BRB No. 97-0388 BLA

EARL D. FLEENOR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
WESTMORELAND COAL COMPANY	)	
	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order of Christine McKenna, Administrative Law Judge, United States Department of Labor.

Earl D. Fleenor, Rogersville, Tennessee, *pro se.*

Douglas A. Smoot (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order (96-BLA-0650) of Administrative Law Judge Christine McKenna 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 fourteen years and seven months of coal mine employment, but concluded

[1] Claimant is Earl D. Fleenor, the miner, who filed this application for benefits on August 23, 1994. Director's Exhibit 1. Tim White, 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. White is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

that the medical evidence failed to establish either the existence of pneumoconiosis or total respiratory disability pursuant to 20 C.F.R. §§718.202(a), 718.204(c). Accordingly, she denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[2]

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. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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).

To be entitled to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Pursuant to Section 718.202(a)(1), the administrative law judge correctly noted that "all of the [x-ray] readings are negative for pneumoconiosis." Decision and Order at 6; Director's Exhibits 13, 14, 22; Employer's Exhibit 1. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(2) and (3), the administrative law judge correctly found that the record contains no biopsy evidence and the presumptions at Sections 718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. Decision and Order at 5 n.2; *see* 20 C.F.R. §§718.304, 718.305, 718.306. We therefore affirm these findings.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the

[2] The administrative law judge's finding of fourteen years and seven months of coal mine employment is affirmed as unchallenged on appeal as it is not adverse to claimant. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

opinions of Drs. Sargent, Broudy, and Hudson. Dr. Sargent examined claimant, while Dr. Broudy reviewed the medical evidence. Both physicians concluded that, on the basis of normal examination findings, normal objective test results, and negative chest x-rays, claimant does not suffer from pneumoconiosis. Director's Exhibit 22; Employer's Exhibit 1. Dr. Hudson examined claimant and diagnosed "chronic bronchitis" based on claimant's two-year history of a cough. Director's Exhibit 11 at 4. Dr. Hudson listed the etiology of the chronic bronchitis as "smoking and/or coal mining." *Id*. After considering that all three physicians are Board-certified in internal and pulmonary medicine, the administrative law judge found the medical opinions "insufficient to carry claimant's burden of proving that he suffers from coal workers' pneumoconiosis or any coal dust-related illness." Decision and Order at 7. In so doing, the administrative law judge found that "Dr. Hudson couched his opinion on the etiology of the chronic bronchitis in terms that were less than certain, indicating coal mining as only a possible cause." *Id*. An administrative law judge may discount a medical opinion found to be equivocal, *see Justice v. Island Creek Coal Co*., 11 BLR 1-91 (1988), and has broad discretion in determining the credibility of the evidence. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Inasmuch as the administrative law judge permissibly weighed the medical opinions, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(4).

Pursuant to Section 718.204(c)(1)-(3), the administrative law judge accurately observed that all of the pulmonary function and blood gas studies are non-qualifying[3] and that the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Director's Exhbits 10, 12, 22. Under Section 718.204(c)(4), the administrative law judge correctly noted that the medical opinions "are unanimous that from a respiratory standpoint, the claimant is able to return to his former coal mine work." Decision and Order at 8; Director's Exhibit 22; Employer's Exhibit 1. Therefore, we affirm the administrative law judge's findings pursuant to Section 718.204(c)(1)-(4).

Because claimant has failed to establish either the existence of pneumoconiosis or total respiratory disability, necessary elements of entitlement under Part 718, the denial of benefits is affirmed. *See Trent, supra; Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[3] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge