BRB No. 02-0296 BLA

ALVIE R. RUDASH	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED:
CONSOLIDATION COAL COMPANY	)	
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 Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Alvie R. Rudash, Morgantown, West Virginia, *pro se*.

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appears without the assistance of counsel and appeals the Decision and Order (1993-BLA-0796) of Administrative Law Judge Edward Terhune Miller 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] This case is

[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, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

before the Board for the third time.[2] In the Decision and Order on Remand, the

[2]In its most recent Decision and Order, the Board vacated the administrative law judge's finding that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) and remanded the case for the administrative law judge to weigh all of the relevant evidence together in accordance with the holding in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), to determine whether Drs. Lebovitz and Levine diagnosed legal pneumoconiosis, and to reexamine the rationale of each medical report of record relevant to this issue. The Board affirmed the administrative law judge's finding, at 20 C.F.R. §718.204(b) (2000), that Dr. Jaworski's opinion was too equivocal to establish that claimant's total disability was due to pneumoconiosis. The Board also affirmed the administrative law judge's rejection of Dr. Fino's report as inconsistent with the holdings in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995) and *Doris Coal Co. v. Director, OWCP [Stiltner]*, 938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991) and the finding that Dr. Renn's opinion was unpersuasive. The Board remanded for reconsideration of the causation issue, however, due to the administrative law judge's shifting of the burden of proof to employer. The Board directed the administrative law judge to determine on remand whether the evidence satisfied claimant's affirmative burden of proof to establish that his disability is due to pneumoconiosis. *Rudash v. Consolidation Coal Co.,* BRB No. 99-0320 BLA (Sept. 19, 2000)(unpub.).

administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b) or total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Claimant also alleges specifically that the evidence presented erroneously indicated that he had minimal coal dust exposure, and that he had mistakenly testified to a greater smoking history than he actually has. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 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 by 30 U.S.C. §932(a).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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 and the evidence of record, we conclude that the administrative law judge's determination that the medical opinions of record are insufficient to establish the existence of pneumoconiosis is supported by substantial evidence and that no reversible error is contained therein. Drs. Lebovitz, Jaworski, and Levine submitted medical opinions in which they indicated that claimant has pneumoconiosis. Pursuant to Section 718.202(a)(4), the administrative law judge acted within his discretion in finding that Dr. Lebovitz's diagnosis of pneumoconiosis was entitled to little weight. In diagnosing coal workers' pneumoconiosis, Dr. Lebovitz, who possesses no special radiological qualifications, relied upon his positive reading of an x-ray that was reread as negative by three physicians who are B readers and Board-certified radiologists. Decision and Order at 8; Claimant's Exhibit 3; Employer's Exhibits 8, 10, 13; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). The administrative law judge also rationally determined that Dr. Lebovitz did not provide a reasoned diagnosis of legal pneumoconiosis. The record reveals that Dr. Lebovitz did not set

forth a distinct diagnosis of a respiratory or pulmonary condition related to dust exposure in coal mine employment nor did he "explain his reasoning or identify the objective evidence he relied on in support of his conclusion." Decision and Order at 9; 20 C.F.R. §718.201; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

With regard to Dr. Jaworski's opinion, that claimant has pneumoconiosis, the administrative law judge rationally found that this report was too equivocal to satisfy claimant's affirmative burden of proof under Section 718.202(a)(4), since Dr. Jaworski did not specifically attribute the chronic obstructive pulmonary disease which he diagnosed to claimant's coal mine employment. Decision and Order at 6; Director's Exhibits 10, 21A; 20 C.F.R. §718.201; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). The administrative law judge also rationally accorded Dr. Levine's diagnosis of pneumoconiosis little weight since he provided no explanation for his conclusion that claimant's condition was due to coal dust exposure, other than claimant's statement. Decision and Order at 8-9; Claimant's Exhibit 1; *see Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Clark, supra*; *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Accordingly, we affirm the administrative law judge's finding that the medical opinions of record, when considered with the other evidence relevant to Section 718.202(a), do not support a finding of pneumoconiosis.[3] Decision and Order at 9; *see Compton, supra*.

With respect to the specific arguments raised by claimant on appeal, because the administrative law judge provided valid reasons for discrediting the opinions of the physicians who diagnosed pneumoconiosis, which were not premised upon his determination regarding claimant's smoking history, we need not address claimant's contention that the administrative law judge's finding regarding claimant's smoking history was in error. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161, 1-162-3 (1988); *Kozele v. Rochester & Pittsburg Coal Co.*, 6 BLR 1-378 (1983); *see also Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Claimant has also alleged that the evidence in the present case suggests, incorrectly, that he had minimal coal dust exposure. In his Decision and Order, the administrative law judge credited claimant's testimony that he worked for thirty years as a miner and was exposed to heavy amounts of coal mine dust. Decision and Order at 6. Therefore, the administrative law judge did not make any findings adverse to claimant based upon an inaccurate understanding of the length of claimant's coal mine employment or the extent to which he was exposed to coal dust.

[3]The Board previously affirmed the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). *Rudash v. Consolidation Coal Co.*, BRB No. 95-1628 BLA (Oct. 25, 1996)(unpub.), slip op. at 2 n.1.

As we have affirmed the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement, we must also affirm the denial of benefits. *See Trent*, *supra*; *Perry*, *supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge