

BRB No. 01-0882 BLA

SHELBY BROWN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
EASTERN ASSOCIATED COAL CORPORATION)	DATE ISSUED:
)	
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 On Remand Denying Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.) Pineville, West Virginia, for claimant.

Lenore S. Ostrowsky (Greenberg Traurig LLP), Washington, D.C. for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denying Benefits (98-BLA-1113) of Administrative Law Judge Pamela Lakes Wood 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 Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. This case is on appeal to the Board for the second time. Pursuant to the prior appeal by employer, the Board affirmed, as

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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

unchallenged on appeal, the administrative law judge's finding that claimant established the existence of coal workers' pneumoconiosis, and that the newly submitted evidence failed to establish total disability at 20 C.F.R. ' 718.204(c)(1)-(3), now 20 C.F.R. ' 718.204(b)(2)(i)-(iii), but the Board vacated the administrative law judge's finding that the new evidence established total disability pursuant to Section 718.204(c)(4), now 20 C.F.R. ' 718.204(b)(2)(iv), and was therefore, sufficient to establish a material change in conditions pursuant to 725.309(d). The Board remanded the case for the administrative law judge to reconsider whether the new evidence was sufficient to establish a material change in conditions, and, if reached, to weigh all the evidence of record on the issues of total disability and causation. *Brown v. Eastern Associated Coal Corp.*, BRB No. 00-0371 BLA (Dec. 20, 2000). On remand, the administrative law judge concluded that the newly submitted evidence was sufficient to establish total disability and thus a material change in conditions. The administrative law judge found, however, that the evidence was insufficient to establish disability causation, an essential element of entitlement. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that disability causation was not established. Employer responds, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs, is not participating in this appeal.

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. See 20 C.F.R. ' ' 718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Claimant contends that the administrative law judge erred in finding that Dr. Rasmussen's opinion did not establish disability causation. Claimant contends further that although the administrative law judge correctly determined that the instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, she misapplied that court's teaching in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998) when weighing the medical evidence. In his reports of January 1988 and September 1988, Dr. Rasmussen diagnosed pneumoconiosis due to coal dust exposure, emphysema due to coal mine employment and smoking, and concluded that claimant was totally disabled from resuming his last coal mine employment, and that coal dust exposure with resulting pneumoconiosis was a significant contributing factor. Director's Exhibits 9, 10; Claimant's Exhibit 1. In her original Decision and Order, the administrative law judge

concluded that, ADr. Rasmussen=s opinion is consistent with the Claimant=s history of coal mine dust exposure over a 36 year period and...his determination that Claimant=s exposure to dust during his coal mine employment worked along with his 31 year smoking history to cause claimant=s disability [appeared] to be most plausible, well-reasoned, and consistent with the clinical evidence of record.@ November 30, 1999, Decision and Order Granting Benefits at 16. On remand, however, assessing the evidence in light of *Hicks, supra*, the administrative law judge found that the above, original analysis, which was, and is, the only basis for her crediting Dr. Rasmussen=s opinion over the other physicians opinions of record on the issue of causation was not in keeping with the Fourth Circuit=s holding in *Hicks, supra*, that Athe length of a claimant=s coal mine employment does not conclusively confirm that the claimant was disabled due to a respiratory or pulmonary condition.@ *Hicks* at 533, 2-337. Thus, in this case, where Dr. Rasmussen was the only physician of record to find that claimant=s lengthy coal mine employment, along with his lengthy smoking history, contributed to his total disability, and all the other physicians of record found that claimant=s disability was entirely due to his cigarette smoking, the administrative law judge properly concluded that disability causation was not established. 20 C.F.R. ' 718.204(c).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge