

BRB No. 05-0571 BLA

JAMES W. RATLIFF)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NORTH STAR CONTRACTORS,)	
INCORPORATED)	
)	
and)	
)	
LIBERTY MUTUAL INSURANCE)	DATE ISSUED: 02/16/2006
COMPANY)	
)	
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 on Remand - Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

James W. Ratliff, Paintsville, Kentucky, *pro se*.

Francesca L. Maggard (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer.

Before: SMITH, McGANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand - Denying Benefits (02-BLA-0221) of Administrative Law Judge Thomas F.

Phalen, Jr. 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).¹ This case is before the Board for the second time. In *Ratliff v. North Star Contractors, Inc.*, BRB No. 03-0320 BLA (Feb. 12, 2004)(unpublished), the Board affirmed, as unchallenged, the administrative law judge's findings of at least fifteen years of coal mine employment, the existence of pneumoconiosis by x-ray evidence arising out of claimant's coal mine employment, *see* 20 C.F.R. §§718.202(a)(1), 718.203(b), and total respiratory or pulmonary disability, *see* 20 C.F.R. §718.204(b). The Board, however, reversed the administrative law judge's finding that the evidence does not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) because he erred in determining that the record contains no reasoned medical opinion diagnosing pneumoconiosis, as defined in 20 C.F.R. §718.201. Similarly, the Board reversed the administrative law judge's finding that the evidence does not establish total disability due to pneumoconiosis, *see* 20 C.F.R. §718.204(c), because he erred in determining that the record contains no medical opinion addressing the cause of claimant's totally disabling respiratory impairment. Accordingly, the Board remanded the case for the administrative law judge to reconsider the relevant evidence under 20 C.F.R. §§718.202(a)(4) and 718.204(c)(1).

In the Decision and Order on Remand – Denying Benefits dated March 23, 2005, which is the subject of the instant appeal, the administrative law judge found that the medical opinion evidence does not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) or total disability due to pneumoconiosis at 20 C.F.R. §718.204(c)(1). The administrative law judge, however, reaffirmed his prior finding that claimant met his burden to establish the existence of pneumoconiosis by x-ray evidence at 20 C.F.R. §718.202(a)(1). Decision and Order on Remand at 9. Nonetheless, the administrative law judge denied benefits on the basis that the evidence does not show that claimant's total respiratory disability is due to pneumoconiosis at 20 C.F.R. §718.204(c)(1). Employer responds to claimant's appeal, and urges the Board to affirm the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has not filed a brief in the appeal.

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).

¹ Susie Davis, president of the Kentucky Black Lung Coalminers & Widows Association, requested, on behalf of claimant, that the Board review the administrative law judge's Decision and Order, but Ms. Davis is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

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 20 C.F.R. Part 718 in a living miner's claim, 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).

Pursuant to 20 C.F.R. §718.204(c)(1), a miner shall be considered to be totally disabled due to pneumoconiosis if pneumoconiosis is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). The regulation at 20 C.F.R. §718.204(c)(1) provides that pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

- (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
- (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i), (ii). The administrative law judge, on remand, correctly characterized the record as containing medical reports from Drs. Younes and Sundaram that are relevant to the issue of causation at 20 C.F.R. §718.204(c)(1).

In his report dated November 23, 1998, Dr. Younes diagnosed coal workers' pneumoconiosis by x-ray, due primarily to occupational dust exposure; chronic obstructive pulmonary disease based on pulmonary function testing, due primarily to claimant's smoking history and secondarily to "dust exposure;" chronic bronchitis of "unclear etiology r/o asthmatic bronchitis;" and hypertension due to "[e]ssential HTN." Director's Exhibit 7. Dr. Younes opined that claimant has a mild obstructive ventilatory impairment "that should prevent miner from doing last coal mining job" and indicated that the impairment is caused by claimant's coal workers' pneumoconiosis, chronic obstructive pulmonary disease, and chronic bronchitis. *Id.* Dr. Younes also noted that claimant started smoking in 1970 at age thirty, smoking one pack of cigarettes per week

until he stopped smoking in 1990.² *Id.* In a supplementary opinion, also dated November 23, 1998, Dr. Younes indicated that claimant has pneumoconiosis due to his coal mine employment, based on the x-ray findings, and further indicated that the primary etiology of claimant's mild impairment is "smoking tobacco." *Id.* Dr. Younes also indicated that claimant has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. *Id.* Dr. Younes testified as to his opinion in his January 25, 1999 deposition. Director's Exhibit 20.

Dr. Sundaram diagnosed, in each of his reports dated May 23, 2001 and November 20, 2001, coal workers' pneumoconiosis due to claimant's thirty-five years of exposure to coal dust. Director's Exhibits 38, 45. In each of these two reports, Dr. Sundaram also noted that claimant "[q]uit smoking 15 years ago" and opined that claimant's impairment, shown by pulmonary function study testing, is due to claimant's thirty-five years of exposure to coal dust. *Id.* Dr. Sundaram indicated, in each of his reports, that claimant is not physically able, from a pulmonary standpoint, to do his usual coal mine employment or comparable and gainful work in a dust free environment "[d]ue to shortness of breath with limited pulmonary activity." *Id.* Weighing these opinions at 20 C.F.R. §718.204(c)(1), the administrative law judge determined that Dr. Younes's opinion is internally inconsistent, and found that Dr. Sundaram did not address the impact of claimant's smoking history. Decision and Order on Remand at 10-11. The administrative law judge thereby found that neither physician's opinion is reasoned and accorded them little probative weight on the issue of causation.

After consideration of the administrative law judge's Decision and Order on Remand – Denying Benefits, the issues on appeal, and the relevant medical evidence of record, we affirm the administrative law judge's finding that the evidence does not establish that claimant's totally disabling respiratory impairment is due to pneumoconiosis at 20 C.F.R. §718.204(c)(1). The administrative law judge permissibly determined that the opinions of Drs. Younes and Sundaram do not establish that pneumoconiosis is a substantially contributing cause of claimant's totally disabling respiratory impairment at 20 C.F.R. §718.204(c)(1), pursuant to *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). Decision and Order on Remand - Denying Benefits at 10-11. The administrative law judge properly discredited Dr. Younes's opinion because he relied on an exaggerated length of coal mine employment, *Barnes v. Director, OWCP*, 19 BLR 1-71, 1-76 (1995)(*en banc* on recon.)(Smith, J., dissenting on other grounds), and did not explain how he determined that claimant's coal mine employment contributed to his impairment, *Riley v. National Mines Corp.*, 852 F.2d

² The record supports the administrative law judge's finding, on original consideration, that claimant was born on October 12, 1940. Decision and Order – Denying Benefits dated December 27, 2002; *see* Director's Exhibit 1.

197, 11 BLR 2-182 (6th Cir. 1988). The administrative law judge, within his discretion, thus accorded “little probative weight” to Dr. Younes’s opinion on the issue of the cause of claimant’s totally disabling respiratory impairment at 20 C.F.R. §718.204(c)(1). *Id.*

Further, the administrative law judge found that Dr. Sundaram’s reports are not well reasoned on the issue of causation. Specifically, the administrative law judge properly found that while Dr. Sundaram noted in each of his 2001 reports that claimant stopped smoking “15 years ago,” or in 1986, Director’s Exhibits 38, 45, Dr. Sundaram “made no mention of the length of time or rate at which Claimant had smoked” and did not “discuss the impact of Claimant’s smoking history” on his respiratory condition. Decision and Order at 9, 10; *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993). The administrative law judge also properly determined that Dr. Sundaram’s opinion was undermined by an exaggerated length of coal mine employment. *Barnes*, 19 BLR at 1-76.

Based on the foregoing, we hold that the administrative law judge’s finding at 20 C.F.R. §718.204(c)(1) is supported by substantial evidence and is in accordance with law, and we affirm that finding. 20 C.F.R. §718.204(c)(1); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997). Because the relevant evidence of record is insufficient to meet claimant’s burden to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c)(1), an essential element of entitlement, we affirm the administrative law judge’s denial of benefits in the instant case. *Trent*, 11 BLR at 1-27.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge