

BRB No. 09-0804 BLA

SAM HENSLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 08/17/2010
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Sam Hensley, Baxter, Kentucky, *pro se*.

Michael J. Rutledge and Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,<sup>1</sup> the Decision and Order – Denial of Benefits (07-BLA-5486) of Administrative Law Judge Larry S. Merck rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). The administrative law judge

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<sup>1</sup> Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1985)(Order).

credited claimant with five years of coal mine employment,<sup>2</sup> pursuant to the parties' stipulation, and adjudicated this claim, filed on February 21, 2003, pursuant to 20 C.F.R. Part 718. The administrative law judge found that claimant established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).<sup>3</sup> Additionally, the administrative law judge found that claimant did not establish that his clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c). The administrative law judge further found that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), but did not establish that his total disability is due to pneumoconiosis, under 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to affirm the administrative law judge's finding that claimant failed to establish that his totally disabling pulmonary or respiratory impairment is due to pneumoconiosis under 20 C.F.R. §718.204(c).<sup>4</sup>

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

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<sup>2</sup> Because claimant's coal mine employment was in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 4.

<sup>3</sup> Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

<sup>4</sup> We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Director's Brief at 8.

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).

### **Impact of the Recent Amendments**

By Order dated May 20, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. The Director has responded.

The Director correctly states that the recent amendments to the Act, which became effective on March 23, 2010, and which apply to claims filed after January 1, 2005, do not apply to this claim because it was filed before January 1, 2005.

### **Merits of Entitlement**

In order to establish entitlement to benefits under Part 718 in a living miner’s claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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).

Relevant to the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1), the administrative law judge considered four interpretations of three x-rays dated March 25, 2003, February 26, 2007, and February 20, 2009.<sup>5</sup> According greater weight to the readings by the more highly qualified readers, the administrative law judge found that all three x-rays were positive, and established the existence of clinical pneumoconiosis. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). Substantial evidence supports the administrative law judge’s finding pursuant to 20 C.F.R. §718.202(a)(1), which is therefore affirmed.

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<sup>5</sup> Dr. Baker, a B reader, interpreted the March 25, 2003 x-ray as negative for pneumoconiosis, while Dr. Alexander, a Board-certified radiologist and B reader, interpreted this x-ray as positive. Director’s Exhibits 10, 25. Dr. Miller, a Board-certified radiologist and B reader, interpreted the February 26, 2007 x-ray as positive for pneumoconiosis. Claimant’s Exhibit 2. Additionally, Dr. Alexander interpreted the February 20, 2009 x-ray as positive for pneumoconiosis. Claimant’s Exhibit 1.

Ordinarily, our affirmance of the administrative law judge's finding that the x-ray evidence established clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1) would obviate the need to address whether claimant otherwise established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4).<sup>6</sup> See *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). In this case, however, no physician opined that claimant is totally disabled due to his clinical pneumoconiosis.<sup>7</sup> Rather, the record contains medical opinion evidence attributing claimant's totally disabling impairment only to legal pneumoconiosis. Therefore, in order to evaluate the administrative law judge's finding that claimant did not establish that he is totally disabled due to pneumoconiosis, we will review the administrative law judge's findings that pneumoconiosis was not established by any of the other methods set forth at 20 C.F.R. §718.202(a)(2)-(4).

Because there is no biopsy evidence of record, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Furthermore, the administrative law judge properly found that claimant is not entitled to any of the statutory presumptions set forth at 20 C.F.R. §718.202(a)(3).<sup>8</sup> We therefore affirm the administrative law judge's findings that pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2),(3).

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<sup>6</sup> Because this case arises within the jurisdiction of the Sixth Circuit, the holdings in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000) and *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 23, 21 BLR 2-104, 2-108 (3d Cir. 1997), that an administrative law judge must weigh all of the relevant evidence together pursuant to 20 C.F.R. §718.202(a), are not applicable.

<sup>7</sup> Moreover, the administrative law judge found that claimant did not prove that his clinical pneumoconiosis arose out of coal mine employment. Decision and Order at 14.

<sup>8</sup> The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. With respect to the presumption set forth in 20 C.F.R. §718.305, the statutory provision that it implements was amended, by Section 1556 of Public Law No. 111-148, to delete the requirement that the claim be filed before January 1, 1982. However, as indicated *supra*, this amendment does not apply in the present case, as this claim was filed before January 1, 2005. Lastly, as this claim is not a survivor's claim filed before June 30, 1982, the presumption at 20 C.F.R. §718.306 is inapplicable.

Relevant to the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the treatment records of Dr. Augustine,<sup>9</sup> and the medical reports of Drs. Freid<sup>10</sup> and Baker.<sup>11</sup> The administrative law judge found that “no physician made a well-reasoned and well-documented diagnosis of . . . legal pneumoconiosis.” Decision and Order at 13.

In so finding, the administrative law judge accurately observed that Dr. Augustine’s treatment records do not contain a diagnosis of legal pneumoconiosis. The administrative law judge found Dr. Freid’s opinion entitled to little probative value, despite his role as claimant’s treating physician, because Dr. Freid “did not provide any objective medical evidence to support his opinion,” and “did not indicate the extent of [c]laimant’s smoking history, as compared to his five years of coal mine employment.”<sup>12</sup> *Id.* at 12. Substantial evidence supports this permissible credibility determination. *See* 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-646 (6th Cir. 2003).

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<sup>9</sup> Dr. Augustine diagnosed claimant with chronic obstructive pulmonary disease (COPD), but did not state an opinion as to its etiology. Claimant’s Exhibit 5 at 3.

<sup>10</sup> Dr. Freid, who is claimant’s treating physician, diagnosed COPD with moderate obstructive defect, bronchitis, and resting arterial hypoxemia. Claimant’s Exhibit 6. Dr. Freid opined that each condition was significantly contributed to, and substantially aggravated by, coal mine dust exposure. *Id.*

<sup>11</sup> In his initial report of the examination he conducted on behalf of the Department of Labor (DOL), Dr. Baker opined that claimant has COPD with borderline moderate to severe obstructive defect, hypoxemia, and chronic bronchitis. Director’s Exhibit 10 at 15. He indicated that the etiology of those conditions was “cigarette smoking / ? coal dust exposure.” *Id.* In a supplemental report generated at the request of a DOL claims examiner, who asked Dr. Baker to clarify his opinion in several respects, Dr. Baker stated that “I do not feel that [claimant] had legal pneumoconiosis.” Director’s Exhibit 34 at 1. Dr. Baker indicated that the “primary etiology” of claimant’s condition is smoking, and explained that coal dust did not significantly contribute to his condition “as he only had five years of coal dust exposure and [a] negative chest x-ray,” and because “his smoking history was much greater than his coal dust exposure.” *Id.*

<sup>12</sup> The administrative law judge found that claimant has “at least a ten pack-year smoking history.” Decision and Order at 4. Substantial evidence supports this finding. Director’s Exhibit 10 at 13; Director’s Exhibit 28; Director’s Exhibit 34 at 1; Hearing Transcript at 17.

Further, the administrative law judge discounted Dr. Baker's opinion, finding that Dr. Baker "improperly based his opinion regarding the cause of [c]laimant's COPD on a negative x-ray." Moreover, the administrative law judge found that Dr. Baker failed to explain the discrepancy between his initial report, in which he attributed claimant's respiratory condition to "cigarette smoking / ? coal dust exposure," and his supplemental report, in which he indicated that "he no longer believed that coal dust exposure played a role in [c]laimant's impairment." Decision and Order at 11. The Director argues that the administrative law judge mischaracterized the basis of Dr. Baker's opinion that claimant does not have legal pneumoconiosis, and asserts that, contrary to the administrative law judge's finding, Dr. Baker's opinion is consistent, when viewed as a whole. Director's Brief at 7-8. We need not resolve these issues, however, as Dr. Baker's opinion that claimant does not have legal pneumoconiosis cannot support claimant's burden of proof. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). As substantial evidence supports the administrative law judge's finding that claimant did not establish legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), that finding is affirmed.

Relevant to the cause of claimant's total disability under 20 C.F.R. §718.204(c), the administrative law judge considered the treatment records of Dr. Augustine,<sup>13</sup> and the medical reports of Drs. Freid<sup>14</sup> and Baker.<sup>15</sup> As noted earlier, no physician attributed claimant's total disability to his clinical pneumoconiosis that was established by the x-ray evidence. Director's Exhibits 10, 34; Claimant's Exhibits 5, 6. Further, the administrative law judge permissibly discounted Dr. Freid's opinion, the only opinion of record attributing claimant's total respiratory disability to legal pneumoconiosis, because Dr. Freid failed to set forth any objective medical evidence to support his conclusion, and "did not demonstrate an accurate understanding of [c]laimant's smoking history."

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<sup>13</sup> Dr. Augustine did not state an opinion as to total disability or disability causation. Claimant's Exhibit 5 at 3.

<sup>14</sup> Dr. Freid opined that claimant's totally disabling pulmonary impairment "is due largely to his coal dust exposure." Claimant's Exhibit 6.

<sup>15</sup> In his initial report, Dr. Baker stated that claimant's cardiopulmonary diagnoses contributed "fully" to his moderate impairment. Director's Exhibit 10 at 15. When asked to clarify his opinion, Dr. Baker opined that "[t]here is no involvement of coal dust in the degree of pulmonary disability that [claimant] currently has." Director's Exhibit 34 at 1-2. Dr. Baker opined that claimant's totally disabling respiratory or pulmonary impairment is primarily due to smoking and that coal dust did not significantly contribute to his condition, as "his smoking history was much greater than his coal dust exposure." Director's Exhibit 34 at 1.

Decision and Order at 18; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

As substantial evidence supports the administrative law judge's finding that claimant did not establish that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), the finding is affirmed. Because claimant failed to establish that his total disability is due to pneumoconiosis, an essential element of entitlement in a miner's claim under Part 718, we affirm the administrative law judge's denial of benefits. *See Trent*, 11 BLR at 1-27.

Accordingly, the administrative law judge's Decision and Order – Denial of 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