

BRB No. 06-0868 BLA

L. F.)
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 Claimant-Petitioner)
)
 v.)
)
 ACE COLLIERY, INCORPORATED) DATE ISSUED: 06/14/2007
)
 and)
)
 KY COAL PRODUCERS c/o)
 ALTERNATIVE SERVICE CONCEPT)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of William S. Colwell, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

John T. Chafin (Chafin Law Office, P.S.C.), Prestonsburg, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-06277) of Administrative Law Judge William S. Colwell 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 found at least twenty-five years of

coal mine employment established and, based on the date of filing, adjudicated this claim pursuant to 20 C.F.R. Part 718. Decision and Order at 4-7. After determining that the instant claim was a subsequent claim,¹ the administrative law judge found that a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d) was established, since the newly submitted evidence established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), one of the elements of entitlement previously adjudicated against claimant. Decision and Order at 3, 6-14; Director's Exhibit 1. Considering all of the evidence, the administrative law judge concluded that it failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 14-15. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to Section 718.202(a)(4) as the administrative law judge failed to give proper weight to the opinions of the treating physicians. Employer responds urging affirmance of the administrative law judge's denial of benefits, as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond in the instant appeal.

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 this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of 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 and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision

¹ Claimant's first claim for benefits was filed on January 23, 1995. That claim was finally denied by the Department of Labor on July 25, 1995, as claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant took no further action, until he filed the instant claim on September 19, 2002. See Director's Exhibits 2, 22, 23.

and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.² On appeal, claimant does not challenge the finding of the administrative law judge, pursuant to 20 C.F.R. §718.204(c), that claimant's totally disabling respiratory impairment was due to his extensive smoking history and unrelated to his coal mine employment. That finding, is, accordingly, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *see also Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

As we affirm, as unchallenged, the administrative law judge's finding that claimant failed to establish that his total respiratory disability was due to pneumoconiosis, an essential element of entitlement under Part 718, benefits, thereunder, are precluded. Thus, we need not address claimant's argument regarding pneumoconiosis. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

² The record indicates that claimant was last employed in the coal mine industry in Kentucky. Director's Exhibits 1, 6, 7; Decision and Order at 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).