BRB No. 02-0246 BLA

BILLY S. RASNAKE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
VIRGINIA POCAHONTAS 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 Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Billy S. Rasnake, Bee, Virginia, *pro se*.[1]

Ashley M. Harman and Douglas A. Smoot (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

[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. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant, representing himself, appeals the Decision and Order (00-BLA-0705) of Administrative Law Judge Mollie W. Neal 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).[2] In the initial decision, Administrative Law Judge Pamela Lakes Wood found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). Accordingly, Judge Wood denied benefits. By Decision and Order dated April 29, 1998, the Board affirmed Judge Wood's findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). *Rasnake v. Virginia Pocahontas Co*., BRB No. 97-1440 BLA (Apr. 29, 1998) (unpublished). The Board, therefore, affirmed Judge Wood's denial of benefits. *Id.*

Claimant subsequently requested modification of his denied claim. Administrative Law Judge Mollie W. Neal (the 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)-(4). 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. 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 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

[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 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

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*).

In determining whether the x-ray evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge accurately found that all of the newly submitted x-ray interpretations of record are negative for pneumoconiosis.[3] Decision and Order at 10. The administrative law judge found that the previously submitted x-ray interpretations "were also predominately negative."[4] *Id.* Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Inasmuch as there is no biopsy evidence of record, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 10.

Because there is no evidence of complicated pneumoconiosis in the record, the administrative law judge properly found that the Section 718.304 presumption is inapplicable. See 20 C.F.R. §718.304. The administrative law judge properly found that 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

[3]Claimant's x-rays taken on September 15, 1998, February 9, 1999, June 10, 1999 and March 6, 2000 were uniformly interpreted as negative for pneumoconiosis. *See* Director's Exhibits 50, 56, 66, 80-82; Employer's Exhibits 4, 14, 15, 17, 24, 25, 27.

[4]The Board, in a substantial evidence review of Administrative Law Judge Pamela Lakes Wood's 1997 Decision and Order, affirmed Judge Wood's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). *Rasnake v. Virginia Pocahontas Co.*, BRB No. 97-1440 BLA (Apr. 29, 1998) (unpublished).

survivor's claim, the administrative law judge found that the Section 718.306 presumption is also inapplicable. See 20 C.F.R. §718.306. Consequently, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3). Decision and Order at 10.

In her consideration of whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge found that the opinions of Drs. Hippensteel, Castle, Fino, Dahhan and Selby that claimant did not suffer from pneumoconiosis[5] were entitled to greater weight than Dr. Forehand's contrary opinion[6] based upon their superior qualifications.[7] *See Dillon*

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[5]Dr. Hippensteel opined that claimant did not suffer from coal workers' pneumoconiosis or any lung disease caused by, contributed to, or aggravated by coal dust exposure. Employer's Exhibit 26.

Dr. Castle opined that claimant did not suffer from coal workers' pneumoconiosis. Director's Exhibit 63. Dr. Castle opined that claimant suffered from tobacco smoke induced airway obstruction and bronchial asthma. *Id.* Dr. Castle opined that these conditions were unrelated to claimant's coal dust exposure. *Id.*

Dr. Fino opined that claimant did not suffer from coal workers' pneumoconiosis. Employer's Exhibit 19. Dr. Fino opined that claimant's pulmonary impairment was due to smoking and asthma and was unrelated to coal dust exposure. *Id.*

Dr. Dahhan opined that claimant did not suffer from coal workers' pneumoconiosis. Employer's Exhibit 18. Dr. Dahhan opined that claimant suffered from an obstructive ventilatory defect due to smoking and possibly asthma. *Id.* Dr. Dahhan further opined that claimant's obstructive ventilatory defect was not due to his coal dust exposure. *Id.*

Dr. Selby opined that claimant did not suffer from coal workers' pneumoconiosis. Employer's Exhibit 21. Dr. Selby opined that all of claimant's respiratory impairment was attributable to his many years of cigarette smoking. *Id.*

[6]In a report dated December 17, 1998, Dr. Forehand opined that claimant's respiratory impairment was attributable to "a combination of smoking cigarettes and working in underground coal mining." Director's Exhibit 59. In a "Pulmonary Evaluation" dated June 11, 1999, Dr. Forehand listed his impressions as: (1) clinical history of coal workers' pneumoconiosis; (2) smokers' bronchitis; and (3) work-

v. Peabody Coal Co., 11 BLR 1-113 (1988); Decision and Order at 10. Inasmuch as it is based upon substantial evidence,[8] we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a),[9] an essential

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limited respiratory impairments of a ventilatory and gas exchange nature. Director's Exhibit 66. In a letter dated June 11, 1999, Dr. Forehand opined that claimant's complaints of shortness of breath were due to a combination of cigarette smoking and coal dust exposure. *Id.* Dr. Forehand opined that claimant suffered from "a totally and permanently disabling respiratory impairment due to occupational lung disease or coal workers' pneumoconiosis (CWP)." *Id.* Dr. Forehand opined that claimant's chronic lung disease was due in part to his coal mine employment. *Id.*

[7]Drs. Hippensteel, Castle, Fino, Dahhan and Selby are Board-certified in Internal Medicine and Pulmonary Diseases. Director's Exhibits 50, 63; Employer's Exhibits 1, 3, 21. Dr. Forehand is Board-certified in Pediatrics and Allergy and Immunology. Director's Exhibit 13.

[8]In a substantial evidence review of Judge Wood's 1997 Decision and Order, the Board affirmed Judge Wood's finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). *Rasnake v. Virginia Pocahontas Co.*, BRB No. 97-1440 BLA (Apr. 29, 1998) (unpublished). Drs. Forehand, Castle, Fino, Dahhan and Selby submitted earlier medical reports. Dr. Forehand was the only physician to opine that claimant suffered from coal workers' pneumoconiosis. *See* Director's Exhibit 10. The Board held, *inter alia*, that Judge Wood acted within her discretion in according less weight to Dr. Forehand's opinion because he failed to explain the basis for his finding that claimant suffered from pneumoconiosis. *Rasnake, supra*.

[9]The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). In the instant case, the administrative law judge did not weigh all of the relevant evidence together in determining whether claimant suffered from pneumoconiosis. However, inasmuch as the administrative law judge properly found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), her findings conform to the Fourth Circuit holding in *Compton*.

element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent, supra*; *Gee, supra*; *Perry, supra*.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge