BRB No. 09-0597 BLA

HARRY SIZEMORE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
and	)	
	)	
PEABODY INVESTMENTS, INCORPORATED	)	DATE ISSUED: 04/30/2010
	)	
Employer/Carrier-Respondents	)	
	)	
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Juliet Rundle & Associates), Pineville, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (2007-BLA-5211) of Administrative Law Judge Thomas M. Burke rendered on a request for modification of

the denial of a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[2] The administrative law judge credited claimant with 17.2 years of coal mine employment, based upon the parties' stipulation, and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge determined that the newly submitted evidence of record established total pulmonary disability pursuant to 20 C.F.R. §718.204(b)(2) and a change in one of the applicable conditions of entitlement since the denial of the prior claim pursuant to 20 C.F.R. §725.309(d). The administrative law judge further found, however, that claimant did not establish the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied.

[1] Claimant filed a claim for benefits on July 21, 1986. Director's Exhibit 1. Administrative Law Judge Richard E. Huddleston denied benefits on April 14, 1989, on the ground that claimant failed to establish any element of entitlement. *Id.* Claimant appealed, but the Board dismissed the appeal as abandoned. *Sizemore v. Eastern Associated Coal Corp.*, BRB No. 89-1687 BLA (Oct. 31, 1989)(Order)(unpub.). Claimant filed a duplicate claim on February 19, 1991, that Administrative Law Judge Frederick D. Neusner denied on June 22, 1995 because claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). Director's Exhibit 2. Claimant took no action until he filed this subsequent claim on June 16, 2004. Director's Exhibit 4, 5. In a Proposed Decision and Order dated April 12, 2005, the district director denied benefits, as claimant failed to establish a change in an applicable condition of entitlement pursuant to the amended version of 20 C.F.R. §725.309, which became effective on January 19, 2001. Director's Exhibit 26. On May 8, 2006, claimant requested modification pursuant to 20 C.F.R. §725.310. Director's Exhibit 31. In response to employer's assertion that claimant's petition for modification should be denied as untimely, the district director issued an Order determining, pursuant to 20 C.F.R. §725.419, that the Proposed Decision and Order dated April 12, 2005, did not become final until May 12, 2005, thereby rendering claimant's request for modification on May 8, 2006, timely. The district director subsequently issued a Proposed Decision and Order Denying Request for Modification and, upon claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibits 35, 38. Thereafter, Administrative Law Judge Thomas M. Burke (the administrative law judge) issued the Decision and Order – Denying Benefits, which is the subject of this appeal.

[2] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as all of the claims were filed before January 1, 2005. Director's Exhibits 1, 2, 5.

On appeal, claimant argues that the administrative law judge erred in relying on negative x-ray evidence to discredit Dr. Rasmussen's opinion, that claimant's obstructive impairment is related, in part, to coal dust exposure, under Section 718.202(a)(4). Claimant also contends that, in light of their reliance on negative x-ray evidence, the administrative law judge erred in according greater weight to the contrary opinions of Drs. Zaldivar and Crisalli. In response, employer urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[3]

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.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and 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; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*)

Pursuant to Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Rasmussen, Zaldivar and Crisalli. Dr. Rasmussen examined claimant on

[3] We affirm, as unchallenged by the parties on appeal, the administrative law judge's determination to accept the parties' stipulation to 17.2 years of coal mine employment and his findings that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), but proved that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2) and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). With respect to the administrative law judge's determination that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309, we note that this finding subsumes a determination that claimant established a change in conditions under 20 C.F.R. §725.310.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Hearing Transcript at 10; Director's Exhibit 2.

September 23, 2004, at the request of the Department of Labor. Dr. Rasmussen determined that claimant's x-ray was negative for pneumoconiosis and diagnosed a totally disabling pulmonary impairment to which coal dust exposure was a significant contributor. Director's Exhibit 14. Dr. Zaldivar examined claimant on December 29, 2004 and reviewed claimant's medical records. Dr. Zaldivar determined that there was no x-ray evidence of pneumoconiosis and that claimant is suffering from severe emphysema caused by smoking. Director's Exhibit 15; Employer's Exhibit 8. Dr. Crisalli examined claimant on April 2, 2007 and diagnosed chronic obstructive pulmonary disease caused by smoking. Employer's Exhibits 7, 11. Dr. Crisalli indicated that the radiological evidence was negative for pneumoconiosis. *Id*.

The administrative law judge found that Dr. Rasmussen's opinion was insufficient to establish the existence of legal pneumoconiosis, as the physician did not "provide any reasoning to support his opinion[,] other than a reference to medical articles purporting to say that coal mine dust and cigarette smoking caused similar lung tissue destruction, and that coal mine dust exposure causes impairment in lung function even absent x-ray changes of pneumoconiosis."[5] Decision and Order at 9. In contrast, the administrative law judge credited the opinions of Drs. Zaldivar and Crisalli as well-documented, well-reasoned and well-explained. *Id*. Based upon this weighing of the evidence, the administrative law judge concluded that claimant did not establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). *Id*.

Claimant argues that the administrative law judge erred in discrediting Dr. Rasmussen's diagnosis of legal pneumoconiosis. This contention is without merit. The administrative law judge acted within his discretion in finding that Dr. Rasmussen's opinion was insufficient to establish the existence of legal pneumoconiosis, as Dr. Rasmussen relied upon a general reference to medical literature, rather than claimant's specific condition, and did not provide any other reasoning in support of his identification of coal dust exposure as a significant contributing cause of claimant's pulmonary impairment. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-176 (4th Cir. 2000); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); Decision and Order at 9. Because claimant has not raised a meritorious allegation of error regarding the administrative law judge's discrediting of Dr. Rasmussen's opinion, the only medical opinion considered by the administrative law judge that was supportive of claimant's burden, we affirm his

[5] Under the terms of 20 C.F.R. §718.201(a)(2), legal pneumoconiosis is defined as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

determination that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).[6] *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

In light of our affirmance of the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), an essential element of entitlement, we must also affirm the denial of benefits. *See Akers*, 131 F.3d at 441, 21 BLR at 2-275; *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.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

[6] Based upon this holding, we need not address claimant's argument that the administrative law judge erred in crediting the opinions in which Drs. Zaldivar and Crisalli ruled out any causal connection between coal dust exposure and claimant's pulmonary impairment. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).