

BRB No. 05-0814 BLA

KENNETH P. WELLS)
)
 Claimant-Petitioner)
)
 v.)
)
 SPURLOCK MINING COMPANY,) DATE ISSUED: 02/16/2006
 INCORPORATED)
)
 and)
)
 AMERICAN BUSINESS AND PERSONAL)
 INSURANCE MUTUAL INCORPORATED)
)
 Employer/Carrier-Respondent)
)
 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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., 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-5682) of Administrative Law Judge Joseph E. Kane rendered 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). Based on the date of filing, August 12, 2002,

the administrative law judge adjudicated this subsequent claim pursuant to 20 C.F.R. Part 718.¹ The administrative law judge found that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found that claimant had failed to establish a change in an applicable element of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find the existence of coal worker's pneumoconiosis established because he failed to recognize that Dr. Baker was a B-reader and contends that such error affects the administrative law judge's review of other medical evidence on the existence of clinical pneumoconiosis and on the issue of causation and compels the Board to set aside the administrative law judge's Decision and Order denying benefits and remand the case for reconsideration of the evidence on the existence of clinical pneumoconiosis and causation. Employer responds, urging affirmance of the denial of benefits. The Director, has filed a letter indicating that he will not participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated 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 pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

We agree with claimant that the evidence of record indicates that Dr. Baker is a B-reader, Director's Exhibit 10, and that the administrative law judge erred, therefore, in stating that Dr. Baker was not a B-reader, Decision and Order at 8. While claimant contends that the administrative law judge's error affects his finding that claimant did not have clinical pneumoconiosis, claimant does not contend that the administrative law

¹ Claimant filed his initial claim for benefits on July 11, 1989. That claim was denied by the district director on December 18, 1989, due to claimant's failure to establish any required element of entitlement. Director's Exhibit 1. Claimant took no further action until filing the present, subsequent claim on August 12, 2002. Director's Exhibit 3.

judge erred in finding that the evidence, *i.e.*, the pulmonary function studies, blood gas studies, and medical opinion evidence, failed to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i)-(iv). *See 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). The administrative law judge has found that claimant failed to establish total respiratory disability, *i.e.*, evidence in the prior claim failed to establish total respiratory disability and the new evidence submitted in support of the subsequent claim failed to establish total respiratory disability, a necessary element of entitlement, and claimant has failed to point to any error in that finding. Moreover, even if the administrative law judge correctly identified Dr. Baker as a B-reader and found the existence of clinical pneumoconiosis, such a finding would not affect his finding that the evidence, as a whole, failed to establish a totally disabling respiratory impairment. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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