

BRB No. 02-0501 BLA

ELZA WILSON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
STRAIGHT CREEK MINING COMPANY)	
)	DATE ISSUED:
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 of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Ronald C. Cox (Atkins Law Office), Harlan, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order (01-BLA-0309) of Administrative Law Judge Thomas F. Phalen, Jr. denying benefits 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).¹ The instant case involves a duplicate claim filed on May 31, 2000.²

¹The Department of Labor has amended the regulations implementing the Federal

Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge) found that the evidence was sufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)³ and was, therefore, sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Consequently, the administrative law judge considered claimant's 2000 claim on the merits. In his consideration of the merits of claimant's 2000 claim, the administrative law judge found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with

Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

²Claimant initially filed a claim for benefits on February 24, 1989. Director's Exhibit 28. In a Decision and Order dated April 15, 1992, Administrative Law Judge Robert L. Cox found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). *Id.* Judge Cox also found that claimant was entitled to a presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). *Id.* However, Judge Cox found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). Accordingly, Judge Cox denied benefits. *Id.* By Decision and Order dated October 29, 1993, the Board affirmed Judge Cox's finding that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Wilson v. Straight Creek Mining Co.*, BRB No. 92-1613 BLA (Oct. 29, 1993) (unpublished). The Board, therefore, affirmed Judge Cox's denial of benefits. *Id.* There is no evidence that claimant took any further action in regard to his 1989 claim.

Claimant filed a second claim on March 31, 2000. Director's Exhibit 1.

³The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now set out at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge erred in finding the opinions of Drs. Baker and Myers insufficient to establish that his total disability was due to pneumoconiosis. 20 C.F.R. §718.204(c)(1).⁴ In his consideration of whether the evidence was sufficient to establish that claimant’s total disability was due to pneumoconiosis, the administrative law judge noted that, in a July 19, 1989 report, Dr. Baker attributed claimant’s total disability solely to coal dust exposure.⁵ Decision and Order at 13; Director’s Exhibit 28. The administrative law judge, however, noted that subsequently Dr. Baker prepared an April 25, 2000 report wherein he indicated uncertainty as to whether claimant’s total disability was attributable to pneumoconiosis or myasthenia gravis.⁶ Decision and Order at

⁴Revised Section 718.204(c)(1) provides that:

A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner’s totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a “substantially contributing cause” of the miner’s disability if it:

- (i) Has a material adverse effect on the miner’s respiratory or pulmonary condition; or
- (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

⁵In a report dated July 19, 1989, Dr. Baker diagnosed coal workers’ pneumoconiosis and chronic bronchitis. Director’s Exhibit 28. Dr. Baker indicated that claimant was not physically able, from a pulmonary standpoint, to do his usual coal mine employment, explaining that claimant would have difficulty doing sustained manual labor on an eight hour basis because of his dyspnea on exertion. *Id.* Dr. Baker further noted that claimant had “symptom complex consistent with pneumoconiosis, but only in the early stages, at 1/1.” *Id.*

⁶In his April 25, 2000 report, Dr. Baker opined that claimant suffered from a moderate pulmonary impairment and did not have the respiratory capacity to perform the work of a coal miner. Director’s Exhibit 9. In response to a question asking whether claimant’s

13; Director's Exhibit 9. The administrative law judge reasonably discounted Dr. Baker's 1989 opinion in light of his later opinion.⁷ *Id.* The administrative law judge also properly accorded less weight to Dr. Myers's opinion that claimant's pulmonary impairment was due to his coal dust exposure because he found that it was not sufficiently reasoned.⁸ *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 13; Director's Exhibit 22. Additionally, the administrative law judge credited the opinions of Drs. Dahhan, Tuteur, Fino and Castle that claimant's total disability was due to myasthenia gravis and not due to pneumoconiosis based upon their superior qualifications.⁹ *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 15; Director's Exhibit 23; Employer's Exhibits 3, 12, 15, 18, 19. The administrative law judge also found that the opinions of Drs. Dahhan, Tuteur, Fino and Castle were "consistent, well reasoned and well documented."¹⁰ *See Rowe, supra; Lucostic, supra*; Decision and Order at 13. Because it is

pulmonary impairment was related to pneumoconiosis or another etiology, Dr. Baker responded: "? coal workers' pneumoconiosis vrs myasthenia gravis." *Id.*

⁷Claimant contends that because he was not diagnosed with myasthenia gravis until after 1989, Dr. Baker's opinion in 1989 that his disability was solely due to coal dust exposure was "completely correct." Claimant's Brief at 9. Although Dr. Baker, in 1989, indicated that claimant's pulmonary impairment was due to pneumoconiosis, the administrative law judge properly discounted this assessment in light of the fact that, in 2000, Dr. Baker called into question his 1989 opinion by expressing uncertainty as to whether claimant's pulmonary impairment was due to pneumoconiosis or myasthenia gravis. Decision and Order at 13.

⁸The administrative law judge accurately noted that Dr. Myers merely checked a box indicating that claimant's pulmonary impairment was due to coal dust exposure without providing any explanation for his opinion. Decision and Order at 13.

⁹Drs. Dahhan, Tuteur, Fino and Castle are Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 23; Employer's Exhibits 8, 14, 17. Dr. Myers is only Board-certified in Internal Medicine. Director's Exhibit 28. Dr. Baker's qualifications are not found in the record.

¹⁰The administrative law judge found "persuasive the fact that while [claimant] left the coal mines in 1988, his pulmonary disability did not significantly worsen until three years later with the advent of his myasthenia gravis manifestation." Decision and Order at 13. Claimant contends that the administrative law judge's finding is "unreasonable and unfounded" in light of the progressive nature of pneumoconiosis. Claimant's Brief at 10. We disagree. The administrative law judge merely found that the opinions of Drs. Dahhan, Tuteur, Fino and Castle that claimant's pulmonary disability was attributable to his

based upon substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to establish that claimant's total disability was due to pneumoconiosis. 20 C.F.R. §718.204(c)(1); *see also Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *see also Adams v. Director, OWCP*, 806 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

myasthenia gravis were consistent with that fact that claimant's pulmonary function significantly worsened subsequent to the onset of his myasthenia gravis. Decision and Order at 13.