BRB No. 99-1250 BLA

CARLTON E. HOWARD	)	
Claimant-Petitioner	)	
	)	DATE ISSUED:
v.	)	
DENVER A. HAWKINS	)	
and	)	
BIG GRASSY CREEK COAL COMPANY	)	
and	)	
DLM COAL CORPORATION	)	
and	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION and ORDER
Party-in-Interest		

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Carlton E. Howard, French Creek, West Virginia, *pro se*.

K. Keian Weld (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for DLM Coal Corporation.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (98-BLA-0185) of Administrative Law Judge Richard A. Morgan rendered on 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). Claimant's initial application for benefits filed on May 25, 1989 was finally denied by the district director on November 7, 1989 because the medical evidence failed to establish any element of entitlement. Director's Exhibit 28. Claimant filed a second claim on May 21, 1992, which the district director denied on October 23, 1992 for the same reason. Director's Exhibit 29. On April 4, 1995, claimant filed the current claim, which is a duplicate claim because it was filed more than one year after the previous denial. Director's Exhibit 1; 20 C.F.R. §725.309(d). The district director denied the claim, and claimant requested a hearing, which was held on June 25, 1999.

In his Decision and Order, the administrative law judge accepted the parties' stipulation to "at least twelve years" of coal mine employment, Decision and Order at 3, and found that the medical evidence developed since the prior denial established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and that claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law judge found that claimant demonstrated a material change in conditions as required by 20 C.F.R. §725.309(d). *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). Considering the merits of the claim, the administrative law judge found that claimant failed to prove that his totally disabling respiratory impairment is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

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[1] Before the requested hearing could be held, the administrative law judge found it necessary to twice remand the claim to the district director for further development of the evidence regarding the identification of the responsible operator.

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 Co.*, 12 BLR 1-176, 1-177 (1989). 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 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

The administrative law judge found and employer concedes that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a), 718.203(b) and that he suffers from a totally disabling respiratory impairment pursuant to Section 718.204(c). Therefore, we turn to the administrative law judge's analysis of whether claimant demonstrated that his total disability is due to pneumoconiosis pursuant to Section 718.204(b).

Pursuant to Section 718.204(b), the administrative law judge applied the proper disability causation standard, that is, whether pneumoconiosis is at least a contributing cause of claimant's totally disabling respiratory impairment. *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1195-96, 19 BLR 2-304, 2-320 (4th Cir. 1995); *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 38, 14 BLR 2-68, 2-76 (4th Cir. 1990). On this point, the administrative law judge considered Dr. Hartman's 1999 letter stating that claimant is disabled due to a 95% left lung function loss resulting from lung cancer "suspected" to be due to pneumoconiosis. Claimant's Exhibit 1. The administrative law judge permissibly found, however, as he had previously at Section 718.202(a), that Dr. Hartman's opinion relating claimant's lung cancer to coal mine dust exposure was not persuasive. Decision and

Order at 24; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). The administrative law judge also found within his discretion that Dr. Hartman's brief, 1996 letter suggesting that claimant is disabled by coal dust-related COPD was unexplained. Director's Exhibit 40; *see Hicks, supra*; *Akers, supra*; *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-88-89 and n.4 (1993). The administrative law judge similarly found Dr. Stewart's reports, interpreted by the administrative law judge as stating that claimant is disabled due to coal dust-related lung cancer and COPD, to be unexplained. Director's Exhibit 35. Substantial evidence supports these findings.

In sum, the administrative law judge permissibly found that the relevant medical reports were "mostly conclusory," and did not "establish the etiology of the total respiratory disability other than the miner's 95% loss of his left lung," which, according to Dr. Hartman, was due to lung cancer and the required radiation and chemotherapy treatments. Decision and Order at 25. Substantial evidence supports the administrative law judge's finding that claimant did not carry his burden to prove that his total disability is due to pneumoconiosis. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.204(b).

Because claimant has failed to establish that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), a necessary element of entitlement under Part 718, we affirm the denial of benefits. *See Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

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[2] The administrative law judge had found that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(2), (4), but did not prove that his lung cancer was significantly related to or substantially aggravated by dust exposure in coal mine employment. Decision and Order at 17-20. The administrative law judge, within his discretion as fact-finder, was not persuaded by Dr. Hartman's opinion that the lung cancer was "suspected" to be related to coal mine dust exposure, or by Dr. Husari's opinion that claimant's lung cancer "could very well be related to" or was "probabl[y]" related to coal mine dust exposure. Director's Exhibit 61; Claimant's Exhibit 1. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). On this issue, the administrative law judge permissibly gave greater weight to the contrary opinion of Dr. Renn, Employer's Exhibit 1, because Dr. Renn explained his opinion based upon medical studies. *Id*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge