

BRB No. 02-0685 BLA

WALTER LOCKHART)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED:
)	
U.S. STEEL MINING COMPANY, LLC)	
)	
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Walter Lockhart, Gary, West Virginia, *pro se*.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (2001-BLA-00988) of Administrative Law Judge Daniel F. Solomon 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).¹ Based on the date of filing, the

¹The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective

administrative law judge adjudicated this duplicate claim pursuant to 20 C.F.R Part 718, and accepted the parties' stipulation to thirty-nine years of coal mine employment.² Hearing Transcript at 35. On the merits, the administrative law judge found the evidence of record

on January 19, 2001, and are found at 20 C.F.R. Parts 718, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

²Claimant filed his initial claim for benefits on June 19, 1973, which was denied by the Social Security Administration on April 18, 1979, because claimant was still employed as a miner, and by the Department of Labor on November 24, 1980, due to claimant's failure to establish total disability due to pneumoconiosis. Director's Exhibits 24-1, 24-21, 24-22. Claimant filed a second claim on December 1, 1987, which was denied on May 15, 1992, by Administrative Law Judge Charles P. Rippey, due to claimant's failure to establish total disability due to pneumoconiosis. Director's Exhibits 23-1, 24-26. Claimant filed a third claim on April 12, 1994, which was denied on May 26, 1999, by Administrative Law Judge Samuel J. Smith, as claimant failed to establish the existence of a totally disabling respiratory impairment or a material change in conditions. Director's Exhibits 22-1, 40. Claimant's subsequent appeal to the Board was dismissed as untimely. *Lockhart v. U.S. Steel Mining Co.*, BRB No. 99-1084 BLA (Aug. 25, 1999)(Order). Claimant filed the present claim on August 28, 2000. Director's Exhibit 1.

sufficient to demonstrate the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(ii), which established a material change in conditions pursuant to 20 C.F.R. §725.309(d). The administrative law judge also found that claimant established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), 718.203(b), but found the record evidence insufficient to establish that claimant's total respiratory disability was due to pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.³

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove 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 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 and the evidence of record, we conclude that the Decision and Order is supported by substantial

³We affirm the findings of the administrative law judge with respect to the length of coal mine employment, the designation of employer as the responsible operator, and at 20 C.F.R. §§718.202(a)(1), 718.203(b), and 718.204(b), as they are unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

evidence, consistent with applicable law, and must be affirmed. Pursuant to Section 718.204(c), the administrative law judge considered the relevant medical reports of record and accorded little weight to the opinions of Drs. Taylor, Rasmussen, Keeley and Baxter, dated between June 23, 1980 and December 5, 1991, “due to the lapse in time between their reports and the time of Claimant’s recent application for benefits.” Decision and Order at 25; Director’s Exhibits 23-11, 23-13, 23-22, 23-23, 24-17, 24-31. Thus, the administrative law judge rationally found these reports too remote in time to be relevant to claimant’s current condition. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994). The administrative law judge also properly accorded little weight to Dr. Capiello’s opinion as it failed to address the issue of the cause of claimant’s total disability. Decision and Order at 26; Claimant’s Exhibit 1; *Ondecko, supra*.

It was also within the administrative law judge’s discretion to accord little weight to Dr. Jabour’s three medical reports which all diagnose coal workers’ pneumoconiosis and various other respiratory conditions, but which vary greatly in the percentage of impairment attributable to each condition. Decision and Order at 25-26; Director’s Exhibits 22-7, 22-18, 29. Consequently, the administrative law judge rationally determined that these reports were inconsistent and unreasoned since “Dr. Jabour failed to set forth any reasoning as to why the percentage of pneumoconiosis as a cause for Claimant’s impairment was substantially decreased within a year’s time.” Decision and Order at 25-26; *Milburn Colliery Company v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998);⁴ *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (*en banc*), *modifying on recon.*, 21 BLR 1-201 (1999); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

Similarly, it was also within the administrative law judge’s discretion to accord little weight to Dr. Vasudevan’s opinion, that interstitial lung disease was the cause of claimant’s pulmonary problem, rather than obesity, hypertension or smoking. The administrative law judge found that Dr. Vasudevan “offers no reasoning to support his conclusions” and thus, the administrative law judge rationally found his opinion unreasoned. Decision and Order at 26; Director’s Exhibit 8; *Hicks, supra*; *Underwood, supra*; *Fields, supra*; *Mabe, supra*.

The administrative law judge credited the opinion of Dr. Castle, a board-certified pulmonologist, who diagnosed chronic obstructive pulmonary disease, emphysema, asthma and heart disease, but found no disability arising from coal mine employment. Decision and

⁴This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant was employed in the coal mine industry in the State of West Virginia. See Director’s Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Order at 26-27; Employer's Exhibit 1. Since the administrative law judge determined that this report was well-documented, reasoned, and more thorough than the other reports of record, and that Dr. Castle possessed superior qualifications in the field of pulmonary medicine, the administrative law judge rationally accorded this opinion determinative weight. Decision and Order at 26-27; Employer's Exhibit 1; *Hicks, supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Fields, supra*. Accordingly, we affirm the administrative law judge's finding that the medical opinions of record do not establish that claimant is totally disabled due to pneumoconiosis.⁵ Decision and Order at 27; *Toler v. Eastern Associated Coal Co.*, 34 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

As we have affirmed the administrative law judge's finding that the evidence of record is insufficient to establish that claimant's total disability arose from his pneumoconiosis pursuant to Section 718.204(c), an essential element of entitlement, we must also affirm the denial of benefits. *See Trent, supra*; *Perry, supra*. We need not, therefore, address the arguments raised by employer.

⁵The administrative law judge did not specifically discuss the opinion of Dr. Forehand at Section 718.204(c). *See* Decision and Order at 25 n.31. This omission is harmless however, since Dr. Forehand did not diagnose a totally disabling respiratory impairment and the administrative law judge found that his opinion regarding the existence of pneumoconiosis was "vague" and confusing. Decision and Order at 23; Director's Exhibit 31; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge