

BRB No. 07-0155 BLA

D.M. )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 GOPHER MINING COMPANY )  
 )  
 and ) DATE ISSUED: 08/29/2007  
 )  
 WEST VIRGINIA COAL WORKERS' )  
 PNEUMOCONIOSIS FUND )  
 )  
 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 of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

S. Parker Boggs (Buttermore & Boggs), Harlan, Kentucky, for claimant.

William S. Mattingly and Francesca Tan (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-6691) of Administrative Law Judge Pamela Lakes Wood denying benefits on a subsequent 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 adjudicated this

claim pursuant to the regulations contained in 20 C.F.R. Part 718.<sup>1</sup> The administrative law judge found that the medical evidence developed since the prior denial of benefits established total disability pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). On the merits, however, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish total disability at 20 C.F.R. §718.204(b). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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 applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 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).

Claimant contends that the administrative law judge erred in finding that the evidence did not establish total disability at 20 C.F.R. §718.204(b). Contrary to claimant's assertion, the administrative law judge did not render a finding adverse to claimant at 20 C.F.R. §718.204(b). In considering whether the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309, the administrative law judge found that claimant established total disability at 20 C.F.R.

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<sup>1</sup> Claimant filed his first claim on May 23, 1986. Director's Exhibit 1. It was finally denied on December 14, 1990, because the evidence did not establish total disability. *Id.* Claimant filed his second claim on January 26, 1993. *Id.* It was finally denied on August 19, 1999, because the evidence did not establish a material change in conditions. *Id.* Claimant filed this claim on August 19, 2003. Director's Exhibit 3.

§718.204(b). Decision and Order at 11. On the merits, however, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). No party contests the administrative law judge's finding. Thus, because the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) is not challenged on appeal, we affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In light of our affirmance of the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. See *Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge