

BRB No. 97-0878 BLA

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

Appeal of the Decision and Order of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Robert P. Duzick, Newark, Delaware, *pro se*.

Gary K. Stearman (Marvin Krislov, Deputy Solicitor for National Operations; 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (96-BLA-00745) of Administrative Law Judge Ainsworth H. Brown 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 six years of coal mine employment and based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.¹ Decision and Order at 3. The administrative law judge concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied. On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, responds, urging remand for the administrative law judge to reconsider the evidence pursuant to 20 C.F.R. §718.202(a)(4).

¹ Claimant filed his claim for benefits on April 15, 1995. Director's Exhibit 1.

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. *McFall v. Jewell Ridge Coal Corp.*, 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 are 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 establish 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 of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Initially, we note that the administrative law judge permissibly determined that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(3). The administrative law judge rationally found that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1) as the preponderance of the x-rays were read as negative by physicians with superior qualifications. Director's Exhibits 7, 14-17, 23-28, 33; Claimant's Exhibits 1, 2, 4-7, 15; Decision and Order at 5; *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *Roberts v. Bethlehem Mines Corporation*, 8 BLR 1-211 (1985). The administrative law judge also properly found the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) and (3) as there is no biopsy evidence of record, 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), (3); Decision and Order at 5; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). We therefore affirm the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(3).

Pursuant to Section 718.204(a)(4), Dr. Kraynak found claimant totally and permanently disabled due to pneumoconiosis arising out of coal mine employment. Director's Exhibit 11. Dr. Chabalko diagnosed asthmatic bronchitis, hypertension and diabetes. Director's Exhibit 12. The administrative law judge found that while:

“Dr. Kraynak disagreed with Dr. Chabalko's interpretation of the latter's pulmonary function testing and diagnosis of asthma of an unknown etiology there is no significant tool for the fact finder to determine whose judgement is better. The record would seem to be in equipoise. This means that the claimant has not succeeded in his burden of persuasion.”

Decision and Order at 6. The administrative law judge is required to weigh all the evidence of record and draw conclusions, inferences, and resolve the conflicts in the medical evidence. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Co.*, 12 BLR 1-77 (1988); *Stark*

v. Director, OWCP, 9 BLR 1-36 (1986). In the instant case, the administrative law judge only compared the qualifications of the physicians and their findings on physical examination. The administrative law judge did not review the medical opinions in the context of the objective evidence of record which may provide a basis for determining the credibility of the opinions. See *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); see also *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). We, therefore, vacate the administrative law judge's findings pursuant to Section 718.202(a)(4) and remand the case to the administrative law judge to reconsider the opinions of Drs. Kraynak and Chabalko. If, the administrative law judge finds that Dr. Chabalko's opinion lacks probative value then the case must be remanded to the district director as the Department of Labor failed to provide claimant with a complete, credible pulmonary evaluation, sufficient to substantiate the claim, as required by the Act. 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*); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990).

Additionally, we note that subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Third Circuit, within whose appellate jurisdiction this case arises, 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 claimant suffers from the disease. *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, BLR (3d Cir. 1997). Consequently, if the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), then the administrative law judge, on remand, must weigh all the evidence relevant to 20 C.F.R. §718.202(a)(1)-(4) together in determining whether claimant suffers from pneumoconiosis. *Williams, supra*. If the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), he must then address the remaining issues of entitlement, *i.e.*, whether claimant's pneumoconiosis arose out of coal mine employment and was totally disabling pursuant to Section 718.203(b) and 718.204(b), (c).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge