BRB No. 02-0405 BLA

WALTER L. THOMPSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DRUMMOND COMPANY, INCORPORATED	)	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 of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Walter L. Thompson, Parrish, Alabama, *pro se*.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (01-BLA-0523) of Administrative Law Judge Gerald M. Tierney 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).[1] The administrative law judge credited claimant with ten and one-half years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge

[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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a brief in this 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. *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 rational, supported by substantial evidence, and in accordance with 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 (1965).

Initially, we note that claimant appeared before the administrative law judge without the assistance of counsel. Based on the facts of the instant case, we hold that there was a valid waiver of claimant's right to be represented, *see* 20 C.F.R. §725.362(b), and that the administrative law judge provided claimant with a full and fair hearing, *see Shapell v. Director, OWCP*, 7 BLR 1-304 (1984); Hearing Transcript at 4-15.

We next address the administrative law judge's consideration of the claim on the merits at 20 C.F.R. Part 718. Since all of the x-ray readings of record are negative for pneumoconiosis, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Director's Exhibits 12, 13. Further, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) since there is no biopsy or autopsy evidence of record. In addition, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) since none of the presumptions set forth therein is applicable to the instant claim. *See* 20 C.F.R. §§718.304, 718.305, 718.306. The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Similarly, claimant is not entitled to the presumption at 20 C.F.R. §718.305 because he filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

With regard to 20 C.F.R. §718.202(a)(4), the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis. The record contains the reports of Drs. Fino, Hasson and Shad. Drs. Fino and Hasson opined that claimant does not suffer from pneumoconiosis. Director's Exhibit 22; Employer's Exhibit 1. Dr. Shad

diagnosed restrictive lung disease with an obstructive component that is related to coal dust exposure and smoking. Director's Exhibit 10. Dr. Shad conducted a pulmonary function study dated August 18, 2000, Director'S Exhibit 7, and Dr. Hasson conducted a pulmonary function study dated November 29, 2000, Director's Exhibit 22. The administrative law judge noted that "Dr. Hasson's interpretation of [c]laimant's pulmonary function testing is somewhat similar to Dr. Shad's."[2] Decision and Order at 4. The administrative law judge also noted that "Dr. Fino, by finding both pulmonary function studies invalid, takes away the premise that [c]laimant in fact suffers from a chronic lung disease or impairment." *Id*. Hence, the administrative law judge discredited the opinion of Dr. Shad on the issue of pneumoconiosis because he found that Dr. Shad's diagnosis was based, in part, on an invalid pulmonary function study. The administrative law judge therefore stated, "I find that [c]laimant has not met his burden of proof." *Id*. at 5. However, an administrative law judge is required to provide a rationale for preferring the opinion of a consulting physician over that of an administering physician in the interpretation of a pulmonary function study. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Sigel v. Director, OWCP*, 8 BLR 1-156 (1985). In the instant case, the administrative law judge did not provide a reason for according determinative weight to Dr. Fino's opinion that the August 18, 2000 pulmonary function study is invalid. Moreover, the record reveals that Dr. Michos, who is Board-certified in internal medicine and pulmonary medicine, also reviewed the August 18, 2000 pulmonary function study and opined that this study is valid. Director's Exhibit 8. Thus, since the administrative law judge did not provide a valid basis for discrediting Dr. Shad's opinion, we vacate the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remand the case for further consideration of the evidence. *See Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981).

[2]In a report dated September 6, 2000, Dr. Shad indicated that the August 18, 2000 pulmonary function study revealed "moderately severe restrictive lung disease [with] obstruction." Director's Exhibit 10. Similarly, Dr. Hasson indicated that the November 29, 2000 pulmonary function study revealed a "moderate restrictive ventilatory impairment with coexisting small airways obstructive changes." Director's Exhibit 22.

If reached, the administrative law judge must consider whether the evidence is sufficient to establish that pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203. Further, the administrative law judge must consider and weigh all of the relevant evidence of record, including the contrary probative evidence, like and unlike, to determine whether the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(b)(2), if reached. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987). Finally, if reached, the administrative law judge must consider whether the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).[3] *See Black Diamond Coal Mining Co. v. Director, OWCP* [*Marcum*], 95 F.3d 1079, 20 BLR 2-325 (11th Cir. 1996); *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990).

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[3]Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §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.

20 C.F.R. §718.204(c)(1)(i), (ii).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge