

BRB No. 10-0317 BLA

EMMA MUNCY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
KERMIT COAL COMPANY)	DATE ISSUED: 01/31/2011
)	
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 on Modification of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Michelle S. Gerdano (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 the Decision and Order – Denying Benefits on Modification¹ (2008-BLA-5744) of Administrative Law Judge Michael P. Lesniak, with respect to a claim filed on August 2, 2007, 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).² After crediting claimant with six and one-half years of coal mine employment, based on the stipulation of the parties, the administrative law judge initially considered whether claimant established a change in conditions or a mistake in a determination of fact under 20 C.F.R. §725.310. The administrative law judge determined that, although claimant established total disability at 20 C.F.R. §718.204(b)(2), she did not establish the existence of clinical or legal pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203 or total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Therefore, the administrative law judge stated that, while he found mistakes in determinations of fact at 20 C.F.R. §725.310, claimant failed to establish all of the

¹ On March 6, 2008, the district director denied benefits, finding that claimant had pneumoconiosis but did not have a totally disabling respiratory or pulmonary impairment and was not totally disabled due to pneumoconiosis. Director's Exhibit 22. In a letter dated April 7, 2008, claimant indicated that she wished to appeal the decision and requested a hearing. Director's Exhibit 23. The district director denied the request as untimely, stating that the thirty-day period for responding to the Proposed Decision and Order expired on April 5, 2008. Director's Exhibit 24. Claimant filed a request for modification on April 11, 2008, which was denied by the district director on June 30, 2008. Director's Exhibits 25, 27. Claimant then requested a hearing. Director's Exhibit 28.

² In a letter dated April 30, 2010, the Director, Office of Workers' Compensation Programs (the Director), stated that the amendments to the Act contained in Section 1556 of Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)) have no impact on this case because claimant worked fewer than fifteen years in coal mine employment. The amendments to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), reinstated the rebuttable presumption of total disability due to pneumoconiosis for miners with at least fifteen years of qualifying coal mine employment who filed their claims after January 1, 2005 and whose claims were pending on or after March 23, 2010. We agree with the Director that the rebuttable presumption is not available in this case, as claimant has not alleged at least fifteen years of qualifying coal mine employment nor does she challenge the administrative law judge's finding of six and one-half years of coal mine employment.

necessary elements of entitlement on the merits. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge did not properly weigh the medical opinion evidence at 20 C.F.R. §§718.202(a)(4), 718.204(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief in this appeal.³

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.⁴ 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 miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that she has 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; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In considering whether total disability causation was established at 20 C.F.R. §718.204(c), the administrative law judge evaluated the opinions of Drs. Rasmussen, Dahhan, and Castle. Dr. Rasmussen examined claimant on October 8, 2007 and diagnosed "COPD [chronic obstructive pulmonary disease]/[e]mphysema." Director's Exhibit 10. Dr. Rasmussen determined that claimant has a totally disabling respiratory impairment to which coal dust exposure "has contributed only minimally." *Id.* Dr. Dahhan determined, based upon a May 9, 2009 examination of claimant, that she did not have either clinical or legal pneumoconiosis and that she is not totally disabled due to

³ We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination and his finding that claimant established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴ The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibits 3, 4; Hearing Transcript at 10. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

pneumoconiosis.⁵ Employer's Exhibit 1. Dr. Castle reviewed claimant's medical records and opined that claimant does not have pneumoconiosis in any form and is not totally disabled due to pneumoconiosis. Employer's Exhibit 2.

The administrative law judge found that, while claimant is disabled due to her respiratory impairment, pneumoconiosis was not a substantially contributing cause of the impairment. Decision and Order at 9. The administrative law judge indicated that Dr. Rasmussen was the only physician who opined that claimant's coal dust exposure contributed to her impairment, but he stated that the contribution was only minimal. *Id.* Consequently, the administrative law judge determined that claimant did not establish disability causation at 20 C.F.R. §718.204(c). *Id.*

Claimant asserts that Dr. Rasmussen's opinion supports a finding that her respiratory impairment "has been contributed to, in some discernible consequence, by her coal mine dust exposure," as required by the United States Court of Appeals for the Sixth Circuit. Claimant's Brief at 8, citing *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997). Claimant argues that, although Dr. Rasmussen stated that claimant's coal dust exposure only caused a minimal contribution, this contribution still constitutes a discernible consequence. Therefore, claimant maintains that the administrative law judge erred in finding that she did not establish total disability due to legal pneumoconiosis at 20 C.F.R. §718.204(c).

Claimant's allegations of error are without merit. Pursuant to 20 C.F.R. §718.204(c)(1), pneumoconiosis is a "substantially contributing cause" of the miner's disability if it has a "material adverse effect" on the miner's respiratory or pulmonary condition or "[m]aterially worsens" a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.⁶ 20 C.F.R. §718.204(c)(1). In interpreting this language, the Sixth Circuit

⁵ Clinical pneumoconiosis "consists of 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. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

⁶ In the comments to the revised version of 20 C.F.R. §718.204(c), the Department of Labor stated that the inclusion of the words "material" or "materially" reflects the view that "evidence that pneumoconiosis makes only a negligible, inconsequential, or

has stated that it will continue to apply its holding in *Smith*, 127 F.3d at 507, 21 BLR at 2-186, that pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment if pneumoconiosis is a contributing cause of some discernible consequence to his or her totally disabling impairment. *Kirk*, 264 F.3d at 611, 22 BLR at 2-303.

In this case, the administrative law judge acted within his discretion in finding that Dr. Rasmussen's opinion was insufficient to satisfy this standard, based upon Dr. Rasmussen's determination that coal dust exposure was a minimal contributor to claimant's totally disabling respiratory impairment. *Kirk*, 264 F.3d at 611, 22 BLR at 2-303; Decision and Order at 9. The administrative law judge's finding is supported by Dr. Rasmussen's statements that he "doubt[ed] [claimant's] coal mine dust exposure was sufficient to cause more than a mild degree of impaired function," that "it seems unlikely this effect rose to a level of significance" and that coal dust exposure "contributed only minimally to [claimant's] impaired function." Director's Exhibit 10. We affirm, therefore, the administrative law judge's finding under 20 C.F.R. §718.204(c), as it is rational and supported by substantial evidence. See *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002). Because we have affirmed the administrative law judge's finding that claimant did not establish disability causation at 20 C.F.R. §718.204(c), an essential element of entitlement, we must also affirm the denial of benefits.⁷ See *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

insignificant contribution to the miner's total disability is insufficient to establish that pneumoconiosis is a substantially contributing cause of that disability." 65 Fed. Reg. 79946 (Dec. 20, 2000).

⁷ In light of our affirmance of the denial of benefits, we need not address claimant's contentions regarding the administrative law judge's findings at 20 C.F.R. §718.202(a)(4). See *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge