

BRB No. 04-0549 BLA

ROY L. BROWN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DRUMMOND COMPANY,)	
INCORPORATED)	
)	DATE ISSUED: 04/22/2005
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 Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Roderick Graham, Birmingham, Alabama, for claimant.

Laura A. Woodruff (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (02-BLA-5086) of Administrative Law Judge Gerald M. Tierney denying benefits on a claim for benefits 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). Claimant's initial application for benefits was denied by the claims examiner on October 20, 1994. The claims examiner denied benefits because the evidence did not establish that claimant had pneumoconiosis, that the disease was caused at least in part by his coal mine employment, or that claimant was totally disabled by the disease. Director's Exhibit 25-12. Claimant did not pursue this claim any further.

On April 5, 2002, claimant filed a new application for benefits. After holding a hearing, the administrative law judge issued his Decision and Order on March 1, 2004. The administrative law judge noted that the claim before him was a subsequent claim, and that claimant was, therefore, required by 20 C.F.R. §725.309 to prove that one of the applicable conditions for entitlement had changed since the denial of his prior claim. The administrative law judge then considered all of the evidence of record and found it insufficient to establish any of the elements of entitlement. Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis. Claimant also argues that he is entitled to a presumption that his pneumoconiosis arose out of his coal mine employment. Claimant alleges that employer failed to establish rebuttal of this presumption. Claimant also contends that the evidence is sufficient to establish that he is totally disabled due to pneumoconiosis. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a 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); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). In addition, the regulations state that a subsequent claim is a claim filed more than one year after the effective date of a final order denying a claim previously filed by the claimant. The regulations provide that a subsequent claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(d).

In this case, the administrative law judge did not address whether the newly submitted evidence was sufficient to establish that one of the applicable conditions of entitlement had changed since the prior denial. Rather, the administrative law judge considered all of the evidence of record and found it insufficient to establish entitlement to benefits. However, in light of our affirmance of the administrative law judge's findings that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), *see* discussion, *infra*, we hold that the administrative law judge's failure to initially address whether the newly submitted

evidence was sufficient to establish that an applicable condition of entitlement has changed constitutes harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

The administrative law judge initially found that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Because this finding is not challenged on appeal, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). The administrative law judge also properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)¹ and (a)(3).² Decision and Order at 2.

Claimant argues that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Although Drs. Harrison and Hudson opined that claimant suffered from pneumoconiosis, Director's Exhibit 21; Claimant's Exhibit 1, Drs. Goldstein and Russakoff opined that the miner did not suffer from the disease.³ Director's Exhibit 22; Employer's Exhibit 1. The record also contains a state award for benefits. *See* Director's Exhibit 8.

The administrative law judge initially considered claimant's state award. The record contains a copy of a 1996 Judgment from an Alabama Circuit Court awarding claimant a

¹Because the record does not contain any biopsy evidence, claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2).

² Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, because the instant claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

³The record also contains a report from Dr. Westerman. Dr. Westerman examined claimant on May 21, 2001. In a report dated May 21, 2001, Dr. Westerman diagnosed coronary artery disease, cardiomegaly, obesity, sleep apnea, and possible chronic obstructive pulmonary disease. Director's Exhibit 12. Dr. Westerman attributed these conditions to claimant's elevated cholesterol and obesity. *Id.* Dr. Westerman also noted claimant's dyspnea was "most likely" a combination of cardiogenic factors (cardiomegaly and prominent pulmonary venous distention on x-ray), obesity (secondarily causing sleep apnea) and possible chronic obstructive pulmonary disease. *Id.* Dr. Westerman noted that there was no definite radiological evidence of "black lung" disease. *Id.*

50% permanent partial disability due to pneumoconiosis under the Alabama Worker's Compensation Act. Director's Exhibit 8. The Board has held that it is a matter within the administrative law judge's discretion to determine what weight to give a state workers' compensation board finding. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). In this case, the administrative law judge permissibly found that claimant's state award was insufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) because the record does not reveal the medical evidence upon which the award was based. Decision and Order at 3.

The administrative law judge also permissibly found that Dr. Harrison's notation of pneumoconiosis set out in a 1996 Progress Note was not sufficiently reasoned and was, therefore, insufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).⁴ *See Clark, supra; Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 3, 5. The administrative law judge also properly found that Dr. Harrison's 2001 report only indicates that claimant was pursuing "coal miner's benefits" and does not contain a diagnosis of pneumoconiosis.⁵ Decision and Order at 3; Director's Exhibit 21. The administrative law judge, therefore, properly found that the opinions of Dr. Harrison were insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. 718.202(a)(4).

The administrative law judge discredited Dr. Hudson's findings regarding the etiology of claimant's lung diseases because the doctor failed to address the effect of claimant's other health problems, most notably claimant's heart conditions.⁶ Decision and Order at 4-5; Claimant's Exhibit 1. The administrative law judge noted that all of the pulmonary specialists addressed the significance of claimant's heart problems.⁷ Decision

⁴In a Progress Note dated October 10, 1994, Dr. Harrison wrote the word "Pneumoconiosis" under the "Dictation" section of the report. *See* Director's Exhibit 21.

⁵In a report dated October 3, 2001, Dr. Harrison indicated that claimant sought a pulmonary function study "to try and help him qualify for coal miner's benefits." *Id.*

⁶In an undated report, Dr. Hudson indicated that the "Date of diagnosis of Pneumoconiosis" was March 6, 2001. Claimant's Exhibit 1. Dr. Hudson diagnosed chronic lung disease (chronic obstructive pulmonary disease), chronic acute bronchitis and chronic acute sinusitis. *Id.* Dr. Hudson attributed these conditions to the miner's coal dust exposure. *Id.*

⁷Dr. Goldstein reviewed the medical evidence. In a report dated December 21, 2001, Dr. Goldstein opined that claimant did not suffer from coal workers' pneumoconiosis. Director's Exhibit 22. Dr. Goldstein further opined that:

and Order at 5. The administrative law judge found that Dr. Hudson's failure to address the significance of claimant's cardiac problems detracted from the credibility of his opinion. *Id.* An administrative law judge may properly discredit the opinion of a physician that is based upon an inaccurate or incomplete picture of the miner's health. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984). Consequently, we hold that the administrative law judge properly discredited Dr. Hudson's opinion.

We reject claimant's argument that because Drs. Russakoff and Goldstein did not examine the miner,⁸ their opinions cannot be credited unless they are corroborated by the opinion of an examining physician. The Board has held that an administrative law judge cannot reject the report of a physician solely because the physician did not examine the miner.⁹ *See Worthington v. United States Steel Corp.*, 7 BLR 1-522 (1984). Because it is

[Claimant's] lung condition is not caused by coal dust. It is related to his history of smoking. He has obstructive airways disease. In addition, he has sleep apnea and congestive heart failure that add to his symptoms.

Director's Exhibit 22.

Dr. Russakoff reviewed the medical evidence. In a report dated September 3, 2002, Dr. Russakoff opined that claimant did not suffer from coal workers' pneumoconiosis or any other lung condition caused by coal dust inhalation. Employer's Exhibit 1. Dr. Russakoff opined that the miner's impaired lung function was attributable to his severe cardiac disease with congestive heart failure and fluid retention in the lungs. *Id.*

⁸We note that although Dr. Russakoff did not examine claimant before preparing his most recent 2002 medical report, the doctor conducted an earlier examination of claimant on July 5, 1994. *See* Director's Exhibit 25-6.

⁹Claimant appears to argue that employer failed to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(a). *See* Claimant's Brief at 5-6. However, because this case is properly considered pursuant to the permanent regulations at 20 C.F.R. Part 718, the 20 C.F.R. Part 727 regulations are not relevant. Consequently, claimant's reliance upon the decisions of the United States Court of Appeals for the Fourth Circuit in *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984) and *Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994) is misplaced. The Fourth Circuit's *Massey* and *Malcomb* decisions address whether a non-examining physician's opinion is sufficient to establish rebuttal of the Section 727.203 presumption. We note that the Fourth Circuit has held that an administrative law judge, in adjudicating Part 718 cases, may not discredit a physician's opinion solely because the physician did not

supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent, supra; Perry, supra.* Consequently, we need not address claimant's contentions regarding the administrative law judge's findings that the evidence is insufficient to establish total disability and total disability due to pneumoconiosis. *See Larioni, supra.*

examine the claimant. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Claimant's reliance upon *McClendon v. Drummond Coal Co.*, 861 F.2d 1512, 12 BLR 2-108 (11th Cir. 1988) and *Broughton v. Heckler*, 776 F.2d 960 (11th Cir. 1985) is similarly misplaced. In *McClendon*, the United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises, held that an administrative law judge could accord greater weight to the opinion of a miner's examining physician than to a physician who had only reviewed medical evidence. However, in *McClendon*, the Eleventh Circuit did not hold that an administrative law judge was required to reject the opinion of a non-examining physician unless it was corroborated by an examining physician. The Eleventh Circuit's *Broughton* decision does not address a claim for benefits under the Black Lung Act, but rather a claim for Social Security disability benefits.

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