

BRB No. 13-0483 BLA

BERNADINE P. HEMM)	
(On behalf of LEROY HEMM))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 06/30/2014
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Living Miner's Benefits of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

George F. Davison, Jr. (Law Office of George F. Davison, Jr., LC), Des Moines, Iowa, for claimant.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: HALL, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Living Miner's Benefits (2012-BLA-5458) of Associate Chief Administrative Law Judge William S. Colwell on a

¹ Claimant is the widow of the miner, Leroy Hemm, who died on August 26, 2009. Director's Exhibit 26.

miner's subsequent claim,² filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). The administrative law judge credited the miner with three years of coal mine employment and found that claimant was unable to invoke the rebuttable presumption of total disability due to pneumoconiosis under amended Section 411(c)(4), as the miner worked fewer than fifteen years in coal mine employment.³ The administrative law judge determined that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, found that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309.⁴ Upon consideration of the merits, however, the administrative law

² The administrative law judge noted that, although the claim records were destroyed, the miner apparently filed two previous claims for benefits, on August 6, 1973 and November 25, 1977, which were denied and administratively closed. Decision and Order at 2. The miner filed this subsequent claim on May 3, 2006. Director's Exhibit 2. In a Proposed Decision and Order dated October 4, 2006, the district director concluded that the evidence failed to establish any element of entitlement. Director's Exhibit 14. At the miner's request, the claim was referred to the Office of Administrative Law Judges (OALJ) for a hearing, but the miner died before a hearing was held and claimant thereafter informed the district director that she would be pursuing her husband's claim. Director's Exhibits 15-19, 27. Meanwhile, Dr. Jewett, the physician who performed the miner's Department of Labor-sponsored pulmonary evaluation, voluntarily surrendered his medical license after he was criminally charged with fraudulently obtaining controlled substances. Director's Exhibit 24. By Order dated July 16, 2010, Administrative Law Judge Daniel F. Solomon remanded the claim to the district director for further development of the evidence in light of this development. The district director subsequently obtained a consultative report from Dr. Horiagon, which was based on the miner's medical and employment records, including Dr. Jewett's examination report and testing results. Thereafter, the district director reviewed the claim in light of the new evidence and denied benefits. Director's Exhibit 29. At claimant's request, the district director referred the miner's claim to the OALJ. Director's Exhibit 30.

³ Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).

⁴ Because the records of the prior claims were destroyed, the administrative law judge assumed that the claims were denied for failure to establish any element of entitlement. Decision and Order at 4.

judge concluded that the evidence was insufficient to establish that the miner had pneumoconiosis or that he was totally disabled due to pneumoconiosis, pursuant to 20 C.F.R. §§718.202(a), 718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the medical opinion of Dr. Jewett, as well as testimonial evidence at the hearing, are sufficient to establish the existence of legal pneumoconiosis and that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c).⁵ The Director, Office of Workers' Compensation Programs, responds, asserting that the administrative law judge's denial of benefits is supported by substantial evidence.⁶

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.⁷ 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203,

⁵ Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). 20 C.F.R. §718.201(a)(2).

⁶ We affirm, as unchallenged on appeal, the administrative law judge's finding of three years of coal mine employment and his findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁷ The record indicates that claimant's coal mine employment was in Iowa. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eighth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3 n.1.

718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (en banc). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Upon consideration of the arguments on appeal, the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's Decision and Order Denying Living Miner's Benefits is rational, supported by substantial evidence, and in accordance with law. The record contains the medical opinions of Drs. Jewett and Horiagon. In a report dated June 16, 2006, Dr. Jewett examined the miner and diagnosed legal pneumoconiosis in the form of a pulmonary insufficiency due, in part, to coal mine employment. Director's Exhibit 10. Conversely, in his consultative report dated June 3, 2011, Dr. Horiagon, who reviewed the miner's hospitalization and treatment records, as well as Dr. Jewett's report and test results, opined that the miner did not suffer from clinical or legal pneumoconiosis and was totally disabled due to cardiac factors, rather than pulmonary factors. Director's Exhibit 29.

Claimant argues that the administrative law judge improperly weighed these medical opinions, contending that he erred in according greater weight to the consultative opinion of Dr. Horiagon than to the opinion of Dr. Jewett, who actually examined the miner. Claimant's Brief at 11-12. We disagree. The administrative law judge noted that although Dr. Horiagon found that the miner had significant exertional limitations, he nonetheless opined that the miner did not suffer from pneumoconiosis and that a number of non-respiratory conditions may have contributed to the miner's disability. The administrative law judge concluded that Dr. Horiagon's medical opinion was reasoned and documented because it was consistent with the miner's objective testing; it was based on an accurate coal mine employment history; and because Dr. Horiagon possessed superior qualifications. Decision and Order at 14-16. The administrative law judge further found that the medical opinion of Dr. Jewett was based on an overstated coal mine employment history and questionable pulmonary function study results and that his conclusions were cursory.⁸ *Id.* at 14. Consequently, the administrative law judge found that Dr. Horiagon's opinion outweighed Dr. Jewett's contrary opinion. *Id.* at 16.

Although the Board has held that, in determining the weight to be accorded a physician's opinion, an administrative law judge may properly take into consideration the fact that the physician had not personally examined the miner, *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988) (en banc); *Wilson v. United States Steel Corp.*, 6 BLR 1-1055 (1984), the Board has also held that an administrative law judge cannot reject the

⁸ The administrative law judge also found that Dr. Jewett's opinion was entitled to diminished weight in light of the criminal charges he was facing prior to examining the miner and submitting his report. Decision and Order at 16.

report of a physician solely because the physician did not examine the miner. *See Worthington v. United States Steel Corp.*, 7 BLR 1-522 (1984). In the instant case, the administrative law judge acknowledged that Dr. Horiagon did not examine the miner, but noted that Dr. Horiagon conducted a review of the hospitalization and treatment records, including the report and objective testing conducted by Dr. Jewett. Decision and Order at 11. Thus, contrary to claimant's contentions, the administrative law judge acted within his discretion in finding Dr. Horiagon's opinion to be reasoned and credible, in spite of his status as a non-examining physician. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988) (en banc). The administrative law judge, therefore, rationally found that the medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).⁹ *See Phillips v. Director, OWCP*, 768 F.2d 982, 10 BLR 2-160 (8th Cir. 1985); *Collins v. J & L Steel*, 21 BLR 1-181 (1999).

Claimant also contends that the administrative law judge erred in failing to credit the lay testimony of the miner's widow and other "circumstantial evidence" of pneumoconiosis and total disability due to pneumoconiosis. Claimant's Brief at 11. Contrary to claimant's contention, the administrative law judge considered claimant's hearing testimony. Decision and Order at 4-5. Lay testimony, without credible, corroborating medical evidence, however, is insufficient to establish the existence of pneumoconiosis and cannot, therefore, satisfy claimant's burden of proof on this issue. *See* 20 C.F.R. §718.202(a).

Claimant's contentions in this appeal constitute a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988). The administrative law judge has discretion

⁹ Although unnecessary to our decision, since the administrative law judge provided proper alternative bases for according less weight to Dr. Jewett's opinion, *see Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-383 (1983), we shall address claimant's contention that the administrative law judge improperly discounted the doctor's opinion based upon his conviction for fraudulently obtaining controlled substances, subsequent to his examination of the miner. Claimant's Brief at 13-14; *see* Decision and Order at 15-16. We disagree. Credibility determinations are committed to an administrative law judge's discretion. *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994). Furthermore, it was reasonable for the administrative law judge to consider Dr. Jewett's conviction for fraudulently obtaining controlled substances since the Federal Rules of Evidence recognize that conviction of a crime is admissible to impeach a witness's credibility if the crime involved dishonesty or a false statement, regardless of the punishment. Fed. R. Evid. 609(a)(2). Since the purpose of fraud is to deceive someone, a conviction of fraud is admissible under Federal Rule 609(a)(2). *U.S. v. Jones*, 554 F.App'x. 460, 471 (6th Cir. 2014).

to determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Newman v. Director, OWCP*, 745 F. 2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Contrary to claimant's arguments, the administrative law judge adequately examined and discussed all of the relevant evidence as it relates to the existence of pneumoconiosis and permissibly concluded claimant failed to satisfy her burden of proof pursuant to 20 C.F.R. §718.202(a)(4). *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); Decision and Order at 16; Director's Exhibits 10, 29. Consequently, we affirm the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). As claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement, benefits are precluded. *See Anderson*, 12 BLR at 1-113; *Trent*, 11 BLR at 1-27. We, therefore, affirm the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order Denying Living Miner's Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge