

BRB No. 01-0323 BLA

TEDDY R. MATNEY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
KNOX CREEK COAL COMPANY)	DATE ISSUED:_____
)	
and)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Stuart Levin, Administrative Law Judge, United States Department of Labor.

Teddy R. Matney, Hurley, Virginia, *pro se*.¹

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

¹Ron Carson, a benefits counselor with Stone Mountain Health Services in Vansant, Virginia, on behalf of claimant, requested an appeal of the administrative law judge's Decision and Order, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant, without the assistance of counsel, appeals the Decision and Order (99-BLA-1281) of Administrative Law Judge Stuart Levin denying benefits on a request for modification of a duplicate claim² 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).³

²Claimant's first claim, filed on August 7, 1989, was denied by the district director on January 10, 1990, as claimant failed to establish any of the elements of entitlement. Director's Exhibit 69. Claimant filed this duplicate claim on May 31, 1994, and submitted new evidence. The administrative law judge denied benefits, finding that the new evidence failed to establish that claimant's respiratory impairment arises out of his coal mine employment. The Board affirmed the administrative law judge's Decision and Order denying benefits. *Matney v. Knox Creek Coal Corp.*, BRB No. 97-0234 BLA (Oct. 28, 1997) (unpublished).

³The 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).

The administrative law judge found that claimant has not established a change in conditions since the prior denial, nor a mistake in a determination of fact. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the denial of benefits. In response, employer urges affirmance of the denial of benefits, as the administrative law judge's Decision and Order is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, did not file a brief on the merits of this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider whether the Decision and Order below is supported by substantial evidence. *See 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 supported by substantial evidence, are rational, and are consistent with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.* 380 U.S. 359

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

(1985).

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 (2000); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See 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 issues on appeal, and the evidence of record, we conclude that substantial evidence supports the administrative law judge's denial of benefits under 20 C.F.R. Part 718 (2000). Subsequent to the issuance of the administrative law judge's Decision and Order, the regulation concerning total disability causation was amended and the revised regulation became applicable to all pending claims. Pursuant to 20 C.F.R. §718.204(c)(2001)⁴:

A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in 20 C.F.R. §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

- (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
- (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

The administrative law judge properly reviewed the newly submitted medical opinions of Drs. Fino and Dahhan and found that the objective evidence of record supported their opinion that claimant's disability is not due to pneumoconiosis, but is caused by cigarette

⁴The administrative law judge applied the total disability causation regulation set forth at 20 C.F.R. § 718.204(b) (2000). After amendments were made to the regulations, the causation regulation is now set forth at 20 C.F.R. §718.204(c) (2001).

smoking and coronary artery disease. Decision and Order at 4; Employer's Exhibits 1, 2; *see McMath v. Director, OWCP*, 12 BLR 1-6 (1988). In addition, the administrative law judge correctly found that Dr. Sutherland's report does not contradict the conclusions of the other physicians of record, that claimant's totally disabling respiratory impairment did not arise from coal mine employment or pneumoconiosis, as Dr. Sutherland did not discuss the etiology of claimant's totally disabling pulmonary condition. Decision and Order at 4; Claimant's Exhibit 1; *see McMath, supra*. Thus, the administrative law judge rationally found that the recent opinions of Drs. Dahhan and Fino are consistent with the previously submitted reports of Drs. Hoffman, Turner, Forehand, Abernathy, Flynn and Jared, that did not link claimant's respiratory pulmonary impairment or disability to coal dust exposure or pneumoconiosis. Decision and Order at 4; Director's Exhibits 8, 27, 31, 32, 34, 38. The administrative law judge's findings are rational and supported by substantial evidence and therefore, we affirm his finding that the evidence of record as a whole is insufficient to establish the etiology of claimant's totally disabling pulmonary condition as related to dust exposure in coal mine employment or pneumoconiosis. Inasmuch as claimant has failed to establish a requisite element of entitlement on the merits, an award of benefits is precluded under 20 C.F.R. Part 718 (2000). *Anderson v. Valley Camp of Utah, Inc.* 12 BLR 1-111(1989); *Trent, supra*; *Perry, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge