BRB No. 06-0565 BLA

STEPHEN E. HOKE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CARBON ENERGY COPORATION	)	DATE ISSUED: 02/09/2007
	)	
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 Denying Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Stephen E. Hoke, White Sulphur Spring, West Virginia, *pro se*.[1]

Monica Taylor Monday (Gentry Locke Rakes & Moore LLP), Roanoke, Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (05-BLA-6197) of Administrative Law Judge Linda S. Chapman rendered on 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). Claimant

[1] Jerry Murphree, of Stone Mountain Health Services, requests, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

filed this subsequent claim on June 14, 2004.[2] Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant established eight and one-quarter years of coal mine employment, and found that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), which, in turn, established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). Turning to the merits, the administrative law judge found that while the evidence of record established that claimant had pneumoconiosis which arose out of his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(a), and that claimant suffered from a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), it failed to establish that claimant's total disability was due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the Decision and Order. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grills Associates, Inc.*, 380 U.S. 359 (1965).

[2] The miner filed his first claim for benefits on August 26, 1993. That claim was denied by the district director on July 26, 1994, because claimant failed to establish any required element of entitlement. Director's Exhibit 1. Claimant requested a formal hearing but, on August 5, 1994, the administrative law judge remanded the claim to the district director to reconsider the issue of the appropriate responsible operator potentially liable for payment of this claim. On August 30, 1996, the district director requested further information from claimant regarding his claim, but claimant never responded to this request. Director's Exhibit 1. Claimant filed a second claim for benefits on December 31, 1996, which was denied on July 15, 1998, by Administrative Law Judge Edward J. Murty, Jr., who found that claimant established less than five years of coal mine employment and did not establish the existence of pneumoconiosis or total respiratory disability. Director's Exhibit 2. Claimant took no further action on this claim until filing the present, subsequent claim.

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Turning first to the administrative law judge's consideration of the evidence relevant to the number of years that claimant worked as a coal miner, the administrative law judge found that claimant established eight and one-quarter years of coal mine employment, rather than the forty-five years alleged. Decision and Order at 4-5. Noting the varying coal mine employment histories that claimant provided to physicians, claimant's hearing testimony, claimant's work history forms, and claimant's Social Security Administration (SSA) records, the administrative law judge found that the evidence failed to establish more than eight and one-quarter years of coal mine employment. The administrative law judge noted that, in particular, claimant was unable to provide the names of many of the mines where he had been employed or the dates of that employment. Thus, the administrative law judge concluded that because claimant could not identify all of the mines he had worked in or the dates he had worked, or otherwise provide information upon which the administrative law judge could calculate the length of such work, the only reliable information regarding claimant's coal mine employment was contained in SSA records and the records of employer, Carbon Energy Corporation, which established eight and one-quarter years of coal mine employment. Decision and Order at 4-5; Hearing Testimony at 18-22; Employer's Exhibits 8, 9; Director's Exhibits 1, 2, 6, 16, 22, 27, 43. Accordingly, the administrative law judge found that claimant established only eight and one-quarter years of coal mine employment. This was proper. *See Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988)(*en banc*); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Clayton v. Pyro Mining Co.*, 7 BLR 1-551 (1984); *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984); *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984).

Regarding the medical opinion evidence relevant to disability causation at Section 718.204(c), the administrative law judge permissibly found that Dr. Rasmussen's opinion, that coal mine dust exposure was a material contributing factor in claimant's disabling lung disease, was not entitled to determinative weight because it was heavily dependent on Dr. Rasmussen's finding that claimant had twenty-five years of coal dust exposure, far in excess of the eight and one-quarter years found by the administrative law judge. Decision and Order at 12-13; Director's Exhibit 16; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Hunt*, 7 BLR 1-709; *Long v. Director, OWCP*, 7 BLR 1-254 (1984). Additionally, the administrative law judge rationally found that the opinions of Drs. Fino

and Dahhan could not establish the element of causation as they attributed claimant's total respiratory disability to cigarette smoking, not coal dust exposure. Decision and Order at 13; Employer's Exhibits 8, 9; *see* 20 C.F.R. §718.204(c); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S.267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Further the administrative law judge acted within his discretion in finding that the opinions of Drs. Forehand and Paranthaman did not establish disability causation because Dr. Forehand did not diagnose the presence of a totally disabling respiratory impairment and Dr. Paranthaman concluded that a diagnosis of pneumoconiosis would be justified only if a history of twenty-one years of coal mine employment had been documented. Decision and Order at 13; Director's Exhibits 1, 2; *see Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-373 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Thus, on considering all of this evidence, the administrative law judge properly concluded that claimant failed to establish disability causation. *See* 20 C.F.R. §718.204(c); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004) (Decision and Order on Recon.)(*en banc*); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003).[3] We, therefore, affirm the administrative law judge's finding that the evidence is insufficient to establish disability causation, an essential element of entitlement and we must, therefore, affirm the denial of benefits. *See Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

[3] Although the administrative law judge did not discuss the previously submitted report of Dr. Michos in considering whether disability causation was established, this error is harmless as Dr. Michos did not diagnose either the existence of pneumoconiosis or a total respiratory disability, and attributed claimant's dyspnea and chronic bronchitis "in all likelihood" to his thirty-two pack year history of smoking. Director's Exhibit at 16; *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge