BRB No. 04-0612 BLA

HAROLD J. ANDERSEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ENERGY FUELS MINING INCORPORATED	)	
	)	
	)	DATE ISSUED: 04/27/2005
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Stephen D. Harris, Colorado Springs, Colorado, for claimant.

W.C. Blanton (Blackwell Sanders Peper Martin LLP), Kansas City, Missouri, for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: DOLDER, Chief Administrative Appeals Judge, SMITH, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2003-BLA-00061) of Administrative Law Judge Jeffrey Tureck with respect to 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] The administrative law judge accepted employer's stipulation to forty years of coal mine employment and considered the claim pursuant to the regulations set forth in 20 C.F.R. Part 718. The administrative law judge determined that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied.

Claimant argues on appeal that the administrative law judge erred in failing to apply the presumption, set forth in 20 C.F.R. §718.203(b), to determine that claimant's chronic obstructive pulmonary disease (COPD) arose out of dust exposure in coal mine employment. Claimant also contends that the administrative law judge did not properly weigh the medical opinions relevant to Section 718.202(a)(4). Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has also responded and disputes claimant's

[1] Claimant filed an application for benefits on May 3, 1983, but later withdrew this claim. Director's Exhibit 32. Claimant filed another application for benefits on March 26, 1991. Director's Exhibit 1. In a Decision and Order issued on October 21, 1993, Administrative Law Judge Samuel J. Smith awarded benefits. Director's Exhibit 52. Upon consideration of employer's appeal, the Board vacated Judge Smith's Decision and Order and remanded the case to him for reconsideration pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204. *Andersen v. Energy Fuels Mining Inc.*, BRB No. 94-0415 BLA (Jan. 30, 1995)(unpub.); Director's Exhibit 67. At the request of the Director, Office of Workers' Compensation Programs, Judge Smith remanded the case to the district director for a complete pulmonary evaluation. Director's Exhibit 74. After Dr. James submitted his medical report, Judge Smith remanded the case once again so that the district director could ask Dr. James to clarify his opinion regarding the cause of claimant's chronic obstructive pulmonary disease and hypoxemia. Director's Exhibit 100. Due to Judge Smith's unavailability, this case was eventually assigned to Administrative Law Judge Jeffrey Tureck who issued the Decision and Order that is the subject of the present appeal.

allegation that the administrative law judge should have applied the Section 718.203(b) presumption in this case.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 (2001); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant initially argues on appeal that the administrative law judge was required to shift the burden of proof regarding whether claimant's pulmonary condition was related to coal dust exposure to employer by applying Section 718.203(b) once claimant was credited with more than ten years of coal mine employment and the administrative law judge found that claimant has COPD. In support of his position, claimant cites the Board's decision in *Price v. Coal Power Corp.*, BRB No. 03-0344 BLA (Mar. 29, 2004)(unpub.). Employer and the Director both assert in response that the administrative law judge acted appropriately in placing the burden of proof upon claimant to prove that his COPD arose out of his coal mine employment under Section 718.202(a)(4).

After consideration of the administrative law judge's findings and the arguments raised by the parties, we reject claimant's allegation of error. By its terms, Section 718.203(b) becomes operative only when a claimant has been credited with at least ten years of coal mine employment and has established the existence of pneumoconiosis. Under 20 C.F.R. §718.201(a), pneumoconiosis is defined as "a chronic dust disease of the lung and its sequelae, including respiratory or pulmonary impairments arising out of coal mine employment." Section 718.201(a) further distinguishes between "clinical" and "legal" pneumoconiosis. Pursuant to Section 718.201(a)(1), clinical pneumoconiosis "consists of those diseases recognized by the medical community as pneumoconioses." In contrast, Section 718.201(a)(2) defines legal pneumoconiosis more generally as

[2] The administrative law judge's findings under §718.202(a)(1)-(3) are affirmed, as they are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

"including any chronic lung disease or impairment and its sequelae arising out of coal mine employment…[and] any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." Under Sections 718.201(a)(2) and 718.202(a), proving the mere existence of a respiratory or pulmonary impairment does not establish the presence of "pneumoconiosis" unless the claimant also proves that the impairment arose out of coal mine employment. Thus, in order to access Section 718.203(b), a claimant must conclusively establish the causal link between dust exposure in coal mine employment and the diagnosed lung disease or impairment under Section 718.202(a). *See Wilt v. Wolverine Mining Co.*, 14 BLR 1-70, 1-76 (1990); *see also Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5-1-7 (1999)(*en banc*).

Contrary to claimant's argument, the Board's decision in *Price* is consistent with this holding. In *Price*, the Board vacated the administrative law judge's finding under Section 718.202(a)(4) and remanded the case to the administrative law judge so that he could reconsider whether the claimant established that the lung diseases diagnosed by the physicians of record were related to dust exposure in coal mine employment. In so doing, the Board specifically indicated that the claimant was required to prove that his lung conditions were related to coal dust exposure under Section 718.202(a)(4) in order for the presumption set forth in Section 718.203(b) to apply. *Price v. Coal Power Corp.*, BRB No. 03-0344 BLA (Mar. 29, 2004)(unpub.), slip op. at 5-7.

Because claimant has not raised any meritorious allegations of error regarding this issue, we decline to remand this case to the administrative law judge for application of the presumption set forth in Section 718.203(b).

We will now turn to claimant's arguments concerning the administrative law judge's weighing of the medical opinions under Section 718.202(a)(4). Claimant alleges that the administrative law judge erred in discrediting the opinions in which Drs James, Simpson, Schwartz, Simpson, and Coultas indicated that claimant's COPD is related to dust exposure in coal mine employment. This contention is without merit.

Dr. James examined claimant on July 7, 1995. In his initial report of this examination, Dr. James diagnosed COPD, chronic productive cough, airflow obstruction, and arterial hypoxemia with exercise. He indicated that the "most likely cause" of the COPD was claimant's forty-three pack year history of smoking. Dr. James noted that claimant's exposure to coal dust over a period of forty years "may" be a contributing factor, but concluded that "given the weight of the evidence and the intermittent nature of the dust exposure…cigarette smoking is more likely the major contributing factor." Director's Exhibit 80. In a subsequent opinion, submitted in response to Judge's Smith remand order seeking clarification, Dr. James stated that "claimant's inhalation of coal mine dust as a coal miner was a contributing cause of his COPD…[i]n a susceptible individual, even mild to moderate coal mine dust can result in respiratory disease."

Director's Exhibit 110. Dr. James cited studies that supported his position and further indicated that claimant's disease met the definition of pneumoconiosis set forth in Section 718.201. *Id.* Dr. James also stated, however, that "it is clinically not possible to differentiate the contributing cause of exposure to coal mine dust and cigarette smoke." *Id*.

Dr. James subsequently reiterated his opinion in a letter to claimant's counsel, citing medical journal and textbook sources in support of his opinion that coal dust exposure was a contributing cause of claimant's COPD. Claimant's Exhibit 1. Finally, at a deposition, Dr. James indicated that if a person is exposed to coal dust and smoking, COPD can be attributed to one factor, both factors, or neither factor. Employer's Exhibit 47 at 28-29. Dr. James also stated that claimant had significant exposure to coal mine dust which increased his risk of developing COPD and that one identifies the causes of an illness by identifying exposures that are known to lead to the development of a particular disease. *Id*. at 66, 94.

The administrative law judge reviewed Dr. James's opinion in detail and acted within his discretion in discrediting it on the ground that Dr. James gave inconsistent statements as to whether a physician can ascertain the causes of COPD in a miner who smoked *and* did not identify the specific evidence in this case that supported his determination that coal dust exposure played a role in claimant's COPD. Decision and Order at 5, 8; s*ee Cooper v. Director, OWCP*, 11 BLR 1-95 (1988); *see also Mangus v. Director, OWCP*, 882 F.2d 152, 13 BLR 2-9 (10th Cir. 1989).

Dr. Simpson examined claimant at the request of the Department of Labor on April 12, 1991. He diagnosed resting hypoxemia which caused a severe impairment. Dr. Simpson stated that the etiology of the hypoxemia was unclear. Director's Exhibit 13. In a letter written in response to an inquiry from a claims examiner, Dr. Simpson indicated that "it is difficult to sort out whether forty years of coal dust exposure or a thirty pack year cigarette history is responsible for this." Director's Exhibit 12. Dr. Simpson concluded, however, that based upon the definition of legal pneumoconiosis, claimant had pneumoconiosis. *Id.* The administrative law judge rationally determined that Dr. Simpson's diagnosis of legal pneumoconiosis is entitled to little weight because the doctor did not explain how he reached this conclusion with respect to the claimant in this case. Decision and Order at 4; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

With respect to the opinion of Dr. Schwartz, the administrative law judge permissibly gave little weight to his diagnosis of COPD caused by smoking due to his failure to accept as fact that coal dust exposure can cause COPD. Decision and Order at 8; Director's Exhibit 122; *see Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004); *Freeman United Coal Mining Co. v. Summers*, 272

F.3d 473, 483 n.7, 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001); *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718, 18 BLR 2-16, 2-25 (4th Cir. 1993). Claimant's argument, that the administrative law judge should have treated Dr. Schwartz's opinion as supportive of a finding that coal mine dust contributed to his COPD because Dr. Schwartz declined to rule out coal dust exposure as a possible causal factor, is without merit, as Dr. Schwartz did not opine that coal dust exposure was actually a contributing factor in this case. *Fields*, 10 BLR 1-19; *Fuller*, 6 BLR 1-1291.

Regarding the opinion in which Dr. Coultas agreed with Dr. James's statement that coal dust exposure is a contributing cause of claimant's COPD, the ALJ acted within his discretion in finding that it was insufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), as Dr. Coultas set forth his conclusion without providing the underlying rationale. Decision and Order at 7; Director's Exhibit 125; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*), *aff'd sub nom. Director, OWCP v. Cargo Mining Co.*, Nos. 88-3531, 88-3578 (6th Cir. May 11, 1989)(unpub.).

In light of the administrative law judge's appropriate weighing of the relevant medical opinions, we affirm his finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). We must affirm, therefore, the administrative law judge's finding that claimant did not prove that he is suffering from pneumoconiosis under Section 718.202(a), an essential element of entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2.

Accordingly, the Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge