

BRB No. 04-0156 BLA

OSCAR H. MORRISON)
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 Claimant-Petitioner)
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 v.)
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 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED: 07/23/2004
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Mickey Hall (Swafford, Peters, Priest & Hall), Winchester, Tennessee, for claimant.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 (2002-BLA-0072) of Administrative Law Judge Richard E. Huddleston rendered 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 Claimant's prior application for benefits

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

filed on July 27, 1979, was denied on January 20, 1980, by the district director, for failure to submit medical evidence. Director's Exhibits 24-1, 24-3. On November 6, 2000, claimant filed his current application. The administrative law judge found that the medical evidence developed since the prior denial of benefits failed to establish the existence of pneumoconiosis and total disability. 20 C.F.R. §§718.202(a), 718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in not finding him entitled to the presumption of total disability due to pneumoconiosis at 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, in light of his twenty-six years of coal mine employment and erred in not finding the existence of pneumoconiosis and total disability established. The Director, Office of Workers' Compensation Programs, (the Director) responds, urging affirmance of the administrative law judge's denial of benefits.

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. 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).

To be entitled to benefits under the Act, 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).

Claimant first contends that the administrative law judge erred in finding him not entitled to the presumption at Section 718.305. This contention is without merit. Section 718.305 provides a presumption of total disability due to pneumoconiosis in claims filed before January 1, 1982 where the miner worked at least 15 years in underground mining or comparable surface mining, and the evidence establishes the existence of a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(a); see *Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987). Because the instant claim was filed on November 6, 2000, the presumption is not available to claimant. 20 C.F.R. §718.305(e).

Claimant next contends the administrative law judge should have credited the opinion of Dr. Hughes, who found the existence of pneumoconiosis and who examined claimant, over the opinion of Dr. Sargent, who read claimant's x-ray, but never examined claimant. Claimant further asserts that the administrative law judge should have applied the "true doubt rule" to resolve any doubt in his favor.

Contrary to claimant's argument, the administrative law judge is not required to accord greater weight to the opinion of an examining physician. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003) ("opinions of treating physicians get the deference they deserve based on their power to persuade"); *Worthington v. United States Steel Corp.*, 7 BLR 1-522, 1-523 (1984) (whether physician examines miner is only one factor to be considered by administrative law judge in weighing medical evidence). In addition, the administrative law judge is not required to resolve conflicting, but equally probative evidence in favor of claimant. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993) (holding that true doubt rule is no longer valid and that claimants must establish entitlement by a preponderance of the evidence). The administrative law judge permissibly accorded little weight to Dr. Hughes's opinion as unreasoned as it was based, in part, on a positive x-ray which was subsequently re-read negative by a more highly qualified reader, and because it was based, in part, on a pulmonary function study which yielded values disparately lower than a subsequent study. Decision and Order at 3-4; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983) (determination of whether an opinion is reasoned and documented requires fact finder to examine validity of a medical opinion's reasoning in light of studies conducted and objective indications upon which medical conclusion is based); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Accordingly, we affirm the administrative law judge's finding that claimant has failed to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a).

Additionally, claimant contends that the administrative law judge should have found total disability established based on his testimony along with Dr. Hughes's opinion. Claimant also contends that the administrative law judge should have considered claimant's age, education, work experience, and qualifying objective tests, and should have applied the true doubt rule in determining whether total disability was established. These contentions are without merit.

Contrary to claimant's arguments, the administrative law judge was not required to consider claimant's age, education or work experience in relation to his ability to work outside of the coal mine industry in determining whether claimant could perform his usual coal mine employment, *see Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985) (test for total disability is solely a medical test, not a vocational test), *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-6-7 (2004); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988), nor was lay testimony alone sufficient to establish total disability in this case, *see* 20 C.F.R. §718.204(d)(5); *Coleman v. Director, OWCP*, 829 F.2d 3, 4-5 (6th Cir. 1987); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985). Further, as discussed previously, the true doubt rule is no longer available.

Ondecko, 512 U.S. 267; 18 BLR 2A-1. Claimant must establish the necessary elements of entitlement. *Anderson*, 12 BLR 1-111; *Trent*, 11 BLR 1-26. The administrative law judge, therefore, properly found that claimant failed to establish total disability. 20 C.F.R. §718.204(b)(2).

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