

BRB No. 01-0893 BLA

ROBERT E. PURIFOY, Sr.)
)
 Claimant-Petitioner)
)
 v.)
)
 U.S. STEEL MINING COMPANY,) DATE ISSUED:
 INCORPORATED)
)
 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 - Denial of Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Robert E. Purifoy, Sr., Birmingham, Alabama, *pro se*.

James N. Nolan (Walston, Wells, Anderson & Bains, LLP), Birmingham, Alabama, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denial of Benefits (2000-BLA-0036) of Administrative Law Judge Gerald M. Tierney 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 Based on claimant's April 19, 1999 filing date, the administrative law judge adjudicated the case pursuant to 20 C.F.R. Part 718 and credited claimant with eleven and one-half years of coal mine employment. In addressing the merits of entitlement, the administrative law judge found the medical evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

In support of his appeal, claimant has submitted a letter to the Board contending that the administrative law judge erred in finding the evidence insufficient to establish entitlement to benefits.² In response, employer urges 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 stating that he will not file a response brief in this appeal.³

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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. If the findings

¹ 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.

² In his letter to the Board, claimant indicated that he was also basing his appeal on his attorney's failure to provide adequate representation, alleging that his attorney did not file a brief with the administrative law judge or contact his family physician to obtain additional evidence. See Claimant's August 3, 2001 Letter at 1. The Board is not empowered on appeal to overturn an administrative law judge's Decision and Order on the ground that claimant's counsel provided inadequate legal representation. See generally *Link v. Wabash Railroad Co.*, 370 U.S. 630 (1962); *Collins v. Director, OWCP*, 795 F.2d 368, 9 BLR 2-58, 2-63 (4th Cir. 1986); *Howell v. Director, OWCP*, 7 BLR 1-259 (1984).

³ The parties do not challenge the administrative law judge's decision to credit claimant with eleven and one-half years of coal mine employment, nor his determination that U.S. Steel Mining Company, Inc. is the properly named responsible operator. Since these findings are not adverse to claimant, they are affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 under 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; *Hobbs v. Clinchfield Coal Co.* [*Hobbs II*], 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Id.*

After consideration of the administrative law judge's Decision and Order and the relevant evidence of record, we conclude that substantial evidence supports the administrative law judge's denial of benefits. In determining whether claimant established entitlement to benefits, the administrative law judge properly found that the x-ray evidence was insufficient to establish the existence of pneumoconiosis because both of the x-ray interpretations submitted with this claim were negative for the existence of pneumoconiosis.⁴ Decision and Order at 3; Director's Exhibits 11, 12; 20 C.F.R. §718.202(a)(1); see *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984), *aff'd*, 806 F.2d 258 (4th Cir. 1986)(*table*); see also *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

⁴ The x-ray evidence consists of two interpretations of a May 18, 1999 x-ray film, both of which were negative for the existence of pneumoconiosis. Director's Exhibits 11, 12.

Furthermore, we affirm the administrative law judge's finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).⁵ Within a reasonable exercise of his discretion, the administrative law judge found that the medical opinion of Dr. Ferris, the lone medical opinion of record, was insufficient to establish the existence of pneumoconiosis because the physician's opinion failed to establish a causal nexus between the diagnosed restrictive ventilatory defect and claimant's coal mine dust exposure. Decision and Order at 3. Specifically, the administrative law judge found that Dr. Ferris's statement that claimant's restrictive ventilatory defect was due to obesity with "perhaps a contribution from pneumoconiosis" was equivocal and, therefore, insufficient to sustain claimant's burden of proof that his pulmonary condition was related to his coal mine dust exposure. Decision and Order at 3; Director's Exhibit 7; 20 C.F.R. §718.201, 718.202(a)(4); see *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); see also *Nance v. Benefits Review Board*, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988); *Perry, supra*; *Handy v. Director, OWCP*, 16 BLR 1-73 (1990). Inasmuch as the administrative law judge has properly considered and weighed all of the relevant medical evidence, we affirm his finding that the medical evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a).⁶

Since claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement, an award of benefits under Part 718 is precluded. *Trent, supra*; *Perry, supra*.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed.

SO ORDERED.

⁵ The existence of pneumoconiosis has not been established pursuant to Section 718.202(a)(2) because there is no biopsy evidence of record. 20 C.F.R. §718.202(a)(2). Likewise, claimant is not entitled to any of the presumptions set forth under Section 718.202(a)(3), in this living miner's claim filed after January 1, 1982. 20 C.F.R. §§718.202(a)(3), 718.304, 718.305(e), 718.306.

⁶ If, however, claimant wishes to submit additional medical evidence in connection with his claim for benefits, he must submit this evidence with a request for modification to the district director. 20 C.F.R. §725.310 (2000); see *Director, OWCP v. Drummond Coal Co. [Cornelius]*, 831 F.2d 240, 10 BLR 2-322 (11th Cir. 1987).

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge