

BRB No. 88-3957 BLA

ALBERT LOONEY)
)
 Claimant-Respondent)
)
 v.)
)
 JIM WALTER RESOURCES,) DATE ISSUED:
 INCORPORATED)
)
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of A.A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

Braxton Schell, Jr. (Bradley, Arant, Rose & White), Birmingham, Alabama, for employer.

Before: STAGE, Chief Administrative Appeals Judge, DOLDER, Administrative Appeals Judge, and CLARKE, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order (86-BLA-488) of Administrative Law Judge A.A. Simpson, Jr., awarding 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 reviewed this *Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

claim pursuant to the provisions of 20 C.F.R. Part 718, and credited claimant with nine and one-half years of qualifying coal mine employment. The administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202 and 718.203(c), total disability pursuant to 20 C.F.R. §718.204(c), based on employer's concession and evidentiary support in the record, and that this total disability was due to pneumoconiosis pursuant to Section 718.204(b). Accordingly, benefits were awarded. Employer appeals, challenging the administrative law judge's finding that the miner's total disability was due to pneumoconiosis. Claimant and the Director, Office of Workers' Compensation Programs, have not participated in this appeal.¹

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

¹ The administrative law judge's findings pursuant to Sections 718.202, 718.203(c), and 718.204(c), and with regard to the length of coal mine employment, are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

this Board and may not be disturbed. 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).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989); Trent v. Director, OWCP, 11 BLR 1-26 (1987).

Employer maintains that the administrative law judge erred in relying on the opinion of Dr. Hasson to support his finding that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b). Employer further contends that the administrative law judge failed to properly analyze and weigh the opinion of Dr. Laws on this issue. We disagree. The administrative law judge acted within his discretion in finding that the report of Dr. Laws was of little probative value inasmuch as the physician did not render an opinion as to the cause of claimant's disability, nor did he affirmatively indicate that the disability was unrelated to pneumoconiosis or coal mine employment exposure. Decision and Order at 3, 4; Director's Exhibit 13. On the other hand, Dr. Hasson concluded that claimant's disability was due to pneumoconiosis, smoking and traumatic injury and stated that any of these three

contributing factors could be disabling without the presence of the other two factors. Decision and Order at 3; Employer's Exhibit 1 at 17, 19. Contrary to employer's argument, the opinion of Dr. Hasson rises to the standard applied by the United States Court of Appeals for the Eleventh Circuit, wherein appellate jurisdiction of this claim lies, which requires a miner to establish that his pneumoconiosis was a substantial contributing factor in the causation of his total pulmonary disability, although it need not be the sole cause of disability. See Lollar v. Alabama By-Products Corp., 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990). The administrative law judge permissibly accorded determinative weight to the opinion of Dr. Hasson, as this physician is a pulmonary specialist, see Cunningham v. Pittsburg and Midway Coal Co., 7 BLR 1-93 (1984), and he performed the most recent examination and testing of claimant. Decision and Order at 3. See generally Wetzel v. Director, OWCP, 8 BLR 1-139 (1985); Lucostic v. United States Steel Corp., 8 BLR 1-46 (1985); Keen v. Jewell Ridge Coal Corp., 6 BLR 1-454 (1983). The administrative law judge's findings pursuant to Section 718.204(b) are supported by substantial evidence, and we hereby affirm them.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

DAVID A. CLARKE, JR.
Administrative Law Judge