

BRB No. 99-1267 BLA

RICHARD BUNCH)
)
 Claimant-Petitioner)
)
 v.)
)
 LAUREL FORK MINING,)
 INCORPORATED)
)
 and)
)
 CNA INSURANCE COMPANIES)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Party-in-Interest)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits Of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Richard Bunch, Wartburg, Tennessee, *pro se*.

Leslie Fair Bishop (Lewis, King, Krieg, Waldrop & Catron, P.C.), Knoxville, Tennessee, for employer and carrier.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying

Benefits (98-BLA-1050) of Administrative Law Judge Mollie W. Neal on a duplicate claim¹ 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 credited the miner with thirteen and one-half years of coal mine employment. He further found that claimant established, based on the pulmonary function study dated September 24, 1997, Director's Exhibit 5, that he is totally disabled, and thereby established a material change in conditions under 20 C.F.R. §725.309(d). Considering the merits of the claim under 20 C.F.R. Part 718, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) through (a)(4). He next indicated,

Notwithstanding my opinion to the contrary, assuming that Dr. Jordan's diagnosis was sufficient to support a finding of pneumoconiosis, he rules out coal workers' pneumoconiosis as a cause of the miner's pulmonary impairment. Since Dr. Jordan is the only physician of record to offer an opinion relating to whether the miner's exposure to coal dust or his coal mine employment contributed to his pulmonary impairment, I also find the evidence insufficient to establish that his total disability is related to coal dust exposure. Thus, Claimant cannot meet his burden of establishing that his total disability is caused by his coal worker's (sic) pneumoconiosis.

¹Claimant filed the instant claim on July 31, 1997. Director's Exhibit 1. Claimant filed his initial claim on March 18, 1991. Director's Exhibit 22-31. Claimant did not pursue the claim following the district director's denial, dated September 3, 1991. Director's Exhibit 22/31-15. Claimant filed a second claim on October 12, 1993. Director's Exhibit 22/1. Administrative Law Judge Robert D. Kaplan issued an Order of Dismissal on July 17, 1995, Director's Exhibit 22/38, following claimant's failure to respond to Judge Kaplan's June 21, 1995 Show Cause Order, which Judge Kaplan issued subsequent to claimant's failure to appear at the hearing. Director's Exhibits 22/36 and 22/37.

Decision and Order at 11. The administrative law judge thus denied benefits on the merits of the claim based on claimant's failure to show that he has pneumoconiosis or that his total disability is due to a pulmonary impairment related to his coal mine employment. Decision and Order at 11.

In response to claimant's *pro substantial evidence* appeal, employer/carrier (employer) contends that the evidence is insufficient to establish a material change in conditions under 20 C.F.R. §725.309(d). Employer also contends that the claim must be denied on its merits because the evidence fails to establish the existence of pneumoconiosis arising out of claimant's coal mine employment, and because, while "there is some evidence in the record which shows that Mr. Bunch suffers from some respiratory impairment," Employer's Brief at 8, there is no evidence that claimant's impairment is due to his coal dust exposure. The Director, Office of Workers' Compensation Programs, has not filed a brief in the appeal.

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. *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 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 under Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that he is totally disabled by the disease. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). In the instant case, which arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*), claimant must establish that his total disability is due at least in part to pneumoconiosis. *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Youghioghney & Ohio Coal Co. v. McAngues*, 996 F.2d 130, 17 BLR 2-146 (6th Cir. 1993), *cert. denied*, 114 S.Ct. 683 (1994); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). Further, the Sixth Circuit has held that a miner must affirmatively establish that pneumoconiosis is a contributing cause of some consequence to his totally disabling respiratory impairment; that the miner's pneumoconiosis must be more than merely a speculative cause of his disability. *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997).

The administrative law judge's finding on the merits of the claim, that the evidence fails to establish that claimant's impairment is related to his coal dust exposure, is rational, supported by substantial evidence, and in accordance with applicable law. Specifically, the administrative law judge correctly noted that Dr. Jordan, claimant's treating physician, is the only physician of record to offer an opinion relevant to whether claimant's exposure to coal mine dust or his coal mine employment contributes to his impairment. On October 18, 1994, Dr. Jordan indicated that claimant does not have a chronic obstructive pulmonary impairment caused by his thirteen years of coal mine employment. Director's Exhibit 22/22. Dr. Jordan subsequently opined, on November 4, 1994, that pneumoconiosis does not contribute to claimant's pulmonary impairment. Dr. Jordan added that claimant "has Kartagener's syndrome with situs invertis totalis, subsequent bronchiectasis that has resulted in the majority of his pulmonary impairment." *Id.* Thus, as the administrative law judge recognized, the physician rules out pneumoconiosis as a cause of claimant's pulmonary impairment. Decision and Order at 10-11. The record contains no other physician's opinion relevant to the cause of claimant's respiratory or pulmonary impairment under 20 C.F.R. §718.204(b). Based on the foregoing, we affirm the administrative law judge's determination that claimant cannot meet his burden of establishing that his impairment is due at least in part to pneumoconiosis. 20 C.F.R. §718.204(b); *Hill, supra; Adams, supra.*

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the requisite cause of his impairment under Section 718.204(b), an essential element of entitlement, we affirm the administrative law judge's denial of benefits in the instant case as a finding of entitlement is precluded. *Trent, supra; Perry, supra.*²

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

²In light of our disposition on the merits of the claim, we need not review the administrative law judge's finding of a material change in conditions at 20 C.F.R. §725.309(d).

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge