

BRB No. 04-0354 BLA

MARY SUE PAUL)
(Widow of MANCE PAUL))
)
 Claimant-Petitioner)
)
 v.)
)
 K.A.S. COAL COMPANY, INC.)
)
 and)
)
 KENTUCKY COAL PRODUCERS SELF) DATE ISSUED: 12/23/2004
 INSURANCE 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 Denying Benefits of Jeffrey Tureck,
Administrative Law Judge, United States Department of Labor.

Mary Sue Paul, Williamsburg, Kentucky, pro se.

Rodney E. Buttermore, Jr. (Buttermore & Boggs), Harlan, Kentucky, for
employer.

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

PER CURIAM:

Mary Sue Paul, the miner's widow,¹ on behalf of the miner's estate, (hereinafter "claimant") appeals, without the assistance of counsel, the Decision and Order Denying Benefits (03-BLA-5422) of Administrative Law Judge Jeffrey Tureck on a subsequent claim² 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).³ The administrative law judge credited the miner with thirteen years of coal mine employment, as supported by his social security records.⁴ The administrative law judge also found that the medical evidence submitted since the prior denial of benefits established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge determined that claimant met her burden to establish a change in

¹ The miner died from a heart attack on March 19, 2002. Hearing Transcript at 17-18, 35; Director's Exhibit 1.

² This claim, the miner's third, was filed on April 12, 2001 and is considered a "subsequent claim for benefits" because it was filed after January 19, 2001 and more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 4. The miner's initial application for benefits, filed on August 11, 1987, was denied by Administrative Law Judge Daniel J. Roketenetz on December 8, 1995. Judge Roketenetz credited the miner with thirteen years of coal mine employment and found that the evidence established the existence of pneumoconiosis arising out of coal mine employment, but did not establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. The miner appealed, and in a decision dated January 29, 1993, the Board affirmed both Judge Roketenetz's length of coal mine employment determination and denial of benefits. *Id.* The miner's second application for benefits, filed on July 3, 1995, was finally denied on December 8, 1995 by the district director because the evidence did not establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment. Director's Exhibit 2. The miner took no further action on this prior claim.

³ The 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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

⁴ The record indicates that the miner last worked as a coal miner in 1987, and that his coal mine employment occurred in Kentucky. Claimant's Exhibit 2; Director's Exhibits 1, 5. Accordingly, 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, 1-202 (1989)(*en banc*).

one applicable condition of entitlement.⁵ 20 C.F.R. §725.309(d); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004); Decision and Order at 4. Considering the merits of the claim, the administrative law judge found that the evidence of record established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202, 718.203, respectively, as well as a totally disabling respiratory impairment at 20 C.F.R. §718.204(b), but failed to establish that the miner's total disability was due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

Claimant generally appeals from the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.⁶

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that the miner was 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 a finding of

⁵ Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim shall be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2).

⁶ Employer asserts no error in the administrative law judge's findings that the evidence of record established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b), respectively, as well as a totally disabling respiratory impairment at 20 C.F.R. §718.204(b). See *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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).

After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the evidence of record, we affirm the administrative law judge's denial of benefits based on claimant's failure to establish that the miner's pneumoconiosis was a substantially contributing cause of his total disability at 20 C.F.R. §718.204(c). See *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 611, 22 BLR 2-288 (6th Cir. 2001). The administrative law judge initially found the recent reports of Drs. Broudy, Burki and Dahhan to be the most probative, because they provided the only reports diagnosing both total disability and offering a discussion as to the cause of the miner's total disability. See *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Gillespie v. Badger Coal Co.*, 7 BLR 1-839 (1985); see also *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109 (4th Cir. 1995); Director's Exhibits 12, 14; Employer's Exhibits 2, 3, 5, 6; Decision and Order at 6. The administrative law judge further found that Drs. Broudy and Dahhan opined that the miner's disabling respiratory impairment was entirely due to smoking, while Dr. Burki opined that eighty percent of the miner's pulmonary impairment was due to smoking, fifteen percent was due to his heart failure, and five percent was due to his coal dust exposure. Decision and Order at 7; Director's Exhibits 12, 14; Employer's Exhibits 2, 3, 5, 6. The administrative law judge permissibly discredited Dr. Burki's opinion, however, because the physician relied on a significantly understated smoking history of only four cigarettes a day for fifteen years, and an inflated coal mine employment history of twenty-one years. *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Long v. Director, OWCP*, 7 BLR 1-254 (1984). As noted above, the administrative law judge credited the miner with thirteen years of coal mine employment. Decision and Order at 3. In addition, the administrative law judge found, based on the evidence of record, including the testimony of claimant, that the miner smoked a pack of cigarettes a day for at least thirty-three years. Decision and Order at 3; Hearing Transcript at 27, 36-37. The law is well established that whether an opinion is reasoned and documented is a determination to be made by the fact finder based on the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical conclusion is based. See *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983). In this case the administrative law judge permissibly discredited Dr. Burki's opinion, the only probative medical opinion in which a physician concluded that the miner's pneumoconiosis played any role in causing his totally disabling pulmonary impairment.

Based on the foregoing, we affirm the administrative law judge's finding that claimant failed to meet her burden to establish that the miner's total disability was due to

his pneumoconiosis pursuant to 20 C.F.R. §718.204(c), an essential element of entitlement. Consequently, we affirm the administrative law judge's denial of benefits. *Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-5 (1986)(*en banc*).

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

REGINA C. McGRANERY
Administrative Appeals Judge