BRB No. 07-0776 BLA

E.T.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 05/29/2008
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Stephen G. Hopkins (Law Offices of Howard O. Mann, PSC), Corbin, Kentucky, for claimant.

Emily Goldberg-Kraft (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (04-BLA-0126) of Administrative Law Judge Donald W. Mosser rendered on a duplicate 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] Claimant filed this duplicate claim

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

on October 18, 1995.[2] Director's Exhibit 1. It is before the Board for the second time. Pursuant to an appeal by the Director, Office of Workers' Compensation Programs (the Director), of an administrative law judge's decision awarding benefits, the Board vacated the award and remanded the case to the district director for claimant to be provided with a complete pulmonary evaluation. [*E.T.*] *v. Director, OWCP*, BRB No. 97-1792 BLA (Sept. 18, 1998)(unpub.). On remand, however, claimant, through his counsel, declined to undergo another pulmonary evaluation because of poor health. Instead, claimant submitted his own additional medical evidence and, following a denial of benefits by the district director, he requested a hearing before the Office of Administrative Law Judges (OALJ). On September 14, 1999, because claimant's health was deteriorating and his condition was grave, upon motion to remand submitted by the Director, and unopposed by claimant's counsel, an administrative law judge remanded the case to the district director for monitoring of claimant's condition, for review of medical records related to claimant's last illness, and for possible review of autopsy results.

Claimant's health eventually improved sufficiently for him to again pursue his claim. Following the submission of additional medical evidence before the district director, the claim was again referred to the OALJ on June 10, 2004. Before the OALJ, claimant, through counsel, submitted additional medical evidence. Additionally, the Director submitted the results of a physical examination by Dr. Fernandes.

In a Decision and Order – Denying Benefits, the administrative law judge credited claimant with at least ten years of coal mine employment, as stipulated by the parties.[3] Pursuant to 20 C.F.R. §725.309(d)(2000), the administrative law judge found that claimant established a material change in conditions because the parties stipulated that he established the existence of pneumoconiosis arising out of coal mine employment. Considering the merits of the claim, the administrative law judge found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), but did not establish that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

[2] Claimant filed an initial claim on March 18, 1983. It was dismissed as abandoned by Administrative Law Judge Hedley G. Pingree on June 25, 1987, because claimant failed to appear at the noticed hearing on that claim. Director's Exhibit 29.

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Decision and Order at 3; Director's Exhibit 4; September 5, 2006 Transcript at 15.

On appeal, claimant challenges the administrative law judge's finding pursuant to Section 718.204(c). The Director responds, urging affirmance of the finding that total disability due to pneumoconiosis was not established. Alternatively, the Director urges the Board to reverse the finding that claimant established that he is totally disabled by a respiratory or pulmonary impairment pursuant to Section 718.204(b)(2). Claimant replies that the Board should not address the Director's argument concerning total disability pursuant to Section 718.204(b)(2) because the Director did not file a cross-appeal.[4]

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. 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, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant argues that the administrative law judge erred in finding that claimant is not totally disabled due to pneumoconiosis pursuant to Section 718.204(c). In considering this issue, the administrative law judge found that the record contained no medical opinion supporting claimant's burden to establish that his total disability is due to pneumoconiosis. Specifically, the administrative law judge found that, although claimant's treating physician, Dr. Vaezy, diagnosed chronic obstructive pulmonary disease due to smoking, coal workers' pneumoconiosis, and coronary artery disease, and opined that claimant is totally disabled by a respiratory impairment, Dr. Vaezy did not discuss the cause of claimant's totally disabling impairment.[5] Director's Exhibits 12, 26;

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[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established the existence of pneumoconiosis arising out of coal mine employment and a material change in conditions pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 725.309(d)(2000). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] Dr. Vaezy, who is Board-certified in Internal Medicine and Pulmonary Disease, has been treating claimant since January 2, 1996. In a report dated October 26, 1995, Dr. Vaezy diagnosed claimant with coal workers' pneumoconiosis (CWP) due to claimant's coal dust exposure of over forty years and chronic obstructive pulmonary disease (COPD) due to claimant's thirty years of smoking, but did not address whether claimant

Claimant's Exhibits 1, 4, 9. Further, the administrative law judge noted that Dr. Fernandes opined that claimant is not totally disabled due to pneumoconiosis. Director's Exhibit 41. The administrative law judge noted further that the record of claimant's prior claim contained no opinion that claimant was totally disabled due to pneumoconiosis.

Substantial evidence supports the administrative law judge's finding that the evidence of record is insufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(c). In a living miner's claim, a finding of total disability due to pneumoconiosis must be established based upon a physician's documented and reasoned medical report. 20 C.F.R. §718.204(c)(2). As the administrative law judge found, Dr. Fernandes concluded that claimant is not totally disabled due to pneumoconiosis, and Dr. Vaezy did not address the cause of claimant's totally disabling respiratory or pulmonary impairment. Claimant, citing *Grundy Mining Co. v. Flynn*, 353 F.3d 467, 483-84, 23 BLR 2-44, 2-71 (6th Cir. 2003), argues that there was no need for Dr. Vaezy to specifically link claimant's pulmonary disability to pneumoconiosis. We disagree. In *Flynn*, the court held that an administrative law judge properly found that a doctor's opinion supported total disability due to pneumoconiosis even though the doctor did not specifically link the claimant's total disability to his pneumoconiosis, because the only pulmonary diagnosis the doctor had rendered was pneumoconiosis. Unlike the doctor in *Flynn*, however, Dr. Vaezy rendered more than one pulmonary diagnosis. Dr. Vaezy diagnosed claimant with both COPD due to smoking and CWP due to coal mine dust, without addressing which disease or diseases cause or contribute to claimant's total disability. Thus, we affirm the administrative law judge's finding that Dr. Vaezy's opinion is insufficient to establish disability causation pursuant to Section 718.204(c).

The remaining evidence cited by claimant does not establish any error in the administrative law judge's determination that disability causation was not established. Specifically, the August 25, 2006 qualifying pulmonary function study and a diagnosis of

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was totally disabled. Director's Exhibit 12 at 4. On May 23, 1996, Dr. Vaezy examined claimant, and stated that claimant has a "continued increase of his respiratory difficulty." Director's Exhibit 26. In a report dated May 2, 2005, Dr. Vaezy diagnosed claimant with COPD, moderate in severity, CWP, and coronary artery disease (CAD), but did not discuss whether claimant was totally disabled. Claimant's Exhibit 1. On August 25, 2006, Dr. Vaezy again examined claimant, and diagnosed COPD, CWP, and CAD. Claimant's Exhibit 4. Dr. Vaezy stated that claimant's pulmonary function study was compatible with a restrictive and obstructive impairment. *Id*. On January 3, 2007, Dr. Vaezy reviewed claimant's record, and stated that claimant's last pulmonary function study performed on August 25, 2006, "verifies [claimant's] total and permanent disability." Claimant's Exhibit 9.

cor pulmonale with right-sided congestive heart failure are relevant only to the issue of the existence of a total respiratory disability.[6] *Piniansky v. Director, OWCP*, 7 BLR 1-171, 1-174 (1984); 20 C.F.R. §718.204(b)(2)(i), (iii); Claimant's Exhibit 9. Further, the opinions of Dr. Krishna, claimant's cardiologist, and Dr. Durham, as well as the hospital records dated March 1, 2000 and March 3, 2005, are silent on the cause of claimant's totally disabling respiratory impairment. *See Chancey v. Consolidation Coal Co.*, 7 BLR 1-240, 1-242 (1984); Director's Exhibit 32 at 256-257, 510-511, 513-514; Claimant's Exhibits 2 at 28-30; 5 at 16-17; 6 at 1, 2. Moreover, any error in the administrative law judge's failure to consider a December 10, 1984 finding by the Kentucky Workers' Compensation Board that claimant was totally disabled by coal workers' pneumoconiosis, was harmless. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989)(*en banc*); *Miles v. Central Appalachian Coal Co.*, 7 BLR 1-744, 1-748 n.5 (1985); Director's Exhibit 3. The state board determination was not binding upon the administrative law judge, and the record does not indicate the medical and legal criteria the state board relied upon in reaching its decision. *Id.*

Lastly, in this living miner's claim, the lay testimony by claimant and his daughter, standing alone, cannot establish disability causation, because the issue is primarily a medical determination and must be supported by medical evidence.[7] *See* 20 C.F.R. §718.204(c)(2), (d)(5); *Salyers v. Director, OWCP*, 12 BLR 1-193, 1-196 (1989); *Cooper v. U.S. Steel Corp.*, 7 BLR 1-842, 1-845 n.4 (1985).

Therefore, we affirm the administrative law judge's finding that claimant did not establish that his total disability is due to pneumoconiosis pursuant to Section 718.204(c). The denial of benefits is therefore affirmed. *See Anderson*, 12 BLR at 1-112. Consequently, we need not address the Director's challenge to the administrative law judge's finding of total disability pursuant to Section 718.204(b)(2).

[6] In any event, the record does not contain a diagnosis of cor pulmonale with right-sided congestive heart failure.

[7] Claimant testified that he had difficulty working because of his lungs and that his respiratory problems have gotten worse. September 5, 2006 Transcript at 11. Claimant's daughter testified that claimant's breathing does not allow him to perform the activities he once did, and that he cannot walk far without stopping to rest. *Id.* at 15-16.

Accordingly, the administrative law judge's Decision and Order – 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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BETTY JEAN HALL
Administrative Appeals Judge