BRB No. 03-0148 BLA

THOMAS EDWARD McCREARY	)	
	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED: 09/29/2003
PEABODY COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order-Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (01-BLA-1178) of Administrative Law Robert L. Hillyard (the administrative law judge) on a miner's 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] The administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, but that the evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b).[2] Accordingly, the administrative law judge denied the claim.[3]

On appeal, claimant challenges the administrative law judge's finding that the evidence fails to establish total respiratory disability pursuant to Section 718.204(b). Claimant asserts, *inter alia*, that the administrative law judge failed to comply with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §919(d), and 30 U.S.C. §932(a). Claimant argues, in the alternative, that the administrative law judge erred in finding the evidence insufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(c). Employer, in response, asserts that the administrative law judge's finding that the evidence fails to establish total respiratory disability is supported by substantial evidence, and accordingly, it urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter, indicating that he will not respond to the instant appeal.[4]

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[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.

[2] The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) is now found at 20 C.F.R. §718.204(b), while the provision pertaining to total disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

[3] The relevant procedural history of this claim is as follows: Claimant filed his original claim with the Department of Labor (DOL) on December 14, 2000. Director's Exhibit 1. The district director issued an initial finding awarding interim benefits on April 20, 2002. Director's Exhibit 19. Thereafter, the district director issued an initial determination again awarding interim benefits on August 3, 2002. Director's Exhibit 28. Following employer's controversion, the case was referred to the Office of Administrative Law Judges for a hearing. Director's Exhibits 22, 24, 25, 27, 30.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that the record establishes twenty-three years of coal mine employment, that claimant's smoking history is at least one pack a day for forty-four years, that the evidence is sufficient to

The Board's scope of review is defined by statute. 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 into the Act 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 a living miner's claim under 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. Failure to prove any of these requisite elements of entitlement compels a denial of benefits. *See* 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)(*en banc*).

With respect to the administrative law judge's finding at Section 718.204(b)(2)(iv), we note that the administrative law judge concluded that the medical opinion evidence was insufficient to demonstrate total respiratory disability. The administrative law judge summarized the relevant medical opinion evidence and properly found that the opinions of Drs. O'Bryan, Powell, Baker and Houser were insufficient to establish total respiratory disability at Section 718.204(b)(2)(iv). Decision and Order at 10; Director's Exhibits 13, 14, Employer's Exhibits 1, 2. A review of the record reveals that each of these four opinions is also insufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(c).[5] Thus, Dr. Simpao's opinion is the only opinion of record that could, if credited,

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establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, that the pulmonary function study evidence is insufficient to demonstrate total respiratory disability at 20 C.F.R. §718.204(b)(2)(i), that the blood gas study evidence is sufficient to demonstrate total disability at 20 C.F.R. §718.204(b)(2)(ii), and that there is no evidence of cor pulmonale with right-sided congestive heart failure, and thus total respiratory disability is not established pursuant to at 20 C.F.R. §718.204(b)(2)(iii). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Coal Co.*, 6 BLR 1-710 (1983).

[5] Revised Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

establish total disability due to pneumoconiosis pursuant to Section 718.204(c). *See also Adams v. Director, OWCP* 886 F. 2d. 818, 13 BLR 2-52 (6th Cir. 1989).[6] The administrative law judge discredited Dr. Simpao's opinion, in part, however, because Dr. Simpao noted a smoking history of only one pack per day for twenty years. In contrast, the administrative law judge found that claimant had a smoking history of at least one pack per day for forty years, Decision and Order at 3, a finding that has been affirmed as unchallenged on appeal. *See* n. 4, *supra.* As claimant alleges, the smoking history underlying Dr. Simpao's medical opinion is not relevant to the issue of total disability. However, a doctor's reliance on an inaccurate smoking history constitutes a valid basis for discrediting that opinion at Section 718.204(c). *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988). As the administrative law judge permissibly discredited Dr. Simpao's opinion, the only opinion of record which could, if credited, satisfy claimant's burden to establish total disability due to pneumoconiosis at Section 718.204(c), a finding of entitlement under 20 C.F.R. Part 718 is precluded.

> (i) Has an material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disabling or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

[6] In *Adams v. Director, OWCP* 886 F. 2d. 818, 13 BLR 2-52 (6th Cir. 1989), the United States Court of Appeals for the Sixth Circuit, which has appellate jurisdiction over the instant case, held that claimant must affirmatively establish that his totally disabling respiratory impairment was due "at least in part" to his pneumoconiosis.

Accordingly, the administrative law judge's Decision and Order-Denial of 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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PETER A. GABAUER, Jr.
Administrative Appeals Judge