

BRB No. 08-0236 BLA

H.B.)
)
 Claimant-Petitioner)
)
 v.)
)
 SCOTT COAL COMPANY) DATE ISSUED: 10/29/2008
)
 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 – Denying Benefits on Remand of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

H.B., Robbins, Tennessee, *pro se*.

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

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

PER CURIAM:

Claimant¹ appeals, without the assistance of legal counsel, the Decision and Order – Denying Benefits on Remand (2003-BLA-5538) of Administrative Law Judge Edward

¹ Ron Carson, Benefits Counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of their client, [W.B.], the miner’s widow, that the Board review the administrative law judge’s decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order). We reject employer’s contention that the case should be dismissed for lack of a proper party because the record does not contain a substitution of party or

Terhune Miller rendered on a subsequent claim² 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). This case is before the Board for a second time. In his initial Decision and Order, the administrative law judge credited claimant with 19.4 years of coal mine employment. Because the administrative law judge determined that the newly submitted evidence was sufficient to establish that claimant was totally disabled, he found that claimant had demonstrated a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge then found that the weight of the medical evidence, as a whole, was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), and that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Employer appealed, and the Board initially rejected employer's contention that the administrative law judge erred by failing to adjudicate the issue of timeliness pursuant to 20 C.F.R. §725.308, holding that employer explicitly waived this issue at the formal hearing. [*H.B.*] *v. Scott Coal Co.*, BRB No. 05-0774 BLA, slip op. at 2-3 (Jun. 20, 2006)(unpub.); Hearing Transcript at 6-7. The Board further held that the administrative law judge erred in finding claimant had established a change in an applicable condition of

disclose that [*W.B.*] is a proper party. Employer's Brief at 4 n.3. The miner's claim does not abate upon his death. Because the Board "may permit any legally appointed guardian, committee, or other appropriate representative to file and pursue or defend the appeal," we need not dismiss this claim for lack of a proper party. 20 C.F.R. §802.201(b) (emphasis added).

² Claimant first filed a claim for benefits with the Social Security Administration (SSA) on July 16, 1970, which was denied by SSA on July 27, 1973 and also denied by the Department of Labor (DOL) on March 14, 1979. Director's Exhibit 1. Claimant filed his second claim, with DOL, on April 29, 1988, which was denied by Administrative Law Judge E. Earl Thomas on January 8, 1992, on the grounds that the medical evidence was insufficient to establish the existence of pneumoconiosis and that claimant was totally disabled by pneumoconiosis. Director's Exhibit 1. Pursuant to claimant's appeal, the Board affirmed Judge Thomas's denial of benefits. [*H.B.*] *v. Scott Coal Co.*, BRB No. 92-0935 BLA (Dec. 30, 1993)(unpub.). Claimant filed two more claims, one dated January 9, 1995 and the other dated March 13, 1997, both of which were denied by the district director because the evidence was insufficient to establish the existence of pneumoconiosis. Director's Exhibits 2, 3. Claimant filed a subsequent claim on November 23, 2001, which is the subject of this appeal. Director's Exhibit 5.

entitlement pursuant to Section 725.309, based on a finding of total disability, because total disability was not a condition of entitlement upon which claimant's prior denial was based. [*H.B.*], slip op. at 3-4. The Board stated that since claimant's prior claim was denied for failure to establish the existence pneumoconiosis, this subsequent claim could be approved only if new evidence submitted in conjunction with it establishes that claimant has pneumoconiosis.³ *Id.* at 4.

Furthermore, although the administrative law judge specifically found that claimant suffered from pneumoconiosis, the Board agreed with employer that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence pursuant to Section 718.202(a)(1), (4). *Id.* at 5-6. Specifically, the Board held that the administrative law judge erred in misstating the quality and quantity of the conflicting x-ray interpretations and in failing to both weigh all of the medical opinions in the record on the issue of the existence of pneumoconiosis, and to explain the basis for his credibility determinations. [*H.B.*], slip op. at 6. Therefore, the Board vacated the administrative law judge's findings pursuant to Sections 725.309 and 718.202(a)(1), (4). *Id.* To the extent that the administrative law judge's findings as to the existence of pneumoconiosis influenced his determination that claimant was totally disabled by pneumoconiosis, the Board also vacated the administrative law judge's finding at Section 718.204(c). *Id.* Thus, the Board vacated the administrative law judge's award of benefits and remanded the case for further consideration pursuant to Sections 725.309, 718.202(a)(1), (4), 718.204(c). The administrative law judge was also instructed to render, if necessary, a new determination as to the date from which benefits were to commence.⁴ *Id.* at 7.

On remand, the administrative law judge found the newly submitted x-ray evidence to be sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and, therefore, he found that claimant had demonstrated a change in one of the applicable conditions of entitlement pursuant to Section 725.309. In addition, the

³ The Board affirmed, as unchallenged, the administrative law judge's finding with regard to the length of claimant's coal mine employment; his finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3); and his finding that the evidence establishes total respiratory disability pursuant to 20 C.F.R. §718.204(b). [*H.B.*] *v. Scott Coal Co.*, BRB No. 05-0774 BLA, slip op. at 2 n.1 (June 20, 2006)(unpub.).

