

BRB No. 99-1226 BLA

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

Appeal of the Decision and Order of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Herbert Allen Mann, Fayetteville, West Virginia, *pro se*.

Jeffrey S. Goldberg (Henry L. Solano, 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: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant<sup>1</sup>, without the assistance of counsel, appeals the Decision and Order (1999-BLA-0089) of Administrative Law Judge Edward Terhune Miller 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). The administrative law judge found that claimant established not more than six months of qualifying coal mine employment, the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1), (2) and (4), but that claimant failed to establish that his pneumoconiosis arose from his coal mine employment pursuant to

---

<sup>1</sup>Claimant is Herbert Allen Mann, the miner, who filed a claim for benefits on November 19, 1997. Director's Exhibit 1.

20 C.F.R. §718.203 or that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, conceding that claimant established five and one-half years of qualifying coal mine employment and urging the Board to vacate the denial of benefits and remand the case to the district director in order for Dr. Rasmussen to complete claimant's pulmonary evaluation based on accurate employment and dust exposure histories.

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. *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 into the Act 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 pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Failure to prove any of these requisite elements by a preponderance of the evidence compels a denial of benefits. *See Anderson, supra; Baumgartner, supra; Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Initially, the administrative law judge found that claimant established "not more than six months" of qualifying coal mine employment. Decision and Order at 2-3. The Director, in his response brief, conceded that, because the administrative law judge did not count claimant's work of loading coal at the tipple onto his father's truck when computing claimant's coal mine employment, claimant has an additional five years of qualifying coal mine employment. Director's Brief at 9. Dr. Rasmussen submitted a report at the request of the Department of Labor (DOL) in which he opined, based on a coal mine employment history of nine years, that claimant has a severe, totally disabling lung disease and x-ray evidence of pneumoconiosis and that his coal mine dust exposure "may be a contributing factor." Director's Exhibit 15. Dr. Rasmussen opined, in a subsequent letter offered in response to a letter from the DOL informing Dr. Rasmussen that claimant had only a few months of coal mine employment, that "[b]ased on a history of 5 years of employment prior to the institution of dust suppression, 5 years of employment would be sufficient for an

individual to acquire coal workers' pneumoconiosis. I would not, however, believe pneumoconiosis could be acquired in only a few months of work." Director's Exhibit 24. Dr. Gaziano, in response to questions submitted by the claims examiner, opined that claimant does not have pneumoconiosis and that he does not "believe the limited exposure to coal dust is of sufficient duration and intensity to produce coal workers' pneumoconiosis."<sup>2</sup> Director's Exhibit 18.

As the Director contends, because Dr. Rasmussen provided claimant with the pulmonary evaluation currently in the record and his opinion is based on an inaccurate coal mine employment history, his opinion is not credible and, thus, claimant has not received a complete pulmonary evaluation as provided by the Act and regulations. Director's Brief at 11; Director's Exhibit 15; *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990)(en banc); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Long v. Director, OWCP*, 7 BLR 1-254 (1984). As a result, we vacate the denial of benefits and remand the case to the district director for him to obtain an opinion from Dr. Rasmussen addressing the issues of the cause of claimant's pneumoconiosis and total disabling respiratory impairment in light of the Director's concession regarding claimant's years of coal mine employment.

---

<sup>2</sup>Dr. Gaziano's one-page opinion is limited to a review of the record answering questions on whether claimant's "limited exposure" to coal mine employment (less than one year of established coal mine employment and approximately six years hauling house coal part time), can establish coal workers' pneumoconiosis. Director's Exhibit 18.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated and the case is remanded to the district director for the development of additional evidence consistent with this opinion.

SO ORDERED.

---

JAMES F. BROWN  
Administrative Appeals Judge

---

REGINA C. McGRANERY  
Administrative Appeals Judge

---

MALCOLM D. NELSON, Acting  
Administrative Appeals Judge