BRB No. 01-0373 BLA

ARTHUR S. RILEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
WELLMORE COAL CORPORATION	)	
	)	
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 Modification Denying Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Arthur S. Riley, Grundy, Virginia, *pro se*.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order on Modification Denying Benefits (99-BLA-1224) of Administrative Law Judge Pamela Lakes Wood 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).[2] This case involves a

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

[2]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

request for modification of the denial of benefits in a duplicate claim. Claimant filed a duplicate claim for benefits on January 5, 1996.[3] In a Decision and Order dated July 24, 1997, Administrative Law Judge Daniel L. Leland credited claimant with twenty and three-quarters years of coal mine employment, and considered the claim under the applicable regulations at 20 C.F.R. Part 718 (2000). Judge Leland determined that the evidence submitted in connection with the duplicate claim was insufficient to establish either the existence of pneumoconiosis under 20 C.F.R. §718.202(a) (2000) or total disability under 20 C.F.R. §718.204(c) (2000). Accordingly, Judge Leland found that claimant did not establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), and denied benefits.

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on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

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). The Board subsequently issued an order requesting supplemental briefing in the instant case. Employer responded to the Board's order in its response brief to claimant's appeal by contending that the amended regulations with regard to the definition of pneumoconiosis at 20 C.F.R. §718.201 would not impact this case. 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). The court's decision renders moot employer's position with regard to the impact of the challenged regulations.

[3]Claimant filed an initial claim on December 10, 1979. Director's Exhibit 59. In a Decision and Order dated April 13, 1992, Administrative Law Judge John C. Holmes credited claimant with more than ten years of coal mine employment, but determined that claimant failed to establish entitlement to benefits pursuant to 20 C.F.R. Part 727. *Id*. Judge Holmes further found the evidence insufficient to establish any of the elements of entitlement under 20 C.F.R. Part 718 (2000). *Id*. Accordingly, Judge Holmes denied the claim. *Id*. Claimant appealed. The Board affirmed the administrative law judge's decision denying benefits. *Riley v. Beth Ann Coal Co.*, BRB No. 92-1599 BLA (May 18, 1994)(unpublished). Claimant did not take any further action in pursuit of benefits until filing a duplicate claim on January 5, 1996. Director's Exhibit 1.

Claimant appealed, and employer filed a cross-appeal.[4] The Board affirmed Judge Leland's findings under Sections 718.202(a) (2000), 718.204(c) (2000) and 725.309 (2000). *Riley v. Wellmore Coal Corp.*, BRB Nos. 97-1652 BLA and 97-1652 BLA-A (Aug. 21, 1998)(unpublished). Thus, the Board affirmed Judge Leland's denial of benefits. *Id*.

Claimant subsequently filed a timely request for modification with the district director. In a Decision and Order dated December 20, 2000, Administrative Law Judge Pamela Lakes Wood (the administrative law judge), found the newly submitted evidence sufficient to establish total disability pursuant to Section 718.204(c)(4) (2000) and determined that, therefore, claimant established a change in conditions pursuant to 20 C.F.R. §725.310 (2000). Considering the claim on the merits, the administrative law judge further found the evidence of record insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4) (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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 under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out

[4]In its cross-appeal, employer contended that Judge Leland erroneously failed to consider employer's duplicate claim evidence, consisting of medical reports from Drs. Dahhan, Tuteur and Hippensteel, numbered as Employer's Exhibits 1-3. The Board rejected employer's contention, holding that employer failed to proffer any evidence demonstrating that it submitted these reports to Judge Leland. *Riley v. Wellmore Coal Corp.*, BRB Nos. 97-1652 BLA and 97-1652 BLA-A (Aug. 21, 1998)(unpublished), slip op. at 5, n. 5.

of coal mine employment, and that the pneumoconiosis is totally disabling. 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); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In considering the x-ray evidence of record under Section 718.202(a)(1) (2000) on the merits, the administrative law judge found that claimant failed to meet his burden of proof to establish the existence of pneumoconiosis by a preponderance of the evidence. The administrative law judge's determination is supported by substantial evidence. The administrative law judge correctly found that five of the six x-ray interpretations associated with claimant's modification request, all six of which were submitted by B reader/Board-certified radiologists, were negative for pneumoconiosis, as were all twelve readings submitted in connection with claimant's duplicate claim. Decision and Order at 6-7, 10, 12-13; Director's Exhibits 14, 15, 26-31; Claimant's Exhibit 1; Employer's Exhibits 1, 3, 5. In addition, the administrative law judge stated that she considered the previously submitted x-ray readings of record and, although she did not specifically summarize the previously submitted readings, found the preponderance of this evidence insufficient to establish the presence of pneumoconiosis. Decision and Order at 13. The previous x-ray evidence consists of one hundred and fourteen readings, the vast majority of which were submitted by B readers and/or Board-certified radiologists. Director's Exhibit 59. Of these one hundred and fourteen interpretations, one hundred and four readings are negative for pneumoconiosis. *Id*. Because substantial evidence supports the administrative law judge's finding that the preponderance of the x-ray evidence of record is negative for pneumoconiosis, we affirm the administrative law judge's finding that clamant failed to meet his burden of proof pursuant to Section 718.202(a)(1) (2000). *See* 20 C.F.R. §718.202(a)(1); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990).

Additionally, the administrative law judge properly found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) (2000), since there is no autopsy or biopsy evidence in the record. *See* 20 C.F.R. §718.202(a)(2); Decision and Order at 10. The administrative law judge also properly found that claimant cannot establish the existence of pneumoconiosis under Section 718.202(a)(3) (2000), as none of the presumptions thereunder applies.[5] *See* 20 C.F.R. §718.202(a)(3); Decision and Order at 10. We, therefore, affirm the administrative law judge's finding that

[5]The record does not contain evidence of complicated pneumoconiosis and, consequently, claimant does not qualify for the presumption at 20 C.F.R. §718.304. The instant claim was filed after January 1, 1982 and, therefore, the presumption at 20 C.F.R. §718.305 is inapplicable. Additionally, as this is not a survivor's claim, the presumption at 20 C.F.R. §718.306 does not apply.

the existence of pneumoconiosis was not established at 20 C.F.R. §718.202(a)(2) or (a)(3) (2000). *See* 20 C.F.R. §718.202(a)(2), (a)(3).

In finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4) (2000), the administrative law judge correctly stated that the medical opinions associated with claimant's duplicate claim and request for modification uniformly indicate that claimant does not suffer from pneumoconiosis. Decision and Order at 8-11, 13. Specifically, Drs. Forehand, Hippensteel, Dahhan and Tuteur all opined that claimant does not suffer from pneumoconiosis. Director's Exhibits 10, 28; Employer's Exhibits 1, 7-9. Additionally, the administrative law judge stated that she considered the previously submitted medical opinion evidence associated with the initial claim, and found the preponderance of this evidence insufficient to establish pneumoconiosis, a finding which is supported by substantial evidence. Decision and Order at 13. In connection with the previous claim, while Drs. Modi, Clarke, Sutherland and Nash found the presence of pneumoconiosis, six physicians – Drs. Garzon, Hess, Hippensteel, Endres-Bercher, Dahhan and Tuteur – indicated that claimant does not suffer from the disease. Director's Exhibit 59. We affirm, therefore, 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) (2000) as supported by substantial evidence. *See* 20 C.F.R. §718.202(a)(4).

Inasmuch as claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000), a requisite element of entitlement under Part 718, the administrative law judge properly denied benefits.[6] *See* 20 C.F.R. §718.202(a); *Trent, supra*; *Gee*, *supra*; *Perry*, *supra*.

Accordingly, the administrative law judge's Decision and Order on Modification

[6]Since the administrative law judge properly found entitlement to benefits precluded upon consideration of the claim on the merits, we need not address the administrative law judge's findings under 20 C.F.R. §§725.309 and 725.310 (2000).

Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge