

BRB No. 00-0688 BLA

BILLY J. RICHARDSON)		
)		
Claimant-Petitioner)		
)		
v.)		
)		
SEA B MINING COMPANY)	DATE	ISSUED:
)		
Employer-Respondent)		
)		
DIRECTOR, OFFICE OF WORKERS')		
COMPENSATION PROGRAMS, UNITED)		
STATES DEPARTMENT OF LABOR)		
)		
Party-in-Interest)	DECISION and ORDER	

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Billy J. Richardson, Swords Creek, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart, Eskridge), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals,¹ without the assistance of counsel, the Decision and Order (99-BLA-1022) of Administrative Law Judge Richard K. Malamphy denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of

¹ Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing him on appeal. See 20 C.F.R. §§802.211(e), 802.220; *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).² In this request for modification of a duplicate claim, the administrative law judge found, after reviewing the entire record and the prior decisions, that the evidence of record was insufficient to establish the existence of pneumoconiosis and, thus, insufficient to establish a basis for modification. Accordingly, benefits were denied. Claimant appeals, generally challenging the administrative law judge's denial of benefits. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond in this appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States 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 claim, 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 2, 2001, to which the parties have responded.³ Based on the responses of the parties and our review, we hold that the

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).

³ The Director in a brief dated March 22, 2001, asserts that the regulations at issue in the lawsuit do not affect the outcome of this case. Employer, in a brief dated March 26, 2001, asserts that the revised regulations will not affect the outcome of this pending claim, although employer asserts generally that the retroactive application of the revised regulation

disposition of this case is not impacted by the challenged regulations. Therefore, we 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); *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 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*).

at 20 C.F.R. §725.2(c) to pending claims violates due process and fundamental fairness. Employer also objects to the retroactive application of 20 C.F.R. §725.101(a)(6) which significantly expands the definition of benefits.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. The administrative law judge found that of twenty-two readings of ten x-rays, only one x-ray was read positive, and that x-ray was re-read as negative by three dually-qualified readers. Director's Exhibits 59, 61, 62, 63; Employer's Exhibits 1, 6, 7, 9, 10, 14, 15, 16, 17, 20, 21, 22; Claimant's Exhibit 1. Thus, the administrative law judge permissibly found the x-ray evidence insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1); *see Perry, supra*.⁴ Likewise, the administrative law judge acted within his discretion in finding that Dr. Forehand's opinion diagnosing pneumoconiosis, when weighed against the medical reports of Drs. Castle and McSharry, who opined that claimant does not have pneumoconiosis, was insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(4). The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal if the administrative law judge's findings are supported by substantial evidence. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Here, in considering the medical opinion evidence, the administrative law judge found that the opinions of Drs. Castle and McSharry were better reasoned than the opinion of Dr. Forehand and therefore entitled to greater weight. This was permissible. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Trent, supra*; *Perry, supra*; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). Consequently, the administrative law judge rationally found that the existence of pneumoconiosis and, therefore, a basis for modification of the prior denial were not established. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

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

SO ORDERED.

⁴ The administrative law judge properly found that the existence of pneumoconiosis could not be established pursuant to 20 C.F.R. § 718.202(a)(2)(2000), as there was no biopsy evidence of record, and that claimant could not establish the existence of pneumoconiosis at 20 C.F.R. § 718.202(a)(3)(2000) as he was not entitled to the presumptions contained therein, as this is a living miner's claim filed after January 1, 1982 and there is no evidence of complicated pneumoconiosis in the record. *See* 20 C.F.R. §§718.202(a)(2)(2000), 718.202(a)(3)(2000), 718.304 (2000), 718.305 (2000), 718.306 (2000); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986); Director's Exhibit 1.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge