

BRB No. 97-0928 BLA

BILL N. HOLBROOK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT OF	)	
LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - On Modification - Denial of Benefits of Daniel J. Rokenetz, Administrative Law Judge, United States Department of Labor.

Bill N. Holbrook, Republic, Ohio, *pro se*.

Jeffrey S. Goldberg (Marvin Krislov, Deputy Solicitor for National Operations; Donald S Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order - On Modification - Denial of Benefits (96-BLA-0102) of Administrative Law Judge Daniel J. Rokenetz on a request for modification in 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). The administrative law judge credited claimant with one and one-half years of coal mine employment. The administrative law judge considered claimant's request for modification of the district director's denial of benefits<sup>1</sup> under 20 C.F.R. §725.310 pursuant to *Napier v. Director*,

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<sup>1</sup>On December 28, 1992, the district director denied benefits in the initial claim filed on August 7, 1992, based on claimant's failure to establish any element of entitlement. Director's Exhibit 19. Claimant requested a formal hearing on September 20, 1993, which the district director denied as untimely on October 6, 1993. *Id.* The administrative law judge found that the

*OWCP*, 17 BLR 1-111 (1993) and *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). Specifically, he found that the newly submitted evidence, considered in conjunction with the previously submitted evidence, fails to establish the existence of pneumoconiosis, an essential element of entitlement, at 20 C.F.R. §718.202(a)(1) - (4). The administrative law judge further determined that claimant failed to establish a change in conditions or a mistake in a determination of fact in the prior denial, and denied claimant's request for modification. Accordingly, benefits were denied.

On appeal, the Director, Office of Workers' Compensation Programs (the Director), who is the respondent in the instant case, initially urges affirmance of the administrative law judge's finding of one and one-half years of coal mine employment. With regard to the merits of the claim, the Director concedes that claimant established the existence of coal mine employment-related pneumoconiosis under 20 C.F.R. §§718.202(a)(1) and 718.203(c), and total respiratory or pulmonary disability under 20 C.F.R. §718.204(c). The Director seeks a remand of the case to the administrative law judge for consideration of the issue of disability causation at 20 C.F.R. §718.204(b).

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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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).

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instant claim, filed on June 9, 1994, Director's Exhibit 1, constitutes a timely request for modification of the district director's October 6, 1993 determination. 20 C.F.R. §725.310.

The Director initially contends that the administrative law judge's finding of one and one-half years of coal mine employment is supported by substantial evidence and must be affirmed. The Director argues that claimant's assertion of fourteen or fifteen years of coal mine employment between 1958 or 1959 and 1973 has little corroboration and is contradicted by claimant's own testimony and by the Social Security Administration earnings statement. Considering claimant's testimony and the relevant documentary evidence, the administrative law judge stated that he was, "struck by [the] incongruity between [claimant's] alleged full time employment during years in which the Social Security Itemized Statement of Earnings shows substantial non-coal mine employment." Decision and Order at 6-7. The administrative law judge also found to be unpersuasive claimant's responses on cross-examination, when questioned by counsel regarding this inconsistency. *Garrett v. Cowin & Company, Inc.*, 16 BLR 1-77 (1990). The administrative law judge properly determined, within his discretion, that claimant therefore is only entitled to credit for the period of coal mine employment documented by the Social Security Administration (SSA) earnings records. *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984). In this regard, the administrative law judge properly found that claimant's SSA earnings statement verifies only six quarters of coal mine employment with South East Coal Company, Inc. in 1971 and 1972, and one quarter of coal mine employment with K & J Coal Company in 1971.<sup>2</sup> Director's Exhibit 2. The administrative law judge's finding of one and one-half years of coal mine employment is thus supported by substantial evidence in the record, and is affirmed.

The Director concedes that Dr. Gaziano's positive interpretation of the x-ray dated June 13, 1995, Director's Exhibit 14, shows that claimant now has pneumoconiosis, which he did not have in 1992 at the time of the prior denial. The Director thus concedes that claimant has established the existence of pneumoconiosis at Section 718.202(a)(1), as well as modification based on a change in conditions under Section 725.310. The Director also concedes that claimant's pneumoconiosis arose from claimant's coal mine employment pursuant to Section 718.203(c) "since the record reflects no alternative dust exposure." Director's Brief at 14.

Noting that the administrative law judge did not reach the issue of whether claimant is totally disabled, the Director states that he now concedes that claimant is totally disabled under Section 718.204(c) based on the pulmonary function study dated July 19, 1994, which resulted in qualifying values.<sup>3</sup> The Director observes that the pulmonary function

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<sup>2</sup>During the last quarter of 1971, claimant worked for both South East Coal Company, Inc. and K & J Coal Company. Director's Exhibit 2. Due to this overlapping quarter-year of employment, claimant receives credit for a total of six quarter-years of coal mine employment as opposed to seven quarter-years.

<sup>3</sup>A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. See 20 C.F.R. §718.204(c)(1),

study dated September 11, 1992 also resulted in qualifying values. The Director thus contends that the “only issue left for the ALJ to determine is whether [claimant’s] disability is related to his pneumoconiosis.” Director’s Brief at 14. The Director urges the Board to vacate the administrative law judge’s denial of benefits and remand the case for determination of the disability causation issue at Section 718.204(b). In this regard, the Director asserts that the record evidence is insufficient to meet claimant’s burden on disability causation.

In light of the Director’s concession that claimant has established the existence of occupationally related pneumoconiosis under Sections 718.202 and 718.203, and total respiratory or pulmonary disability under Section 718.204(c), we vacate the administrative law judge’s denial of benefits in the instant case. We also remand the case to the administrative law judge for determination of the disability causation issue under Section 718.204(b). On remand, the administrative law judge must determine whether claimant has met his burden to establish total disability due to pneumoconiosis pursuant to *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). Specifically, claimant must establish that his total disability is due at least in part to pneumoconiosis. *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Youghioghery & Ohio Coal Co. v. McAngues*, 996 F.2d 130, 17 BLR 2-146 (6th Cir. 1993), *cert. denied*, 114 S.Ct. 683 (1994); *Adams, supra*. Further, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises, see *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*), has held that a miner must affirmatively establish that pneumoconiosis is a contributing cause of some consequence to his totally disabling respiratory impairment; that the miner’s pneumoconiosis must be more than merely a speculative cause of his disability. *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997).

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(c)(2).

Accordingly, the administrative law judge's Decision and Order - On Modification - Denial of Benefits is affirmed in part, and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge