BRB No. 00-0375 BLA

LAWRENCE J. RAY Claimant-Petitioner v. BRUSHY CREEK TRUCKING COMPANY, INC. and THE TRAVELERS INSURANCE COMPANY 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 - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Thomas P. Marnell (Edward J. Malek & Associates), Chicago, Illinios, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (99-BLA-0533) of Administrative Law Judge Robert L. Hillyard on a duplicate 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 administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c), and therefore, was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings with respect to claimant's years of qualifying coal mine employment. Claimant challenges the administrative law judge's determination not to credit six years of employment for Mid-America Transportation Company on the basis that claimant did not qualify as a miner during this employment. Claimant also challenges the administrative law judge's finding that the newly submitted medical opinion evidence fails to establish the existence of pneumoconiosis at Section 718.202(a)(4) and total respiratory disability due to pneumoconiosis pursuant to Section 718.204(b), (c). Employer, in response, urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a response brief in the instant appeal

The Board's scope of review is defined by statute. 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[1]Claimant is Lawrence J. Ray, the miner, who filed two claims with the Department of Labor (DOL). The first, filed on November 7, 1988 was denied on April 26, 1989, on the basis that claimant did not establish that he was totally disabled by pneumoconiosis caused at least in part by coal mine employment. Director's Exhibit 22. Claimant took no further action on this claim and the denial became final. Claimant then filed a duplicate claim on August 5, 1994. Director's Exhibit 1. This claim was informally denied on July 14, 1995, Director's Exhibit 19, and claimant then requested a hearing. Administrative Law Judge Rudolf J. Jansen issued an Order dated November 26, 1996, Director's Exhibit 25, remanding the case to the district director for a responsible operator determination. Ultimately, the district director named the instant respondent, Brushy Creek Trucking Company, Inc., as the responsible operator. The claim was then forwarded to the Office of Administrative Law Judges for a hearing.

In order to establish entitlement to benefits in a living miner's claim under 20 C.F.R. Part 718, claimant must establish that the miner has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. Failure to prove any of these requisite elements of entitlement compels a denial of benefits. *See* 20 C.F.R. §§718.3, 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*).

Claimant initially challenges the administrative law judge's determination that his six years of employment with Mid-America Transportation Company did not qualify as coal mine employment because claimant was not a miner within the meaning of the Act during that time. Claimant asserts that he was a transportation worker, hauling unprocessed coal on barges to facilities which would then process it further. Claimant stated that while employed at Mid-America Transportation Company (Mid-America) he was a deck hand on a river barge and his duties included picking up coal in St. Louis. Claimant also stated that the coal had been crushed, but had not been washed or had debris removed from it. Director's Exhibit 24; Claimant's Exhibit 1. Notwithstanding claimant's contentions on appeal, the administrative law judge permissibly relied upon claimant's affidavit and the Employment and Smoking History addendum to Dr. Krantz' initial medical report, *see* Claimant's Exhibit 1; Director's Exhibit 24, to find that claimant's work with Mid-America took place on a barge that transported *processed* coal from the processing plants to power companies. Decision and Order at 7. (Emphasis added). The administrative law judge thus found that claimant's employment for Mid-America was not coal mine employment within the meaning of the Act, as claimant's work was ancillary to the delivery and commercial use of processed coal. The record contains no evidence that once the coal was loaded onto the barge, it was further processed, *i.e.* washed or the debris removed, by anyone other than the ultimate consumers, the power companies. Hauling coal that is already "in condition for delivery to distributors and consumers" is not the work of a miner within the scope of the Act. *See Southard v. Director, OWCP*, 732 F. 2d 66, 6 BLR 2-26 (6th Cir. 1984); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Foster v. Director, OWCP*, 8 BLR 1-188 (1985); *Luther v. Director, OWCP*, 8 BLR 1-42 (1985); *Straight v. U. S. Steel Corp.*, 8 BLR 1-14 (1985). We affirm, therefore, the administrative law judge's finding that claimant's six years of employment with Mid-America did not constitute qualifying coal mine employment within the meaning of the Act, and thus that claimant established seven and one-half years of coal mine employment, as it is supported by substantial evidence, and in accordance with applicable law.

We next address claimant's argument that the administrative law judge erred in finding that the newly submitted evidence fails to establish total disability due to pneumoconiosis at Section 718.204(b). Claimant asserts that the administrative law judge erred by discounting the opinion of Dr. Krantz on the basis that her opinion "lacked confidence." We disagree. The administrative law judge correctly found that Dr. Krantz opined that "it is *probable* that [the miner's] coal dust exposure ...contributed substantially to his pulmonary abnormality". Claimant's Exhibit 2. (Emphasis added). He also correctly

found that she stated that the restrictive pattern on pulmonary function testing is *most likely* due to coal workers' pneumoconiosis, and that the pneumoconiosis *probably* renders claimant unable to perform the kinds of work required by his usual coal mine job. Director's Exhibit 24 (Emphasis added); *see* Decision and Order at 10. Thus, we hold that the administrative law judge, within his discretion, discounted Dr. Krantz' opinion on the basis that it was equivocal. *See Justice v. Island Creek Coal Co.*, 11 BLR 1- 91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Snorton v. Ziegler Coal Co.*, 9 BLR 1-106 (1986).

Claimant also challenges the administrative law judge's determination to discount Dr. Rubin's opinion at Section 718.204(b). The administrative law judge, however, permissibly gave Dr. Rubin's opinion less weight because she relied upon an erroneous coal mine employment history. *See McMath v. Director, OWCP,* 12 BLR 1-6 (1988); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Long v. Director, OWCP,* 7 BLR 1-254 (1984). In addition, the administrative law judge found that Dr. Rubin relied upon a 25 pack-year smoking history when the Coal Mine Employment History addendum to the report, upon which the administrative law judge relied, *see* Decision and Order at 4, referred to a 150 pack-year history, Director's Exhibit 7; Decision and Order at 15. An administrative law judge may discount opinions that he finds are based upon an erroneous smoking history. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52(1988); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984). Thus, we affirm the administrative law judge's treatment of Dr. Rubin's discussion. In light of the foregoing, we affirm the administrative law judge's findings that the newly submitted evidence fails to establish total respiratory disability due to pneumoconiosis at Section 718.204(b). Inasmuch as the previous record contains no evidence supportive of a finding that claimant's total disability was due to pneumoconiosis, we hold that claimant has failed to establish total disability due to pneumoconiosis at Section 718.204(b). Thus, entitlement pursuant to the Part 718 regulations is precluded. *See Trent , supra; Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the Decision and Order - Denial of Benefits of the administrative law

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[2]In light of the foregoing, we need not address claimant's other arguments regarding the administrative law judge's treatment of Dr. Krantz' opinion as any error contained therein would be harmless. *Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984).

[3]Dr. Rubin relied upon a history of 17 years of coal mine employment, Director's Exhibit 7, while the administrative law judge concluded that claimant had seven and one-half years of qualifying coal mine employment. Decision and Order at 7.

[4] It is unnecessary to address claimant's contentions pursuant to 20 C.F.R §§ 718.202(a) and 718.204(c) in light of our holding that entitlement is precluded under the regulations at 20 C.F.R. Part 718. *See Cochran v. Director, OWCP*, 16 BLR 1-101 (1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

judge is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting
Administrative Appeals Judge