⁴ The Board agreed with employer that the administrative law judge erred in awarding benefits as of April 2001, "the month in which the claim was filed," since the record establishes that claimant's subsequent claim was not filed until November 2001. [*H.B.*], slip op. at 6-7, quoting Decision and Order at 10.

administrative law judge found that claimant's pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(b). However, pursuant to Section 718.204(c), the administrative law judge found that the evidence failed to establish that claimant was totally disabled due to pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of his subsequent claim. Employer responds to claimant's appeal, urging the Board to affirm the administrative law judge's finding that claimant is not totally disabled due to pneumoconiosis pursuant to Section 718.204(c). Although employer maintains that the administrative law judge erred in finding the x-ray evidence sufficient to establish the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(1), employer asserts that this error may be deemed harmless in light of the administrative law judge's findings at Section 718.204(c) and his denial of benefits. Employer's Brief at 13. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not submit a substantive response unless requested to do so by the Board.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). 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.⁵ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe 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 the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Trent*, 11 BLR at 1-27.

After consideration of the administrative law judge's Decision and Order – Denying Benefits on Remand and the evidence of record, we affirm the administrative law judge's denial of benefits. Specifically, we affirm his finding that claimant failed to

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment was in Tennessee. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 6.

establish that he is totally disabled due to pneumoconiosis pursuant to Section 718.204(c).

In considering the issue of disability causation, the administrative law judge initially found that the medical opinions submitted in conjunction with the prior claims, dated between 1988 and 1997, were not as probative as the newer evidence, since those earlier opinions “rest on the premise that Claimant did not suffer from pneumoconiosis,” contrary to the newly submitted x-ray evidence which establishes “that as of 2002 the disease had manifested itself in [c]laimant’s lungs.” Decision and Order on Remand at 11. The administrative law judge also accorded Dr. Baker’s 1988 opinion, that claimant suffered from pneumoconiosis and was totally disabled by pneumoconiosis, little weight, noting that contrary to Dr. Baker’s conclusion, “the evidence of record demonstrates that [c]laimant did not suffer from pneumoconiosis in 1988.” *Id.* Because the administrative law judge acted within his discretion, we affirm his conclusion that the newer evidence is the most probative as to whether claimant is totally disabled by pneumoconiosis.⁶ See *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Parsons v. Wolf Creel Collieries*, 23 BLR 1-29, 1-35 (2004); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004); Decision and Order on Remand at 11-12.

Of the newly submitted evidence, the administrative law judge correctly noted that Drs. Dahhan, Repsher and Fino opined that claimant’s respiratory disability was due entirely to smoking, while Dr. Baker opined that claimant is totally disabled due, in part, to both clinical and legal pneumoconiosis (chronic obstructive pulmonary disease due, in part, to coal dust exposure and smoking). In weighing the conflicting evidence, the administrative law judge permissibly assigned less weight to the opinions of Drs. Dahhan and Dr. Repsher, as to the cause of claimant’s disability, since neither physician was of the opinion that claimant had clinical pneumoconiosis, contrary to the administrative law judge’s finding at Section 718.202(a)(1). See *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order on Remand at 12. We also affirm the administrative law judge’s decision to accord less weight to Dr. Baker’s opinion since the administrative law judge properly found that, in his January 23, 2002 report, Dr. Baker provided no explanation or medical rationale for his conclusion that claimant was totally

⁶ The administrative law judge identified a February 7, 1995 medical report as having been authored by Dr. Baker, although that report was actually prepared by Dr. Giles. Director’s Exhibit 2; Decision and Order on Remand at 11-12. Dr. Giles opined that claimant suffered from severe obstructive disease, but he did not attribute that condition to coal dust exposure, or otherwise diagnose clinical or legal pneumoconiosis. Director’s Exhibit 2.

disabled as a result of clinical coal workers' pneumoconiosis and chronic obstructive pulmonary disease due to both smoking and coal dust exposure (legal pneumoconiosis). *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-495, 2-512 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order on Remand at 12; Director's Exhibit 11.

In contrast, the administrative law judge rationally concluded that Dr. Fino's opinion was reasoned and documented, and entitled to controlling weight at Section 718.204(c), because Dr. Fino explained, with specific references to the objective evidence, why claimant's respiratory disability was due to smoking and not clinical pneumoconiosis or any dust-related disease.⁷ *Clark*, 12 BLR at 1-149; Decision and Order on Remand at 12.

Claimant has the general burden of establishing entitlement, and bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Since the administrative law judge rejected Dr. Baker's opinion, the only new medical opinion supportive of claimant's burden of proof, we affirm his finding that claimant failed to satisfy his burden to establish that he is totally disabled due to pneumoconiosis at Section 718.204(c). 20 C.F.R. §718.204(c); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). Because claimant failed to establish total disability due to pneumoconiosis pursuant to Section 718.204(c), an essential element of entitlement, benefits are precluded. *Hill*, 123 F.3d at 416, 21 BLR at 197; *Trent*, 11 BLR 1-27; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).⁸

⁷ As noted by the administrative law judge, although Dr. Fino did not diagnose the existence of pneumoconiosis, he opined that "even if coal workers' pneumoconiosis were present in a 1/0 or 1/1 profusion, the pneumoconiosis would not contribute to [c]laimant's disability." Decision and Order on Remand at 12, *see* Employer's Exhibit 1. The administrative law judge was persuaded by Dr. Fino's explanation that claimant's arterial blood gas studies were not consistent with impairment related to coal dust inhalation since there was "no arterial oxygenation abnormality with exercise." Employer's Exhibit 1.

⁸ In light of our affirmance of the administrative law judge's denial of benefits pursuant to 20 C.F.R. §718.204(c), we agree with employer that it is not necessary that we further address the propriety of the administrative law judge's finding that claimant

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.