

BRB No. 98-1195 BLA

CURTIS RAY SWINEY)
)
 Claimant-Petitioner)
)
 v.)
)
 TROJAN MINING AND PROCESSING) 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 on Remand of Daniel A. Sarno, Jr.,
Administrative Law Judge, United States Department of Labor.

Curtis Ray Swiney, Elkhorn City, Kentucky, *pro se*.

J. Logan Griffith (Wells, Porter, Schmitt & Jones), Paintsville, Kentucky, for
employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN,
Administrative Appeals Judge, and NELSON, Acting Administrative Appeals
Judge.

PER CURIAM:

Claimant,¹ without the benefit of counsel, appeals the Decision and Order on Remand (95-BLA-2409) of Administrative Law Judge Daniel A. Sarno, Jr. 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 case is before the Board for the second time. Following remand from the Board, 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)(4). Accordingly, the administrative law judge denied benefits.

¹ Claimant is the miner, Curtis Ray Swiney, who filed an claim for benefits with the Department of Labor on June 6, 1994. Director's Exhibit 1.

The procedural history of this case is as follows: the miner filed his first claim with the Department of Labor (DOL) on June 6, 1994, Director's Exhibit 1, which was initially denied on April 5, 1995. Director's Exhibit 15. The miner then requested a hearing before the Office of Administrative Law Judges. Administrative Law Judge Daniel A. Sarno, Jr., denied the claim in a Decision and Order dated February 26, 1997. Judge Sarno found that the evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(4). Following the miner's appeal, the Board affirmed the administrative law judge's findings at Section 718.202(a)(1)-(3), but remanded the case specifically for the administrative law judge to reconsider the medical opinions of Drs. Baker and Guberman at Section 718.202(a)(4). *Swiney v. Trojan Mining & Processing*, BRB No. 97-0819 BLA (Feb. 12, 1998)(unpub.). Thereafter on remand, Administrative Law Judge Sarno again found that the evidence failed to establish the existence of pneumoconiosis at Section 718.204(a)(4), and thereby, again denied the claim. It is from this decision that claimant bases his *pro se* appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Antonio v. Bethlehem Mines Corp.*, 6 BLR 1-702 (1983). 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 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). Employer, in response, asserts that the administrative law judge's finding that the evidence fails to establish the existence of pneumoconiosis is supported by substantial evidence, and accordingly, urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter, indicating that he will not respond to the instant appeal.

In order to establish entitlement to benefits in a living miner's claim, claimant must establish that the miner has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. Failure to prove any of these requisite elements of entitlement compels a denial of benefits. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

The administrative law judge summarized the six medical opinions of record and correctly concluded that Drs. Baker and Guberman opined that claimant had pneumoconiosis, while Drs. Lane, Broudy, Fino and Branscomb found that claimant did not have pneumoconiosis. Decision and Order on Remand at 2. He permissibly discounted Dr. Guberman's opinion because it was based upon a positive x-ray interpretation by Dr.

Rubenstein which was later reread negative by five other physicians. Decision and Order at 5; *Winters v. Director, OWCP*, 6 BLR 1-877 (1984); see *Lucostic v. Director, OWCP*, 8 BLR 1-46 (1993); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Turning to the other opinions, although the administrative law judge found that the opinions of Drs. Baker and Myers which diagnosed pneumoconiosis were credible, Decision and Order on Remand at 2, he permissibly found them outweighed by the contrary opinions of Drs. Lane, Broudy, Fino and Branscomb. See *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). *Perry, supra*. We affirm, therefore, the administrative law judge's finding that the evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). As this finding precludes entitlement pursuant to the Part 718 regulations, see *Trent, supra*; *Perry, supra*, we affirm the denial of benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge