

BRB No. 07-0466 BLA

B.L.)
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 Claimant-Petitioner)
)
 v.)
)
 GATLIFF COAL COMPANY c/o) DATE ISSUED: 02/21/2008
 ACORDIA EMPLOYERS SERVICE)
)
 Self-Insured)
 Employer-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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Mark L. Ford, Harlan, Kentucky, for claimant.

Lois A. Kitts (Baird and Baird, P.S.C), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2005-BLA-5944) of Administrative Law Judge Adele Higgins Odegard denying benefits 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). The administrative law judge credited claimant with 10.55 years of coal mine employment, and adjudicated this subsequent claim, filed on May 24, 2004, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found that the new evidence submitted in support of this

subsequent claim¹ was sufficient to establish that claimant was totally disabled due to a respiratory or pulmonary condition, and therefore, claimant had demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge further found, however, that the evidence was insufficient to establish the existence of pneumoconiosis arising out of coal mine employment or disability causation. Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's finding at 20 C.F.R. §718.202(a)(4),² and contends that the administrative law judge erred in failing to credit Dr. Baker's diagnosis of legal pneumoconiosis. Claimant's Brief at 2; Decision and Order at 15. Claimant submits that the administrative law judge's reason for discrediting Dr. Baker's opinion is not rational and is contrary to the regulatory provisions at 20 C.F.R. §718.203. Claimant's Brief at 2.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.³ 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).

Claimant argues that Dr. Baker's opinion constitutes substantial evidence upon which the administrative law judge could rely to support a finding of legal pneumoconiosis. Claimant's Brief at 2-3. Claimant specifically argues that because Dr. Baker identified only coal dust exposure and smoking one pipe a day for three years as the basis for his diagnosis, and because tobacco use was not significant, ten years of coal mine employment would have been sufficient for Dr. Baker to conclude that coal dust exposure was the sole cause of claimant's disabling obstructive lung defect. Claimant's

¹ Claimant's first claim was filed December 14, 1973, and was denied on September 10, 1984 after a hearing. Director's Exhibits 1-347; 1-16. Claimant's second claim was filed August 12, 1987 and was administratively denied on January 21, 1988. Director's Exhibits 2-27; 2-2.

² We affirm, as unchallenged on appeal, the administrative law judge's finding that pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1)-(3), and her finding with regard to the length of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

³ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 1-339.

Brief at 3. Additionally, claimant argues that the presumption at Section 718.203 supports his position that ten years of employment is sufficient to cause legal pneumoconiosis. Claimant's Brief at 3. Claimant's arguments are without merit.

The administrative law judge noted that Dr. Baker's diagnosis of pneumoconiosis was based on an erroneous assumption that claimant worked for twenty years in the coal mine industry, contrary to her finding of 10.55 years, Decision and Order at 15, and she permissibly discounted his opinion for this incorrect premise. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993), citing *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Long v. Director, OWCP*, 7 BLR 1-254 (1984). Furthermore, because no other doctor diagnosed pneumoconiosis, and claimant must establish the existence of pneumoconiosis without benefit of any presumption, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4) as supported by substantial evidence. *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*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

BETTY JEAN HALL
Administrative Appeals Judge