BRB No. 06-0652 BLA

GEORGE W. FORD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	DATE ISSUED: 02/28/2007
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

George W. Ford, Stanaford, West Virginia, *pro se*.

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

Before: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order - Denying Benefits (04-BLA-6719) of Administrative Law Judge Daniel L. Leland 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] Claimant is the miner, who died on November 30, 2004. Claimant's son is pursuing this claim on behalf of claimant's estate.

filed this subsequent claim for benefits on June 24, 2003.[2] Director's Exhibit 3. In response to the district director's initial finding of entitlement, employer requested a hearing, which was scheduled for October 27, 2005. Director's Exhibits 28, 34. When the hearing convened, employer's counsel informed the administrative law judge that claimant was deceased. Hearing Transcript at 5. The administrative law judge issued an Order to Show Cause instructing claimant's surviving spouse to notify the administrative law judge by November 7, 2005 if she requested a hearing. The administrative law judge informed claimant's surviving spouse that failure to request a hearing would result in a decision based on the evidence currently in the file. No response was received.

In his Decision and Order, the administrative law judge credited the miner with thirty-four years of coal mine employment. Decision and Order at 3; Director's Exhibit 5. The administrative law judge determined that the newly submitted medical evidence was sufficient to establish that claimant suffered from a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(b), thereby demonstrating a change in one of the applicable conditions of entitlement since the denial of the prior claim. 20 C.F.R. §725.309(d); Decision and Order at 6. The administrative law judge then considered the claim on the merits, finding that the weight of the medical evidence established the presence of clinical pneumoconiosis. *Id*. The administrative law judge also found that the evidence demonstrated that claimant was totally disabled from a pulmonary standpoint. *Id.* However, after reviewing the medical evidence of record, the administrative law judge concluded that claimant's pneumoconiosis was not a substantially contributing cause of his totally disabling impairment and, therefore, he was not totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id*. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find that pneumoconiosis was a substantially contributing cause of claimant's totally disabling pulmonary impairment.[3] Employer responds, urging affirmance of the denial of

[2] Claimant's initial application for benefits was filed on June 15, 1981, and was denied in a Decision and Order issued on December 4, 1990 by Administrative Law Judge Nicodemio DeGregorio. Judge DeGregorio found that the evidence did not establish that claimant had a totally disabling respiratory or pulmonary impairment. Decision and Order at 1-2; Director's Exhibit 1.

[3] When filing the appeal, claimant's estate included new documents in support of the claim. Because the Board lacks jurisdiction to reopen the record and review evidence not presented to the administrative law judge, evidence submitted by claimant's estate with this appeal will not be considered and will be returned. 20 C.F.R. §§801.102, 802.301. However, if claimant's estate considers this evidence necessary to the proper adjudication of the claim for benefits, it may, within one year of the final denial of this

benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response to claimant's appeal.[4]

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. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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).

To be entitled to benefits under the Act, claimant must demonstrate, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

The evidence relevant to the issue of whether claimant was totally disabled due to pneumoconiosis under Section 718.204(c) consists of the reports of Drs. Tuteur, Caffrey, Zaldivar, Porterfield, and Rasmussen. Director's Exhibits 3, 12; Employer's Exhibits 9-14. Dr. Tuteur reviewed medical opinions and objective evidence spanning from 1982 through 2004 and concluded that claimant did not have pneumoconiosis of sufficient severity to cause or contribute to a totally disabling pulmonary impairment. Employer's Exhibits 9, 12. Based upon his review of the medical evidence from 1987 through 2004, and tissue slides taken during claimant's lobectomy in 2003, Dr. Caffrey opined that claimant's pneumoconiosis was too minimal to have had any impact on claimant's lung function. Employer's Exhibits 10, 12. Dr. Caffrey attributed the qualifying results of the August 7, 2003 pulmonary function study to the lobectomy performed on claimant earlier that year. *Id*; Director's Exhibit 14 Dr. Zaldivar reviewed the medical opinions and objective evidence of record and stated that claimant's pneumoconiosis did not affect his

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claim, file a request for modification before the district director and submit any pertinent evidence it has in support of that request. 20 C.F.R. §§802.301(c), 725.310 (2000); *see Berka v. North American Coal Corp.*, 8 BLR 1-183 (1985).

[4]We affirm the administrative law judge's findings under 20 C.F.R. §§718.202(a), 718.204(b), and 725.309(d), as they are not adverse to claimant and are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

pulmonary condition, instead attributing claimant's impaired lung function to claimant's March 2003 lobectomy. Employer's Exhibits 11, 12. Both Drs. Tuteur and Zaldivar explained that claimant's normal blood gas studies following his lung surgery corroborated their opinion that claimant's pulmonary impairment was caused by the lobectomy. Employer's Exhibits 13 at 13-14, 14 at 18-19.

Dr. Porterfield examined claimant on August 7, 2003 and obtained an x-ray, pulmonary function study, and blood gas study. Director's Exhibit 12. Dr. Porterfield indicated that claimant had a twenty percent impairment of his pulmonary capacity that was sufficient to render him totally disabled. Dr. Porterfield stated that forty percent of claimant's pulmonary impairment was due to coal dust exposure. *Id*. Dr. Rasmussen examined claimant in conjunction with the prior claim and also prepared several consultative reports. Director's Exhibit 3. Dr. Rasmussen concluded that in 1989, claimant became totally disabled due to occupational dust exposure. *Id*.

The administrative law judge reviewed this evidence and rationally determined that the opinions of Drs. Tuteur, Caffrey, and Zaldivar are well-reasoned and well-documented because their conclusion, that claimant did not become totally disabled until after his surgery for lung cancer in 2003, is consistent with the pulmonary function study evidence of record and the pathological evidence examined by Dr. Caffrey.[5] Decision and Order at 4-6; Director's Exhibits 1, 14; Employer's Exhibits 2, 3; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).[6] The administrative law judge also acted within his discretion as fact-finder in rejecting the opinions of Drs. Porterfield and Rasmussen on the issue of disability causation because they did not explain how their conclusions were supported by the objective evidence of record. Decision and Order at 6; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126

[5] The pulmonary function studies, dated January 28, 1982, August 26, 1987, and April 4, 1988, produced non-qualifying results pursuant to Part 718 Appendix B. Decision and Order at 3, 5. Claimant's lung surgery was performed in March of 2003. The pulmonary function studies dated August 7, 2003, December 15, 2003, and August 11, 2004, were qualifying. Director's Exhibit 14; Employer's Exhibits 2, 3. In examining the tissue slides taken during claimant's lobectomy, Dr. Caffrey determined that claimant's pneumoconiosis was too minimal to have any impact on lung function. Employer's Exhibit 12 at 13.

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

(1985). Therefore, the administrative law judge's determination that the evidence of record was insufficient to establish that pneumoconiosis was a substantially contributing cause of claimant's totally disabling pulmonary impairment pursuant to Section 718.204(c) is affirmed, as it is rational and supported by substantial evidence. 20 C.F.R. §718.204(c); *see Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). Because we have affirmed the administrative law judge's finding that claimant did not establish disability causation at 20 C.F.R. §718.204(c), an essential element of entitlement, we must also affirm the denial of benefits. *Trent*, 11 BLR at 1-27.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge