

BRB No. 05-0488 BLA

JIM JONES)
)
 Claimant-Petitioner)
)
 v.)
) DATE ISSUED: 11/22/2005
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT OF)
 LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jeffrey Tureck,
Administrative Law Judge, United States Department of Labor.

Jim Jones, Coburn, Virginia, *pro se*.

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,¹ appeals the Decision and Order Denying Benefits (04-BLA-5412) of Administrative Law Judge Jeffrey Tureck 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). Pursuant to the

¹ Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

parties' stipulations, the administrative law judge credited claimant with twenty-nine years of coal mine employment,² found the existence of pneumoconiosis established, and found that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b). Decision and Order at 2-3. The administrative law judge also noted that the Director, Office of Workers' Compensation Programs (the Director), agreed to dismiss claimant's employer, Fountain Bay Mining Company, and its insurer, as parties.³ Decision and Order at 2; Hearing Transcript at 5.

Noting that this claim is a subsequent claim,⁴ the administrative law judge found that because the existence of pneumoconiosis and total disability were established, claimant also established a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Decision and Order at 2-3. The administrative law judge determined that the evidence of record did not rebut the presumption that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge found, however, that there was no evidence in the record that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 3-4. Accordingly, the administrative law judge denied benefits.

² The record indicates that claimant's last coal mine employment occurred in Virginia. Director's Exhibits 5, 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

³ The Board has received employer's letter indicating that it is no longer a party in this claim, and the Director's Motion to Reform the Caption stating that employer has been dismissed and that the Black Lung Disability Trust Fund is to be the party responsible for the payment of any benefits awarded. The caption in this case is hereby amended to exclude employer and its insurance carrier as parties and to list the Director as the respondent. The caption is correct as it appears above.

⁴ Claimant's initial claim filed on November 28, 1979, was finally denied on June 20, 1980. Director's Exhibit 1. Claimant's second claim filed on July 7, 1988, was finally denied on November 8, 1988 because claimant failed to establish any element of entitlement. Director's Exhibit 2. Claimant filed a third claim on March 18, 1997, but subsequently withdrew it. Director's Exhibit 3. Claimant filed this claim on July 23, 2001. Director's Exhibit 5.

On appeal, claimant generally challenges the denial of benefits. The Director responds that the denial of benefits should be affirmed as supported by substantial evidence.⁵

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). 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'Keeffe 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. 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*).

Pursuant to Section 718.204(c), the administrative law judge found that there was no evidence that claimant's total disability is due to pneumoconiosis. Substantial evidence supports the administrative law judge's finding. *McFall*, 12 BLR at 1-177. The administrative law judge noted accurately that Drs. Forehand, Dahhan, and Paranthaman did not opine that claimant is totally disabled due to pneumoconiosis.⁶ Director's Exhibits 2, 3, 13, 15. Substantial evidence also supports the administrative law judge's

⁵ We affirm as unchallenged on appeal the administrative law judge's length of coal mine employment finding, and his findings pursuant to 20 C.F.R. §§725.309(d), 718.202(a), 718.203(b), and 718.204(b), all of which are favorable to claimant. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁶ As the Director notes, the administrative law judge inaccurately stated that Dr. Paranthaman did not diagnose pneumoconiosis, as Dr. Paranthaman diagnosed respiratory impairments that he linked to both smoking and coal dust exposure, diagnoses which, if credited, could establish the existence of legal pneumoconiosis. See 20 C.F.R. §718.201; Decision and Order at 3. A remand is not required, however, because substantial evidence supports the administrative law judge's finding that Dr. Paranthaman did not opine that claimant is totally disabled due to pneumoconiosis. See *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Director's Exhibits 2, 3, 15; Decision and Order at 3.

finding that hospitalization records from St. Mary's Hospital indicating that claimant was treated for several conditions, including left lower lobe pneumonia, chronic respiratory failure, myocardial infarction, and idiopathic pulmonary fibrosis, did not attribute any of claimant's medical problems to coal mine employment. Claimant's Exhibit 8. We therefore affirm the administrative law judge's finding pursuant to Section 718.204(c).

Because claimant did not establish that he is totally disabled due to pneumoconiosis, a necessary element of entitlement in a miner's claim under Part 718, we affirm the administrative law judge's denial of benefits. *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.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge