BRB No. 99-1113 BLA

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

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

George F. McDaniels, Plymouth, Pennsylvania, *pro se*.

Barry H. Joyner (Henry L. Solano, Solicitor of Labor; 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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and McGRANERY, Administrative Appeals Judges, NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (98-BLA-01351) 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 credited claimant with six years of coal mine employment, and based on the filing date of September 9, 1997, adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied. On appeal, claimant generally challenges the findings of the administrative law judge on the length of coal mine employment and on the existence of pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence.

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. *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). 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove 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 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*).

Initially, claimant contends that the administrative law judge should have credited him with twelve years of coal mine employment based on his testimony as well as the affidavits of his former coworkers. Claimant bears the burden of proving his length of coal mine employment. *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984). In crediting claimant with six years of coal mine employment, the administrative law judge permissibly compared claimant's hearing testimony on coal and noncoal employment with his Social Security earnings statement to determine when claimant worked in the coal mines. *Id*. Based on this comparison, the administrative law judge properly concluded that the Social Security earnings statement established 13 quarters of coal mine employment.[1] *Id.*; Director's Exhibit 4. In addition, the administrative law judge acted within his discretion when he relied on claimant's testimony and the supporting statement of William T. Miller to credit claimant with approximately one year of coal mine employment prior to 1950. *See Niccoli v. Director, OWCP*, 6 BLR 1-910 (1984); Director's Exhibit 14. As the administrative law judge's method of calculating claimant's length of coal mine employment is reasonable, we affirm his findings. *See Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

With respect to the merits, claimant bears the burden of establishing each and every element of entitlement. *Perry, supra*; *Trent, supra*. The administrative law judge correctly

[1] The administrative law judge reviewed the affidavits of claimant's coworkers, Thomas Stires, George Berdy, Durwood Smith, and Thomas Merrifield, and did not find that the affidavits supported claimant's contention that he spent additional time in the coal mines.

determined that since the record contained no biopsy evidence, claimant did not establish the existence of pneumoconiosis at Section 718.202(a)(2), and that claimant, a living miner, was not entitled to the presumptions at Section 718.202 (a)(3) as this claim was filed after January 1, 1982 and the record does not contain any evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305(e), 718.306. We, therefore, affirm the findings of the administrative law judge at 20 C.F.R. §718.202(a)(2) and (a)(3) as they are supported by substantial evidence.

In determining whether the evidence is sufficient to meet claimant's burden of establishing the existence of pneumoconiosis, the administrative law judge must consider all relevant evidence together at Section 718.202(a). *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). The administrative law judge found that although the x-ray taken September 29, 1997 was read positive by Dr. Gaia, a Board-certified radiologist, it was read negative by Dr. Cook, a Board-certified radiologist, and negative by Dr. Barrett, a Board-certified radiologist and B-reader, who is also a professor of radiology. Likewise, the administrative law judge noted that although the x-ray dated April 21, 1998, was read positive by Dr. Imperiale, a Board-certified reader,[2] it was read negative by Dr. Cook, a Board-certified reader, and negative by Dr. Navani, a Board-certified B-reader, and that although the third x-ray taken November 21, 1998, was read positive by Dr. Gaia, a Board-certified radiologist, it was read negative by Dr. Barrett, a Board-certified B-reader and professor of radiology. In evaluating the x-ray evidence, the administrative law judge further noted that Dr. Barrett stated that he did not see the pleural abnormalities on this last film that he had observed on the first film, and that Dr. Cook had said that a side view was needed to differentiate this possible abnormality. Decision and Order at 5.

Regarding the medical opinion evidence, the administrative law judge noted that Dr. Talati, who is Board-certified in both internal and pulmonary medicine, diagnosed chronic obstructive lung disease which he attributed to smoking history, while Dr. Aquilina, who is Board-certified in anesthesiology opined that claimant's respiratory impairment is multi-factorial in etiology and that claimant's coal workers' pneumoconiosis was co-existent with COPD and emphysema. Decision and Order at 5.

In evaluating the x-ray and medical opinion evidence and finding that claimant failed to establish the existence of pneumoconiosis, the administrative law judge permissibly

[2] Dr. Imperiale's x-ray reading does not report his credentials. Director's Exhibit 31. Dr. Anquilina refers to Dr. Imperiale as a Board-certified reader in his deposition. Claimant's Exhibit 2.

accorded the greatest weight to Dr. Talati's opinion based on his superior qualifications and greater expertise in pulmonary diseases and their causes, and on the fact that while Dr. Talati was aware of the references to pleural abnormalities (on x-ray) he never rendered a diagnosis of coal workers' pneumoconiosis, or any condition related to coal dust exposure. *See* 20 C.F.R. §§718.102(b), 718.202(a)(1); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989)(a doctor's finding of pleural abnormalities consistent with pneumoconiosis on an x-ray report is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4)); *Trent, supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Having properly considered all the evidence together, *Williams*, *supra*, and permissibly finding that claimant failed to establish the existence of pneumoconiosis by a preponderance of the evidence, we affirm the administrative law judge's finding that claimant has failed to establish the existence of pneumoconiosis, and entitlement to benefits. *Trent, supra*; *Perry*, *supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge