

BRB No. 00-1200 BLA

SAMUEL SHORT)
)
 Claimant-Petitioner)
)
 v.)
)
 SHORT TRUCKING COMPANY) DATE ISSUED:
)
 and)
)
 OLD REPUBLIC 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 on Remand of Thomas F. Phalen, Jr.,
Administrative Law Judge, United States Department of Labor.

Samuel Short, Red Fox, Kentucky, *pro se*.

Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig LLP),
Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order on Remand (96-BLA-1326) of Administrative Law Judge Thomas F. Phalen, Jr. 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 The instant case is before the Board for the third time. In the initial Decision and Order, the administrative law judge, after crediting claimant with thirty years of coal mine employment, found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000).² The administrative law judge also found that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. 718.203(b) (2000). The administrative law judge further found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000)³ and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge awarded benefits. By Decision and Order dated October 14, 1998, the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1)-(3) and 718.204(c)(2) and (c)(3) (2000) as

¹The 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). The Board subsequently issued an order requesting supplemental 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). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

²The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) (2000).

³Although the administrative law judge found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(2) and (c)(3) (2000), he found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1) and (c)(4) (2000). After weighing all the relevant evidence together, both like and unlike, the administrative law judge found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §728.204(c) (2000).

unchallenged on appeal. *Short v. Short Trucking Co.*, BRB No. 98-0105 BLA (Oct. 14, 1998) (unpublished). The Board, however, vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b) and 718.204(b) and (c) (2000) and remanded the case for further consideration.

On remand, the administrative law judge found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). The administrative law judge also found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). The administrative law judge further found that the evidence was sufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(c) (2000) and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge awarded benefits. By Decision and Order dated March 3, 2000, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b) and 718.204(b) and (c) (2000) and remanded the case for further consideration. *Short v. Short Trucking Co.*, BRB No. 99-0587 BLA (Mar. 3, 2000) (unpublished).

On remand, the administrative law judge again found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). The administrative law judge, however, found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. Employer, however, argues that the administrative law judge erred in finding the medical opinion evidence sufficient to establish total disability. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *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); *O'Keefe 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 in a living miner's claim, a 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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

The Board previously affirmed the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) (2000). *See Short v. Short Trucking Co.*, BRB No. 98-0105 BLA (Oct. 14, 1998) (unpublished). However, in his most recent decision, the administrative law judge reconsidered whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis. The administrative law judge explained that he had failed to address Dr. Sundaram's positive interpretation of claimant's February 9, 1995 x-ray in his initial weighing of the x-ray evidence. In his re-evaluation of the x-ray evidence, the administrative law judge properly accorded greater weight to the interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order on Remand at 2. All of the x-ray interpretations rendered by readers with these qualifications are negative for pneumoconiosis.⁴ Director's

⁴Claimant's April 20, 1994, September 8, 1994, February 28, 1995, November 17, 1995 and August 9, 1996 x-rays were uniformly interpreted as negative for pneumoconiosis. Although Dr. Sundaram, a physician whose radiological qualifications are not found in the record, interpreted claimant's February 9, 1995 x-ray as positive for pneumoconiosis, Director's Exhibit 41, Drs. Sargent and Wiot, each dually qualified as a B reader and Board-certified radiologist, interpreted this x-ray as negative for pneumoconiosis. Director's Exhibit 46; Employer's Exhibit 4. Similarly, although Dr. Baker, a B reader, interpreted claimant's April 24, 1996 x-ray as positive for pneumoconiosis, Director's Exhibit 66, Drs. Sargent, Wiot, Barrett and Spitz, all of whom are dually qualified as B readers and Board-certified radiologists, interpreted this x-ray as negative for pneumoconiosis. Director's

Exhibits 14, 15, 40, 45, 46, 57, 59, 62, 64, 69, 71; Employer's Exhibits 1, 4. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1).

Exhibits 69, 71; Employer's Exhibit 1.

Since the record does not contain any biopsy or autopsy evidence, claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Furthermore, claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3).⁵ Consequently, claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3).

In his consideration of whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge noted that while Drs. Sundaram, Gish, Guberman and Baker opined that claimant suffered from pneumoconiosis, Drs. Wicker, Fino, Lackey and Broudy opined that he did not suffer from the disease.⁶ Decision and Order on Remand at 4-7.

⁵Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. See 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. See 20 C.F.R. §718.305(e). Finally, inasmuch as the instant claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. See 20 C.F.R. §718.306.

⁶The administrative law judge properly noted that Drs. McKay, Mettu and Anderson did not address whether claimant suffered from pneumoconiosis. Decision and Order on Remand at 6-7.

Dr. Guberman, in diagnosing pneumoconiosis, relied upon an 0/1 reading of claimant's November 17, 1995 x-ray.⁷ Director's Exhibit 58. The administrative law judge properly noted that an 0/1 reading is not considered a positive x-ray interpretation under the regulations. Decision and Order on Remand at 5; *see* 20 C.F.R. §718.102(b) (A chest x-ray classified as 0/1 "does not constitute evidence of pneumoconiosis."). The administrative law judge, therefore, found that Dr. Guberman's diagnosis of pneumoconiosis was "not supported by the evidence." Decision and Order on Remand at 5. We hold that the administrative law judge properly discredited Dr. Guberman's diagnosis of pneumoconiosis.

⁷Dr. Guberman appears to have relied upon Dr. Rubenstein's 0/1 reading of claimant's November 17, 1995 x-ray. *See* Director's Exhibit 57. Dr. Rubenstein, a physician dually qualified as a B reader and Board-certified radiologist, interpreted claimant's November 17, 1995 x-ray as having a profusion of 0/1. Director's Exhibit 57. Three equally qualified physicians, Drs. Sargent, Wiot and Spitz, also interpreted this film as negative for pneumoconiosis. Director's Exhibits 59, 62, 64.

In regard to the remaining relevant evidence, the administrative law judge found that there was no basis to credit the opinions of Drs. Sundaram, Gish and Baker that claimant suffered from pneumoconiosis over the contrary opinions of Drs. Wicker, Lockey and Broudy. *Id.* at 7. The administrative law judge, however, provided a basis for questioning the opinions of Drs. Sundaram, Gish and Baker. Drs. Sundaram, Gish and Baker based their respective diagnoses of pneumoconiosis on positive x-ray interpretations.⁸ Dr. Sundaram relied upon his positive interpretation of claimant's February 9, 1995 x-ray; Dr. Gish relied upon Dr. Sundaram's positive interpretation of claimant's February 9, 1995 x-ray; and Dr. Baker relied upon his positive interpretation of claimant's April 24, 1996 x-ray. The administrative law judge properly found that claimant's February 9, 1995 and April 24, 1996 x-rays were read by more qualified physicians as negative for pneumoconiosis. See n.4, *supra*. The negative readings of the x-rays relied upon by Drs. Sundaram, Gish and Baker call into question the reliability of their respective diagnoses. See *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis. 20 C.F.R §718.202(a)(4).

In light of our affirmance of the administrative law judge's findings that the evidence

⁸In office notes dated February 28, 1995, May 23, 1995, and August 22, 1995, Dr. Sundaram diagnosed coal workers' pneumoconiosis. Director's Exhibits 41, 60. Dr. Sundaram based his diagnosis of pneumoconiosis on his positive interpretation of claimant's February 9, 1995 x-ray. Director's Exhibit 41.

In responses to a questionnaire, Dr. Gish diagnosed coal workers' pneumoconiosis. Director's Exhibit 60. During a subsequent September 17, 1996 deposition, Dr. Gish explained that, because she did not consider herself qualified to make a radiological diagnosis, she had relied upon Dr. Sundaram's positive interpretation of claimant's February 9, 1995 x-ray. Employer's Exhibit 2 at 9. Although Dr. Gish testified that she felt that claimant "probably" had coal workers' pneumoconiosis, she admitted that she relied upon Dr. Sundaram's expertise as a pulmonologist to confirm that diagnosis. *Id.* at 17. Dr. Gish explained that her diagnosis of pneumoconiosis was based upon claimant's symptoms, his forty years of coal dust exposure, the results of his pulmonary function and arterial blood gas studies and Dr. Sundaram's interpretation of claimant's February 9, 1995 x-ray. *Id.* at 21, 25.

In a report dated April 29, 1996, Dr. Baker diagnosed coal workers' pneumoconiosis based on his positive interpretation of an April 24, 1996 x-ray and a significant duration of exposure. Director's Exhibit 67.

is insufficient to establish the existence of pneumoconiosis, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent, supra; Gee, supra; Perry, supra.* Consequently, we need not address employer's challenge to the administrative law judge's finding that the medical opinion evidence was sufficient to establish total disability. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge