

BRB No. 02-0488 BLA

DAN CARVER, JR.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
SANDY FORK MINING COMPANY)	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-Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

David H. Neeley (Neeley & Reynolds, PSC), Prestonburg, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (01-BLA-0434) of Administrative Law Judge Rudolf L. Jansen rendered on a duplicate claim¹ 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 The administrative law judge credited claimant with seventeen

¹Claimant's initial claim, filed on November 16, 1988, was denied by Administrative Law Judge Bernard J. Gilday. Director's Exhibit 33. The Board affirmed Judge Gilday's decision denying benefits. *Carver v. Sandy Fork Mining Co.*, BRB No. 92-0509 BLA (Nov. 20, 1992)(unpublished). Claimant's second claim, filed on March 23, 1995, was denied on August 28, 1997 by Administrative Law Judge Donald W. Mosser. Director's Exhibit 34. The instant claim was filed on June 8, 2000. Director's Exhibit 16.

²The Department of Labor has amended the regulations implementing the Federal

years of coal mine employment and found that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000), as the weight of the newly submitted evidence established total disability under 20 C.F.R. §718.204(b), an element of entitlement previously adjudicated against claimant.³ After considering all the evidence of record, however, the administrative law judge found that claimant failed to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits. On appeal, claimant challenges the administrative law judge's findings at Sections 718.202(a)(1), (4) and 718.204(c). In response, employer argues that the administrative law judge's Decision and Order is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has declined to respond to the issues raised in claimant's brief.⁴

The Board must affirm the findings of the administrative law judge if they are

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.

³The amendments to the regulation at 20 C.F.R. §725.309 do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2.

⁴We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established seventeen years of coal mine employment, a material change in conditions under 20 C.F.R. §725.309(d) (2000), and total respiratory disability under 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 this living miner's claim, it must be established that claimant suffers from pneumoconiosis, that the pneumoconiosis arose out of his coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Failure to prove any one of these elements precludes entitlement. *Id.*

After consideration of the administrative law judge's Decision and Order, the arguments on appeal and the evidence of record, we conclude that the administrative law judge's denial of benefits is supported by substantial evidence and contains no reversible error. Turning to the issue of disability causation, claimant contends that the administrative law judge erred in finding that the opinion of Dr. Baker was insufficient to establish that claimant's totally disabling respiratory impairment was due to pneumoconiosis at Section 718.204(c). We disagree. The administrative law judge accurately determined that although one section of Dr. Baker's report attributed claimant's impairment to chronic bronchitis and coal workers' pneumoconiosis, the physician indicated on a supplemental page that the impairment was due to cigarette smoking and "coal dust exposure," followed by a question mark. Director's Exhibit 7. The administrative law judge thus reasonably found that Dr. Baker's conclusions regarding disability causation were vague and entitled to little weight, as the physician's report created uncertainty as to whether he was merely hypothesizing or whether he in fact opined that claimant's impairment was due to occupational exposure.⁵ Decision and Order at 15; see *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). The administrative law judge acted within his discretion as trier-of-fact in according greater weight to the contrary medical opinions of record, and in according determinative weight to the opinion of pulmonary expert Dr. Broudy, that claimant's disability was due to smoking, based on the physician's qualifications and opportunity to examine claimant on multiple occasions in order to evaluate claimant's current condition. Decision and Order at 15; see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985);

⁵The administrative law judge additionally determined that Dr. Baker did not address the improvements in claimant's pulmonary function studies after bronchodilation or administer bronchodilators during his examination and testing of claimant on July 14, 2000, and there was no indication that Dr. Baker considered the results of earlier pulmonary function studies which included post-bronchodilator results. Decision and Order at 14-15; Director's Exhibit 7.

Wetzel v. Director, OWCP, 8 BLR 1-139 (1985). The administrative law judge's finding that the preponderance of the evidence did not establish total disability due to pneumoconiosis pursuant to Section 718.204(c), *see Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989), is supported by substantial evidence and is affirmed. Because claimant has failed to establish that his total respiratory disability was due to pneumoconiosis, a requisite element of entitlement under Part 718, claimant is precluded from entitlement to benefits. *Perry, supra*. Consequently, we need not reach claimant's arguments regarding the issue of the existence of pneumoconiosis at Section 718.202(a)(1), (4).

Accordingly, the administrative law judge's Decision and Order-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