BRB No. 03-0599 BLA

DONALD VARNEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BIG LUMP COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 03/29/2004
TRAVELERS INSURANCE COMPANY	)	
	)	
Employer/Carrier-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 Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

Donald Varney, Raccoon, Kentucky, *pro se*.

Lois A. Kitts (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2002-BLA-278) of Administrative Law Judge Stephen L. Purcell 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

[1] Susie Davis, a benefits counselor with the Kentucky Black Lung Association in Pikeville, Kentucky, requested on behalf of claimant that the Board review the

law judge determined that this case presented a modification request and found that employer was the proper responsible operator.[2] Decision and Order at 13. The administrative law judge further found at least seven years of coal mine employment, in accordance with the parties' stipulation, and based on the date of filing the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 2-4, 10-11; Hearing Transcript at 52-53. After considering all of the relevant evidence of record, the administrative law judge concluded that claimant failed to establish a basis for modification pursuant to 20 C.F.R. §725.310 (2000) as the evidence of record as a whole was insufficient to establish the existence of totally disabling pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202, 718.203 and 718.204.[3] Decision and Order at 13-19. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond to the instant appeal.

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administrative law judge's decision. The Board acknowledged the instant appeal on June 26, 2003, stating that the case would be reviewed under the general standard of review.

[2] Claimant filed his initial claim for benefits with the Department of Labor on March 20, 1990; it was denied by the district director on July 17, 1990 as claimant failed to establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Director's Exhibit 29. Claimant took no further action thereafter until filing a second claim on June 19, 2000; it was denied by the district director on October 6, 2000 as claimant failed to establish any element of entitlement. Director's Exhibits 1, 11-12, 14, 18. Claimant submitted additional medical evidence on September 28, 2001; it was construed to be a request for modification by the district director. Director's Exhibits 19, 20. The modification request was denied by the district director on December 18, 2001. Director's Exhibit 24. Claimant requested a formal hearing before the Office of Administrative Law Judges on December 28, 2001. Director's Exhibit 25.

[3] 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 (2002). The amendments to the regulation governing consideration of requests for modification do not apply to claims, such as the present one, which were pending on January 19, 2001. 20 C.F.R. §§725.2, 725.310.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider 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). If the findings of fact and conclusions of law of the administrative law judge 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, 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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

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 contains no reversible error. In addressing claimant's request for modification pursuant to Section 725.310 (2000), the administrative law judge rendered findings as to the existence of pneumoconiosis and total disability due to pneumoconiosis based upon a weighing of all of the evidence of record. Thus, the administrative law judge's findings under Sections 718.202(a) and 718.204 constitute findings on the merits of entitlement and we will review them as such. *See Kott v. Director, OWCP*, 17 BLR 1-9 (1992); *Motichak v. BethEnergy Mines, Inc.*, 17 BLR 1-14 (1992); Director's Exhibits 1, 14, 18, 19, 20, 24, 29; Decision and Order at 2-4, 13-19.

Pursuant to Section 718.202(a), the administrative law judge rationally found that claimant did not establish the existence of pneumoconiosis. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). The administrative law judge acted within his discretion as trier-of-fact in determining that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1), as the preponderance of readings by physicians with superior qualifications was negative. Director's Exhibits 8, 10, 19, 21, 29; Claimant's Exhibits 1-3; Employer's Exhibits 2, 4, 6, 7C; Decision and Order at 13-15; *Worhach v. Director,* OWCP, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

The administrative law judge also rationally found that the existence of pneumoconiosis was not established at Section 718.202(a)(2) and (a)(3), as the record does not contain any biopsy or autopsy results demonstrating the presence of pneumoconiosis and none of the presumptions set forth in 20 C.F.R. §§718.304, 718.305, and 718.306 is applicable to this claim.[4] *See* 20 C.F.R. §§718.304, 718.305, 718.306; Decision and Order at 13; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

In determining whether the existence of pneumoconiosis was established pursuant to Section 718.202(a)(4), the administrative law judge weighed all of the medical opinions of record and considered whether they were supported by the underlying documentation and adequately explained. *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Worhach*, 17 BLR 1-105; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark*, 12 BLR 1-149; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 7-10, 15-18. The administrative law judge acted within his discretion as fact-finder in determining that the diagnosis of pneumoconiosis rendered by Dr. Sundaram, a treating physician, was entitled to less weight than the contrary opinions of Drs. Fino, Wiot, and Rosenberg, because their opinions were better supported by the objective medical evidence of record and they possessed superior qualifications.[5] *See Eastover Mining Co. v. Williams*, 338 F.3d 501, BLR (6th Cir. 2003); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040, 17 BLR 2-16, 2-21 (6th Cir. 1993); *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001); *Freeman*

[4] The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 because this claim was filed after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, as this claim was filed after June 30, 1982 and it is not a survivor's claim, the presumption at 20 C.F.R. §718.306 is also inapplicable.

[5] Dr. Wiot is a Board-certified radiologist and a B reader. Employer's Exhibit 6. Dr. Rosenberg is a Board-certified pulmonologist. Employer's Exhibit 2. Dr. Sundaram's qualifications are not of record. The administrative law judge stated that Dr. Fino is a dually qualified radiologist. Decision and Order at 15, 17. Dr. Fino is a Board-certified pulmonologist and a B reader, but he is not a Board-certified radiologist. Employer's Exhibit 7A. The administrative law judge's mischaracterization of Dr. Fino's qualifications does not constitute an error requiring remand, as the administrative law judge's determinations that Dr. Fino's opinion was better supported by the objective evidence of record and that Dr. Fino had qualifications superior to those of Dr. Sundaram are rational and supported by substantial evidence. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

United Coal Mining Co. v. Summers, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001); Decision and Order at 16-17; Director's Exhibits 8, 19, 29; Claimant's Exhibit 3; Employer's Exhibits 2, 6, 7A, 7C, 7D.[6] We therefore affirm the administrative law judge's finding that claimant has not established the existence of pneumoconiosis as it is supported by substantial evidence and is in accordance with law.

In light of the administrative law judge's finding that the evidence of record, as a whole, is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement, claimant's entitlement to benefits is precluded. *Trent v. Director, OWCP*, 11 BLR 1-26; *Perry v. Director, OWCP*, 9 BLR 1-1. We need not address, therefore, the administrative law judge's findings under Section 718.204, as error, if any, in these findings is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[6] The administrative law judge determined that this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit because claimant last performed coal mine employment in the State of Indiana. Decision and Order at 2. The record indicates, however, that claimant's last coal mine employment may have occurred in the Commonwealth of Kentucky, which falls within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. Director's Exhibits 3, 5. Although we have applied the law of the Sixth and Seventh Circuits, any appeal from the Board's decision can be filed in the United States Court of Appeals for any circuit in which the miner was engaged in coal mine employment as provided under 33 U.S.C. §921(c). *See Danko v. Director, OWCP*, 846 F.2d 366, 368, 11 BLR 2-157, 2-159 (6th Cir. 1988); *Wetherill v. Director, OWCP*, 812 F.2d 376, 379 n.6, 9 BLR 2-239, 2-242 n.6 (7th Cir. 1987); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge