

BRB No. 03-0637 BLA

IRVIN POTTER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
SOUTHERN OHIO COAL COMPANY)	
)	DATE ISSUED: 04/29/2004
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 - Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Irvin Potter, Oak Hill, Ohio, *pro se*.

Christopher C. Russell (Porter, Wright, Morris & Arthur), Columbus, Ohio, for employer.

Timothy S. Williams (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (2001-BLA-0758) of Administrative Law Judge Thomas F. Phalen, Jr., denying benefits on a duplicate 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 credited claimant with at least twenty-three years of qualifying coal mine employment, as stipulated by the parties and substantiated by the record, and considered this duplicate claim, filed on July 5, 2000, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge determined that claimant's original claim, filed on February 6, 1997, was finally denied on July 21, 1997, when the district director issued his decision denying benefits because claimant failed to establish any element of entitlement. The administrative law judge properly reviewed the newly submitted evidence and found that it established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), an element of entitlement previously adjudicated against claimant. As this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the administrative law judge compared the newly submitted evidence against the sum of the previously submitted evidence, and determined that because the new evidence was substantially more supportive of claimant's entitlement to benefits, claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). The administrative law judge then reviewed the entire record *de novo* and found that the weight of the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), but was insufficient to establish disability causation pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Claimant's daughter, Elizabeth Thompson, also filed a supporting statement on behalf of claimant, which the Board accepted as part of the record. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to remand this case to the district director for further development of the evidence in order to satisfy the statutory duty of the Department of Labor (DOL) pursuant to Section 413(b) of the Act, 30 U.S.C. §923(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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *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.*

¹The 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 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2001). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Initially, based on the facts of the instant case, we hold that there was a valid waiver of claimant's right to be represented by an attorney, *see* 20 C.F.R. §725.362(b) (2000), and that the administrative law judge provided claimant with a full and fair hearing. *See Shapell v. Director, OWCP*, 7 BLR 1-304 (1984); Hearing Transcript at 5-17.

Turning to the issue of disability causation at Section 718.204(c), the administrative law judge accurately reviewed the relevant medical opinions of record, Decision and Order at 5-10, 17-19, and acted within his discretion in discounting the opinion of Dr. Mavi, that pneumoconiosis was responsible for twenty to twenty-five percent of claimant's impairment, because the administrative law judge found that Dr. Mavi's diagnosis of pneumoconiosis was not well-reasoned, and the physician did not identify any underlying documentation that supported his conclusions. Decision and Order at 19; Director's Exhibit 8; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge determined that although Dr. Vallee opined that pneumoconiosis was the best possibility when considering differential diagnoses of claimant's disabling impairment, the physician recommended a follow-up visit and testing in three months because he could not rule out the possibility of idiopathic pulmonary fibrosis or a superimposed lesion. Decision and Order at 19; Claimant's Exhibit 1; *see Justice v. Island Creek Coal Co.*, 11 BLR -191 (1988). Further, Dr. Zaldivar reviewed claimant's medical records thereafter and opined that claimant's rapid deterioration in pulmonary function was an indicator of progressive pulmonary fibrosis unrelated to dust exposure in coal mine employment. The administrative law judge permissibly found, however, that Dr. Zaldivar's opinion and the earlier opinion of Dr. Pope-Harmon also were not entitled to full weight because these physicians did not diagnose pneumoconiosis, contrary to the administrative law judge's finding that pneumoconiosis was established. Decision and Order at 19; Director's Exhibit 32; Employer's Exhibit 1 and Post-Hearing Exhibit; *see generally Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-373 (4th Cir. 2002); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). As the remaining medical opinions of record did not address the extent or cause of claimant's disability, the administrative law judge reasonably concluded that there was insufficient reliable medical evidence in the record to establish that claimant's totally disabling respiratory impairment was due at least in part to his pneumoconiosis. Decision and Order at

19; *see Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001); *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). In these circumstances, where the administrative law judge has found that the medical evidence fails to credibly address an essential element of entitlement, the Director maintains that DOL's statutory obligation to provide claimant with a complete and credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim as required by the Act and regulations has not been satisfied. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges*, 18 BLR 1-84; *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*). We agree. Consequently, we vacate the administrative law judge's denial of benefits and remand this case to the district director for further development of the evidence.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and this case is remanded to the district director for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge