

BRB No. 06-0535 BLA

LON T. GARNER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 12/29/2006
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order—Denying Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Lon T. Garner, Whitwell, Tennessee, *pro se*.<sup>1</sup>

Emily Goldberg-Kraft (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order—Denying Benefits (04-BLA-6766) of Administrative Law Judge Edward Terhune Miller rendered on a subsequent 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). The instant subsequent claim is governed by the regulations that took effect on January 19, 2001 as it

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<sup>1</sup> Ron Carson, the program director of Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

was filed on August 29, 2003. Decision and Order at 2; Director's Exhibit 5. After crediting claimant with at least seventeen years of coal mine employment, 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)(1)-(4), pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), the three elements of entitlement previously adjudicated against claimant. Accordingly, the administrative law judge found that claimant did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and denied benefits. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's denial of benefits.

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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *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 by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We first address the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish disability causation pursuant to 20 C.F.R. §718.204(c), and thus is insufficient to establish a change in this applicable condition of entitlement pursuant to Section 725.309. Assuming, *arguendo*, that claimant established the existence of pneumoconiosis, the administrative law judge found the newly submitted medical opinion evidence did not establish that pneumoconiosis was a substantially contributing cause of claimant's disability.<sup>2</sup> Decision and Order at 9. The newly submitted medical opinions of record consist of the opinions of Drs. Enjeti and Douglas. Dr. Enjeti stated that claimant's moderately severe COPD was due to smoking. Director's Exhibit 10. Dr. Douglas related claimant's underlying lung disease to smoking, coal dust exposure, or both, but did not address the cause of claimant's total disability. Claimant's Exhibit 1. In his response brief, the Director asserts that the administrative law judge properly found no disability causation as none of the newly submitted medical opinion evidence addresses the causal relationship between claimant's disability and his coal mine employment. Director's Brief at 5.

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<sup>2</sup> The administrative law judge initially found that claimant did not establish disability causation at 20 C.F.R. §718.204(c) because he did not establish the existence of pneumoconiosis. Decision and Order at 9.

Upon review of the newly submitted medical opinions of Drs. Enjeti and Douglas, we affirm the administrative law judge's finding pursuant to Section 718.204(c). Dr. Enjeti's opinion, that claimant has moderately severe COPD due to smoking, does not relate claimant's disability to coal mine employment and is therefore insufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(c). *See Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6<sup>th</sup> Cir. 2001)(disability causation is established under Section 718.204(c) where pneumoconiosis is a substantially contributing cause of claimant's totally disabling pulmonary impairment); Decision and Order at 9; Director's Exhibit 10. Moreover, Dr. Douglas's opinion that claimant's underlying lung disease is due to smoking, coal dust exposure, or both, is not probative of the issue of disability causation because it does not address the cause of claimant's total disability. *See Kirk, supra*; Decision and Order at 9; Claimant's Exhibit 1. Therefore, the administrative law judge's finding that claimant did not establish disability causation pursuant to 20 C.F.R. §718.204(c), based on the newly submitted evidence, is affirmed. Moreover, inasmuch as disability causation pursuant to Section 718.204(c) was not established in the prior claim,<sup>3</sup> Director's Exhibit 3, and claimant did not further pursue that claim, we hold that a finding of disability causation pursuant to Section 718.204(c) on the merits is precluded, based on all the evidence of record. Therefore, the administrative law judge properly denied the claim. *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6<sup>th</sup> Cir. 1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

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

SO ORDERED.

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<sup>3</sup> Claimant's prior claim was denied on February 29, 2000, by the district director because the evidence did not establish the existence of pneumoconiosis arising out of coal mine employment and that claimant was totally disabled due to pneumoconiosis. Director's Exhibit 3. Apparently, the district director found that claimant established total disability based on a qualifying pulmonary function study dated January 6, 2000, but noted that the evidence failed to show that claimant's breathing impairment was due to pneumoconiosis.

NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge