

BRB No. 05-0589 BLA

PARMA KINCAID)
(o/b/o of JOHN ALLEN KINCAID, JR.))
)
Claimant-Petitioner)
)
v.)
)
PCR PARTNERSHIP JOINT VENTURE)
)
and)
)
WEST VIRGINIA COAL WORKERS') DATE ISSUED: 11/29/2005
PNEUMOCONIOSIS FUND)
)
Employer/Carrier-)
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 Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Parma Kincaid, Mt. Hope, West Virginia, *pro se*.

Robert Weinberger (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (03-BLA-6389) of Administrative Law Judge Gerald M. Tierney 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 Pursuant to the parties' stipulations, the administrative law judge credited the miner with at least twenty-four years of coal mine employment² and found that employer was the responsible operator. Decision and Order at 2; Director's Exhibits 2, 3; Hearing Transcript at 9. Based on the date of filing, the administrative law judge considered entitlement in this claim pursuant to 20 C.F.R. Part 718. Decision and Order at 2. After noting that this claim involves the miner's request for modification of the denial of his claim, the administrative law judge found that as employer now conceded that the miner was totally disabled, a change in conditions was established pursuant to 20 C.F.R. §725.310. Decision and Order at 2-3; Hearing Transcript at 9. Reviewing the entire record, the administrative law judge found that the miner did not prove that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs has declined to file a substantive response in this appeal.³

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). The Board's scope of review is defined by statute. The administrative law judge's

¹ The miner, who is now deceased, filed this claim for benefits on January 19, 1999 and the claim was denied by Administrative Law Judge Edward Terhune Miller on February 6, 2001, because the miner failed to establish that he was totally disabled due to pneumoconiosis. Director's Exhibits 1, 34. The Board affirmed the denial of benefits on February 12, 2002. Director's Exhibit 40. The miner requested modification on March 12, 2002. Director's Exhibit 41. The miner died on December 17, 2004, and Administrative Law Judge Gerald M. Tierney denied the modification request on March 11, 2005. Claimant's Brief at 1. Claimant, the miner's widow, is now pursuing the miner's claim.

² The record indicates that the miner's coal mine employment occurred in West Virginia. Director's Exhibits 2, 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

³ The administrative law judge's length of coal mine employment and responsible operator determinations, as well as his findings pursuant to 20 C.F.R. §§725.310 and 718.204(b)(2), are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

In order to establish entitlement to benefits in the miner’s claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner was 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).

Pursuant to Section 718.204(c), the administrative law judge found that the miner did not prove that he was totally disabled due to pneumoconiosis. In making this determination, the administrative law judge found no mistake of fact in the prior administrative law judge’s findings that the initial evidence addressing the issue, specifically, the opinions of Drs. Rasmussen and Zaldivar, did not establish that the miner was totally disabled due to pneumoconiosis.⁴ Decision and Order at 3; *see* 20 C.F.R. §725.310; *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). The administrative law judge then considered the three new pieces of medical evidence submitted by the miner on modification, which included a hospital discharge summary, a CT scan, and a PET scan. Decision and Order at 3; Director’s Exhibits 43, 45. The administrative law judge noted accurately, however, that none of these items addressed whether the miner was totally disabled due to pneumoconiosis. The administrative law judge further noted that on modification, employer submitted an updated opinion from Dr. Zaldivar, who reviewed the medical evidence of record and opined that the miner was totally disabled due to asthma and possibly vasculitis, both unrelated to pneumoconiosis or coal mine employment. Employer’s Exhibit 1. Based on this evidence, the administrative law judge found that the miner did not carry his burden to establish, by a preponderance of the evidence, that he was totally disabled due to pneumoconiosis. Substantial evidence supports the administrative law judge’s finding, which is in accordance with law. *McFall*, 12 BLR at 1-177.

⁴ Dr. Rasmussen examined the miner on February 24, 1999 and opined that the miner had a minimal loss of respiratory function and retained the pulmonary capacity to perform his last regular coal mine job. Director’s Exhibit 8. Dr. Zaldivar examined the miner on March 17, 1999 and opined that, while he did have a pulmonary impairment that prevented him from performing his usual coal mine employment, the impairment was entirely due to asthma, and was unrelated to pneumoconiosis. Director’s Exhibit 9.

In claimant's *pro se* letter, she alleges that the administrative law judge did not consider that the miner was "awarded 30% from the state" of West Virginia. Claimant's Letter, Jan. 6, 2005. The record does not contain a copy of the award or decision to which claimant refers. At the hearing, employer stipulated that the miner received "a 30 percent award by the West Virginia Occupational Pneumoconiosis Board." Hearing Tr. at 6. Any error by the administrative law judge in failing to discuss this stipulation was harmless, however, "because the record does not indicate the legal or medical criteria which the state board relied upon," *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989)(*en banc*), nor whether the "30 percent award" was for total disability due to pneumoconiosis, or merely partial disability. See *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). We therefore affirm the administrative law judge's finding pursuant to Section 718.204(c).

Because claimant failed to establish that the miner was totally disabled due to pneumoconiosis, an essential element of entitlement in a miner's claim, we affirm the administrative law judge's denial of benefits. See *Anderson*, 12 BLR at 1-112.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge