

BRB No. 01-0812 BLA

JAMES F. GRAY)
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED:
)
 SOUTHERN STATES COAL CO.,)
 INC.)
)
 and)
)
 ALABAMA INSURANCE)
 GUARANTEE)
)
 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 of Gerald M. Tierney, Administrative Law Judge,
United States Department of Labor.

Ritchie Tipton, Tuscaloosa, Alabama, for claimant.

Before: McGRANERY, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (1999-BLA-0490) of Administrative Law
Judge Gerald M. Tierney 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 administrative law judge found that claimant established at least ten years and eleven months of coal mine employment, and based on the date of filing,² the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718. In this request for modification of claimant's duplicate claim, the administrative law judge found the newly submitted evidence sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000), by establishing that claimant suffered from a totally disabling respiratory

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 20 C.F.R. Parts 718, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

²The record indicates that claimant filed his initial claim for benefits on February 8, 1983, which was denied by the district director on June 15, 1983. Director's Exhibits 21-1, 21-15. Claimant filed a duplicate claim on July 25, 1995, which was denied by the administrative law judge in a Decision and Order issued on January 15, 1998, due to claimant's failure to establish a material change in condition, or any requisite element of entitlement. Director's Exhibits 1, 29. Claimant requested modification of this denial on September 17, 1998, which was denied by the district director on October 30, 1998. Director's Exhibits 30-32. On December 4, 1998, claimant requested a formal hearing. Director's Exhibit 33.

impairment.³ Decision and Order at 3-4. The administrative law judge then considered the record evidence as a whole, and found the evidence of record insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied.

On appeal, claimant challenges the findings of the administrative law judge that the evidence is insufficient to establish the presence of pneumoconiosis. Claimant also asserts that his due process rights have been violated by the failure of the administrative law judge to allow the scheduled oral argument as stated at the conclusion of the January 2001 hearing. Employer did not file a brief in the instant appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

³We affirm the administrative law judge's finding that claimant established a change in conditions as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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*).⁴

With respect to the administrative law judge's weighing of the x-ray evidence relevant to Section 718.202(a)(1), claimant argues that the administrative law judge erred in rejecting the positive reading of the 1983 x-ray without adequate explanation. Claimant's contention is without merit. The Decision and Order indicates that the administrative law judge weighed the nine x-ray readings of record and the qualifications of each reader, and found that only one reading, the 1983 reading by Dr. Cole, was interpreted as positive for the existence of pneumoconiosis. Director's Exhibits 10, 11, 14, 18, 21-10, 21-11, 28. The administrative law judge noted that Dr. Cole was a Board-certified radiologist and B-reader. Decision and Order at 5. The administrative law judge also found that Drs. Wiot and Sargent were equally qualified and that Dr. Hasson was qualified as a B-reader. *Id.*

⁴This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit as the miner was employed in the coal mine industry in the State of Alabama. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

The administrative law judge rationally accorded determinative weight to the greater number of negative readings, which included a re-reading of the 1983 x-ray by a dually qualified radiologist as well as readings of significantly more recent x-rays, which date from 1995. Director's Exhibits 10, 11, 14; Decision and Order at 5. Thus, the administrative law judge properly found that claimant did not satisfy his affirmative burden of proof of establishing the existence of pneumoconiosis by a preponderance of the x-ray evidence. 20 C.F.R. §718.202(a)(1); Decision and Order at 5; Director's Exhibits 10, 11, 14, 18, 21-10, 21-11, 28; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990). As the administrative law judge has discussed the relevant considerations in weighing the x-ray evidence, we reject claimant's contention that the administrative law judge's Decision and Order fails to specify the basis of his decision, or violates the provisions of the Administrative Procedure Act (the APA).⁵ *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Robertson v. Alabama By-Products Corp.*, 7 BLR 1-793 (1985).

Claimant also asserts on appeal, that the medical reports of Dr. Strickland, in addition to Dr. Cole's positive x-ray, establish the existence of pneumoconiosis. We disagree. The administrative law judge considered the relevant medical reports of record and found that the existence of pneumoconiosis was not established since "[n]one of the physicians' records or reports developed through 1998 linked Claimant's respiratory or pulmonary condition to his coal mine dust exposure for a reasoned and documented diagnosis of pneumoconiosis as defined at §718.201." Decision and Order at 5; Director's Exhibits 8, 18, 28, 30. The administrative law judge rationally found that the newly submitted reports of Dr. Strickland were equivocal since this physician provided only a possible causal nexus to coal mine employment as the report stated that it was "likely that he [claimant] has had some occupational exposure which has produced his interstitial lung disease" and that "occupational exposure may have contributed to his chronic obstructive pulmonary disease." Decision and Order at 5; Claimant's Exhibit 1; 30 U.S.C. §902(b); *Brown v. Director, OWCP*, 851 F.2d 1569, 11 BLR 2-192 (11th Cir. 1988), *appeal dismissed*, 864 F.2d 120 (11th Cir. 1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). As the administrative law judge reasonably discredited the medical reports of Dr. Strickland and the remaining medical reports of record fail to diagnose the presence of pneumoconiosis, he rationally determined that claimant could not establish this required element at Section 718.202(a)(4). Since the administrative law judge's findings are supported by substantial

⁵The Administrative Procedure Act, 5 U.S.C. §§557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

evidence, we affirm the finding that claimant failed to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a).

Claimant also contends that his due process right to a full and fair hearing was violated by the administrative law judge's failure to allow oral argument at the hearing level of the proceedings. The record indicates that the hearing before the administrative law judge was held on January 9, 2001. The hearing was terminated after the submission of evidence and claimant's testimony; the record was closed and the hearing transcript indicates that final arguments were scheduled to be heard on April 20, 2001. Hearing Transcript at 27. There is no indication in the record that the hearing was ever reconvened; the Decision and Order was issued without oral arguments taking place. We hold that any error in this omission is harmless, since the administrative law judge's findings, based on the medical evidence of record, are rational and supported by substantial evidence and claimant has not any demonstrated undue prejudice. *See Arthur Murray Studios of Washington, Inc. v. Federal Trade Commission*, 458 F.2d 622, (5th Cir. 1972); *Sykes v. Itmann Coal Co.*, 2 BLR 1-1089 (1980).

Because claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement under Part 718, *see Trent, supra*, we affirm the administrative law judge's decision that claimant is not entitled to benefits.

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.

Administrative Appeals Judge