

BRB No. 07-0109 BLA

B.M.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
LONE MOUNTAIN PROCESSING,)	
INCORPORATED/ARCH COAL,)	
INCORPORATED)	
)	
and)	
)	DATE ISSUED: 08/27/2007
UNDERWRITERS SAFETY & CLAIM)	
)	
Employer/Carrier-)	
Respondents)	
)	
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 of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John Crockett Carter, Harlan, Kentucky, for claimant.

Denise M. Davidson (Davidson & Associates), Hazard, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (04-BLA-6477) of Administrative Law Judge Richard K. Malamphy 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 filed a claim for benefits on March 7, 2003. Director's Exhibit 2. The district director issued a Proposed Decision and Order denying benefits on March 2, 2004. Director's Exhibit 30. Claimant requested a hearing, which was held on January 26, 2006. The administrative law judge credited claimant with twenty-three years of coal mine employment, but found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, benefits were denied.

Claimant's sole contention on appeal is that the administrative law judge ignored relevant evidence, namely he failed to consider the results of a state coal workers' pneumoconiosis claim "in which [claimant] was awarded benefits against the same employer" for having contracted pneumoconiosis. Claimant's Brief at 2-3. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated 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 under 20 C.F.R. Part 718, claimant must prove, by a preponderance of the evidence, that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In this case, the administrative law judge denied benefits because he determined that claimant failed to establish the existence of pneumoconiosis and total respiratory disability. Claimant alleges that, in response to question 10 on his CM Form-911 application for benefits, claimant informed the district director that he had filed a workers' compensation claim in Kentucky and that he had been awarded benefits against employer based on a finding that he was disabled by pneumoconiosis. Claimant's Brief at 2. Claimant asserts that there is no indication in the record that this prior state award was considered by the administrative law judge prior to the denial of his claim. *Id.*

A state award does not *per se* establish that claimant is totally disabled due to pneumoconiosis for the purposes of the Act. *See Schegan v. Waste Management & Processors, Inc.*, 18 BLR 1-41 (1994); *Miles v. Central Appalachian Coal Co.*, 7 BLR 1-

744 (1985); *Stanley v. Eastern Associated Coal Corp.*, 6 BLR 1-1157 (1984). The Board has held that, while determinations made by other agencies serve as relevant evidence to Department of Labor adjudication, such determinations are not binding. *Schegan*, 18 BLR at 1-46. It is a matter within the administrative law judge's discretion to determine what weight to give to a state workers' compensation board decision. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Moreover, it is the responsibility of the parties to introduce medical evidence into the record. The Act, the regulations and Board case law recognize that it is the claimant's burden initially to establish entitlement. *White v. Director, OWCP*, 6 BLR 1-368 (1983); *Bain v. Old Ben Coal Co.*, 2 BLR 1-1219 (1981). Claimant, therefore, bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element of entitlement. *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).

In this case, claimant did not submit any documentation with respect to his state award, nor did he submit any evidence to identify the medical or legal criteria that formed the basis for the state award. Because claimant bears the burden of production of evidence to support his claim, we reject claimant's assertion that the administrative law judge erred in failing to consider his state claim award prior to denying benefits. *Id.*

Claimant raises no specific legal or factual challenges to the administrative law judge's determinations with respect to the weight accorded the evidence of record, other than his failure to consider the state award. *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). We therefore affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and his finding that claimant is not totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b).¹ As claimant has failed to establish the existence of pneumoconiosis and total disability, requisite elements of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

¹ The Board's review authority does not permit consideration of evidence not submitted into record before the adjudication officer below. *Burks v. Hawley Coal Mining Corp.*, 2 BLR 1-323, 1-326-27 (1979); *see also Sparkman v. Director, OWCP*, 2 BLR 1-488, 1-490 (1979); *Ellison v. Director, OWCP*, 2 BLR 1-317, 1-318-19 (1979).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge