, 1983. Director's Exhibit 25. Claimant's second claim, filed on October 24, 1988, was denied on May 7, 1997 because the evidence was insufficient to establish any element of entitlement. Director's Exhibit 26. The administrative law judge found that claimant's letter of March 20, 1989 was a request for modification of the district director's denial of the

of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge credited claimant with eight years and seven months of coal mine employment and found the evidence insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a) (2000) and total disability due to pneumoconiosis under 20 C.F.R. §718.204(b), (c) (2000). Accordingly, the administrative law judge denied benefits. Claimant appeals, generally challenging the denial of benefits. In response, the Director, Office of Workers' Compensation Programs, argues that the administrative law judge's denial of benefits is supported by substantial evidence.

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duplicate claim filed on October 24, 1988. Consequently, the administrative law judge found that claimant's 1988 duplicate claim remains viable. Decision and Order at 3. The Director did not contest this finding. Director's Response Brief at 4. Therefore, the third claim, filed on February 2, 1999, Director's Exhibit 1, merged with the duplicate claim filed on 1988.

[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). On August 1, 2001, the Board subsequently issued an order requesting 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). As a result, on August 10, 2001, the Board rescinded its August 1, 2001 order.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 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 supported by substantial evidence, are rational, and are consistent with applicable law. 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 (1985).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of 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 (2000); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one 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*).

After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the evidence of record, we conclude that the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) is supported by substantial evidence. The administrative law judge correctly found that the record consists of nine readings of five x-rays. Director's Exhibits 9, 10, 19-21, 26, 31, 34. The administrative law judge acting within his discretion found that although Dr. McCloud's positive interpretation of the most recent film dated March 20, 2000, is entitled to due weight, this reading does not overcome the negative interpretations of the 1997 and 1999 films by similarly qualified readers or the fact that no other radiologist has provided a classified diagnosis of pneumoconiosis. *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Decision and Order at 7. As the vast majority of the x-rays of record interpreted by qualified physicians, were negative for the existence of pneumoconiosis, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); Decision and Order at 7.

Further, because the record contains no biopsy evidence or evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304, and the presumptions at 20 C.F.R. §§718.305 and 718.306 are inapplicable to this claim filed after January 1, 1982, the administrative law judge properly found that the evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(2) and (3).

With respect to Section 718.202(a)(4), the administrative law judge rationally found that the medical opinions of record are insufficient to establish the existence of pneumoconiosis. The administrative law judge found unpersuasive Dr Sweer's diagnosis of pneumoconiosis and credited the opinions of Dr. Green that claimant suffers from arteriosclerotic heart disease and not from pneumoconiosis or any pulmonary or respiratory impairment related to or aggravated by coal mine dust exposure. Decision and Order at 9; Director's Exhibits 7, 26, 32; Claimant's Exhibit 1. The administrative law judge, within his discretion, reasonably deferred to Dr. Green's superior qualifications as a board-certified internist and pulmonologist and three examinations documented by objective evidence that supported his diagnosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order on Remand at 9-10; Director's Exhibits 7, 26, 32; Claimant's Exhibit 1. The administrative law judge further found that Dr. Green's examinations over the course of twelve years, demonstrated a greater familiarity with claimant's coronary condition, hypertension and cigarette smoking history than that demonstrated by Dr. Sweer, who did not reveal the extent of claimant's smoking history and did not have records of claimant's coronary artery bypass surgery. *Id.*

Moreover, the administrative law judge reasonably accorded diminished weight to the newly submitted diagnosis of silicosis by Drs. Marakowski and Jurgensen, set forth on prescription slips, because they failed to provide supporting rationale or clinical basis. Decision and Order at 10; Director's Exhibits 17, 18. Accordingly, we affirm the administrative law judge's finding that claimant failed to establish a change in conditions or a mistake in a determination of fact, tantamount to a finding that claimant failed to establish the existence of pneumoconiosis, as he properly considered all the evidence of record under Section 718.202(a). *See* 20 C.F.R. §725.310.

Because substantial evidence supports the administrative law judge's finding that claimant failed to satisfy his burden of establishing the existence of pneumoconiosis, an essential element of entitlement, the denial of benefits under 20 C.F.R. Part 718 is affirmed.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge