

BRB No. 99-0984 BLA

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WILLIAM L. RISENHOOVER)	
Claimant-Petitioner)	
v.)	DATE ISSUED:
GARLAND COAL & MINING COMPANY)	
Employer-Respondent)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	DECISION and ORDER

Party-in-Interest

Appeal of the Decision and Order Denying Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Clyde Stipe (Stipe Law Firm), McAlester, Oklahoma, for claimant.

Kendall B. Jones (Jones & Harper), Fort Smith, Arkansas, for employer.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (97-BLA-1282) of Administrative Law Judge Thomas M. Burke 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). Claimant's initial application for benefits filed on November 14, 1985 was finally denied on February 23, 1995. Director's Exhibit 28. On May 20, 1996, claimant filed the current

application for benefits, which is a duplicate claim because it was filed more than one year after the previous denial of benefits. Director's Exhibit 1; 20 C.F.R. §725.309(d).

The administrative law judge accepted the parties' stipulation to thirty-one and one-half years of coal mine employment, and found that the evidence developed since the previous denial did not establish a material change in conditions as required by Section 725.309(d). Additionally, the administrative law judge found that, even assuming a material change in conditions, claimant did not establish that his totally disabling respiratory impairment is due to pneumoconiosis pursuant to Section 718.204(b). Consequently, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge ignored relevant medical evidence and did not consider the lay testimony concerning claimant's health. Employer responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe 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).

¹ The first administrative law judge to consider the claim denied benefits because he found that the medical evidence of record did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The Board affirmed the administrative law judge's decision. *Risenhoover v. Garland Coal & Mining Co.*, BRB No. 89-1242 BLA (May 21, 1991). Thereafter, claimant timely requested modification of the denial pursuant to 20 C.F.R. §725.310. A different administrative law judge denied claimant's modification request on February 23, 1995, and claimant did not appeal the decision.

In this case, the administrative law judge assumed a material change in conditions pursuant to Section 725.309(d) and considered the merits of the claim. The administrative law judge found that although claimant demonstrated the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c), claimant did not establish that pneumoconiosis is a contributing cause of his total disability pursuant to Section 718.204(b). *See Mangus v. Director, OWCP*, 882 F.2d 1527, 1531, 13 BLR 2-9, 2-19 (10th Cir. 1989). Substantial evidence supports the administrative law judge's finding pursuant to Section 718.204(b), which we therefore affirm.

Pursuant to Section 718.204(b), the administrative law judge considered the conflicting medical opinions of Drs. Meade and Heard. Review of the record indicates that Dr. Meade, claimant's treating physician, opined that claimant suffers from a totally disabling respiratory impairment due to advanced chronic obstructive pulmonary disease and pneumoconiosis. Director's Exhibits 8, 15, 17, 19. Dr. Heard, a pulmonary specialist, examined claimant and reviewed the medical evidence of record, and concluded that claimant has a severe lung impairment due to smoking. Employer's Exhibits 1, 7. The administrative law judge found within his discretion that Dr. Heard's opinion was more thorough, better reasoned, and better supported by the chest x-ray evidence, pulmonary function study results, and smoking history. *See Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 873, 20 BLR 2-334, 2-338-339 (10th Cir. 1996); *Hansen v. Director, OWCP*, 984 F.2d 364, 370, 17 BLR 2-48, 2-59 (10th Cir. 1993).

Claimant does not specifically challenge the administrative law judge's weighing of the medical opinions pursuant to Section 718.204(b), but rather, contends generally that the administrative law judge did not consider certain evidence. Claimant's Brief at 2-4. However, claimant's argument that the administrative law judge ignored Dr. Usman's reports and Dr. Dyer's reading of a November 4, 1995 x-ray lacks merit because claimant never submitted these items into

² Because we affirm the administrative law judge's finding on the merits pursuant to 20 C.F.R. §718.204(b), we need not address his application of the material change in conditions standard of the United States Court of Appeals for the Sixth Circuit to this claim arising within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. Director's Exhibit 28 (last coal mine employment in Oklahoma); *see Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996); *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

³ Claimant does not challenge the administrative law judge's conclusion that the varying reports of claimant's smoking history contained in the record indicate at least a "lengthy history of smoking cigarettes and then cigars. . . ." Decision and Order at 7.

evidence. There is likewise no merit in claimant's contention that the administrative law judge erred by not considering on the merits the medical reports that were already considered in claimant's prior denied claim. Claimant's Brief at 2. The old medical evidence is not relevant to whether claimant currently establishes the element of disability causation pursuant to Section 718.204(b). *Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 1511, 20 BLR 2-302, 2-319 (10th Cir. 1996).

Additionally, because the administrative law judge relied upon the objective medical evidence to find that claimant has a totally disabling respiratory impairment pursuant to Section 718.204(c), the administrative law judge did not err in not also citing the lay testimony that claimant has "severe lung problems." Claimant's Brief at 1. To the extent that claimant argues that this testimony would have been relevant to establishing disability causation pursuant to Section 718.204(b), the administrative law judge permissibly declined to credit Dr. Meade's report, the medical evidence necessary to corroborate the lay testimony. *See* 20 C.F.R. §§718.202(c); 718.204(d)(2)(findings of the existence of pneumoconiosis and total disability cannot be based solely on lay testimony in a living miner's claim); *Trent*, 11 BLR at 1-28; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). Thus, any error in failing to discuss the lay testimony at Section 718.204(b) was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Therefore, and in light of the foregoing, we affirm the administrative law judge's finding pursuant to Section 718.204(b). *See Mangus, supra*.

Because claimant has failed to establish that his total respiratory or pulmonary disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), a necessary element of entitlement under Part 718, we affirm the denial of benefits. *See Trent, supra; Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

⁴ Because claimant did not submit any ILO classifications of the November 4, 1995 x-ray into the record, *see* 20 C.F.R. §718.102, the administrative law judge did not err in not discussing a letter to claimant from a NIOSH nurse concerning two unidentified physicians' readings of the November 4, 1995 x-ray. Director's Exhibit 12.

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON
Administrative Appeals Judge