

BRB No. 07-0533 BLA

F.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WYOMING POCAHONTAS LAND	)	
COMPANY	)	
	)	DATE ISSUED: 03/14/2008
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 on Remand – Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Thomas McK. Hazlett (Harper and Hazlett), St. Clairsville, Ohio for claimant.

Erik A. Schramm (Hanlon, Duff, Estadt, McCormick & Schramm Co., LPA), St. Clairsville, Ohio for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand – Denying Benefits (04-BLA-5063) of Administrative Law Judge Michael P. Lesniak<sup>1</sup> (the administrative law judge) rendered on a subsequent claim filed pursuant to the provisions of Title IV of the

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<sup>1</sup> This matter was originally heard and decided by Administrative Law Judge Gerald M. Tierney, who has since retired.

Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 et seq. (the Act). Claimant filed this claim on October 1, 2002,<sup>2</sup> Director's Exhibit 5, and this case is before the Board for the second time.

On August 25, 2005, Administrative Law Judge Gerald M. Tierney found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, as employer conceded the issue of the existence of pneumoconiosis. Judge Tierney further found that claimant established the remaining elements of entitlement and, accordingly, awarded benefits. Pursuant to employer's appeal, the Board issued a split decision, vacating the award of benefits and remanding the case for further consideration. *[F.K.S.] v. Wyoming Pocahontas Land Co.*, BRB No. 05-1018 BLA (Jun. 29, 2006)(unpub.)(McGranery, J., dissenting). The Board affirmed, as unchallenged on appeal, Judge Tierney's determination that claimant established total respiratory disability pursuant to 20 C.F.R. §718.203(b)(2)(ii), (iv), as well as a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *Id.* The panel majority, however, vacated Judge Tierney's finding that disability causation was established at 20 C.F.R. §718.204(c), and instructed him to consider, upon remand, whether Dr. Murty's opinion was sufficiently reasoned to support claimant's burden of proof on the issue, and to explain the basis for the weight he assigned to the conflicting medical opinion evidence of record. *Id.* Judge McGranery stated in her dissent that she would defer to the administrative law judge's factual findings regarding the credibility and weight of Dr. Murty's opinion, and affirm the administrative law judge's findings pursuant Section 718.204(c). *Id.*

On remand, the case was assigned to the administrative law judge, who determined that Dr. Murty's opinion was unreasoned because it failed to explain how the

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<sup>2</sup> Claimant filed his first claim for benefits on June 21, 1978. Director's Exhibit 1. Administrative Law Judge John C. Holmes issued a Decision and Order denying benefits on April 12, 1983, which was affirmed by the Board on appeal, *see [F. K. S.] v. Youghioghny and Ohio Coal Co.*, BRB No. 83-1079 BLA (Nov. 15, 1985) (unpub.). *Id.* Claimant filed a second claim on August 15, 1994. Director's Exhibit 2. The district director denied benefits on October 25, 1994, on the grounds that claimant failed to establish a material change in conditions or that he was totally disabled due to pneumoconiosis. *Id.* Claimant filed a third claim on May 15, 1997, which was also denied by the district director based on claimant's failure to establish a material change in conditions, or any of the requisite elements of entitlement. Director's Exhibit 3. The instant subsequent claim, filed on October 1, 2002, is claimant's fourth claim for benefits. Director's Exhibit 5.

objective medical evidence supported a finding that claimant's coal mine employment was a substantially contributing cause of claimant's total disability. Decision and Order at 3. As the remaining medical opinions of record did not find coal dust exposure to be a substantially contributing cause of disability, the administrative law judge found that claimant had failed to establish disability causation at Section 718.204(c). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erroneously found Dr. Murty's opinion insufficient to establish disability causation at Section 718.204(c).<sup>3</sup> Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a response.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.<sup>4</sup> 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 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).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence and contains no reversible error. In assessing Dr. Murty's causation opinion pursuant to Section 718.204(c), the administrative law judge accurately quoted the physician's diagnosis as "severe pulmonary decompensation. Resting hypoxia and O<sub>2</sub>, on. Related to coal mining and chronic lung disease;" and, properly noted that Dr. Murty failed to discuss the etiology of

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<sup>3</sup> The Board affirms, as unchallenged on appeal, the administrative law judge's finding that the medical opinions of Drs. Altmeyer and Pacht do not support a finding of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>4</sup> The law of the United States Court of Appeals for the Sixth Circuit is applicable as the miner was employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

the chronic lung disease, explain how the objective medical evidence supported his diagnosis, or indicate what consideration was given to claimant's extensive smoking history. Decision and Order at 3; Director's Exhibits 11, 15. The administrative law judge, therefore, acted within his discretion in finding that the opinion was not well-reasoned. Decision and Order at 3; *see Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Company v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2004); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Consequently, we affirm the administrative law judge's finding that Dr. Murty's opinion was insufficient to establish disability causation at Section 718.204(c), as supported by substantial evidence, and affirm the denial of benefits.

Accordingly, the administrative law judge's Decision and Order on Remand – Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge