

BRB No. 01-0694 BLA

BILLY R. WILLIAMS)	
)	
Claimant-Petitioner)	DATE ISSUED:
)	
v.)	
)	
TRANSPORT, INCORPORATED)	
PENNEY’S TRUCKING, INCORPORATED)	
)	
and)	
)	
WEST VIRGINIA COAL WORKERS’)	
PNEUMOCONIOSIS FUND)	
)	
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 on Remand-Denying Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Billy R. Williams, Peytona, West Virginia, *pro se*.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand-Denying Benefits (1998-BLA-0734) of Administrative Law Judge Gerald M. Tierney 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 This is the second time that this case is before the Board. The Board previously affirmed the administrative law judge's finding that total disability was established pursuant to 20 C.F.R. §718.204(c)(2000), but vacated the administrative law judge's Decision and Order in part and remanded the case to the administrative law judge for further consideration.² *Williams v. Transport Inc.*, BRB No. 99-1334 BLA (Nov. 29, 2000)(unpublished). On remand, the administrative law judge credited claimant with fifteen years of coal mine employment and found that claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203 and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's

¹This claim was filed on September 18, 1995. Director's Exhibit 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 (2001). All the citations to the regulations, unless otherwise noted, refer to the amended regulations.

²The Board affirmed the administrative law judge's findings that the Director, Office of Workers' Compensation Programs, is the party responsible for the payment of benefits in this case, if any, as well as the administrative law judge's findings that the presence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(3), and that total disability was established pursuant to 20 C.F.R. §718.204(c)(2000). The Board remanded the case for reconsideration of the length of claimant's coal mine employment, the existence of pneumoconiosis pursuant to Section 718.202(a)(4), and the cause of claimant's total disability pursuant to Section 718.204(c)(2000).

denial of benefits. Employer and the Director, Office of Workers' Compensation Programs, have not filed a response brief.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.* 380 U.S. 359 (1985).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, claimant must prove that the miner suffered from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that his pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203 and 718.204. Failure to establish any one of these elements precludes entitlement. *See Perry v. Director, OWCP*, 9 BLR 1-1(1986)(*en banc*).

After consideration of the administrative law judge's findings, the issues on appeal and the relevant evidence of record, we conclude that substantial evidence supports the administrative law judge's Decision and Order on Remand-Denying Benefits. The administrative law judge reconsidered the opinions of Drs. Ranavaya and Rasmussen, that claimant had pneumoconiosis, the contrary opinions of Drs. Zaldivar, Crisalli, Gaziano and Fino, and the hospital and treatment notes.³ Decision and Order on Remand-Denying Benefits at 2; Claimant's Exhibits 5-7; Director's Exhibits 13, 38; Employer's Exhibits 2, 3. The administrative law judge noted that Dr. Ranavaya "was the only physician who did not specifically include smoking as a factor in claimant's impairment." Decision and Order on Remand-Denying Benefits at 4. In contrast, the administrative law judge correctly found that

³The administrative law judge correctly found that the hospital and treatment notes "usually" documented claimant's respiratory problems as chronic obstructive pulmonary disease without diagnosing pneumoconiosis. Decision and Order on Remand-Denying Benefits at 2; Employer's Exhibit 3. The administrative law judge noted that one progress report diagnosed chronic obstructive pulmonary disease secondary to coal mine employment and cigarette smoking. However, the administrative law judge correctly found that the physician's name and the basis of his conclusion were not part of the record. *Id.*

Drs. Crisalli, Gaziano, Fino and Zaldivar diagnosed smoking related emphysema and asthma not related to claimant's coal dust exposure. *Id.* The administrative law judge further found that even Dr. Rasmussen, who diagnosed pneumoconiosis, noted that most of claimant's lung disease is due to his cigarette smoking. *Id.*; Claimant's Exhibit 6.

Moreover, the administrative law judge considered the qualifications of Dr. Ranavaya, who is Board-certified in occupational medicine and Dr. Rasmussen, who is Board-certified in internal medicine, and "was not persuaded that their opinions can be considered the preponderance of the evidence" in light of the fact that the four Board-certified pulmonologists of record, Drs. Crisalli, Gaziano, Fino and Zaldivar, related claimant's disabling impairment to his smoking and not to claimant's dust exposure. Decision and Order on Remand Denying Benefits at 4. See *Milburn Colliery Co., v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985). Consequently, as the administrative law judge rationally found that the opinions of Drs. Crisalli, Gaziano, Fino, and Zaldivar were entitled to dispositive weight, we affirm the administrative law judge's finding that claimant failed to establish, by the preponderance of the evidence, the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Inasmuch as the Board previously affirmed the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(3), *Williams*, slip op. at 2, the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); Decision and Order on Remand at 4. Therefore, as claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement, an award of benefits is precluded under 20 C.F.R. Part 718. *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 on Remand-Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge